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JEFFERSON--33 GRATTAN.

1730–1880.

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THOMAS JOHNSON MICHIE.

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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA:

BY PEACHY R. GRATTAN.

VOLUME XI.

FROM APRIL 1, 1854, TO JANUARY 1, 1855.

JUDGES

OF THE

SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

JOHN J. ALLEN, PRESIDENT.

WILLIAM DANIEL, RICHARD C. L. MONCURE,

GEORGE H. LEE, GREEN B. SAMUELS.

Attorney General: WILLIS P. BOCOCK.

Entered according to Act of Congress, in the year one thousand eight hundred and fifty-five, for the

COMMONWEALTH OF VIRGINIA,

In the Clerk's Office of the Eastern District of Virginia.

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CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Upper Appomattox Co. v. Hardings.

April Term, 1854, Richmond.

Action for Damages against Improvement Company—Death of Plaintiff—Case at Bar.—A proceeding has been instituted under the 9th section of the act of February 23d, 1835, Sess. Acts, p. 82, in relation to the Upper Appomattox company, for the purpose of recovering damages to land occasioned by the improvement of the company. The jury have returned their verdict ascertaining the damages; and the company has filed exceptions, and obtained a continuance of the cause; and then the plaintiff dies. HELD:

1. **Same—Same—Revival of Suit.**—The proceeding may be revived by the proper party against the company.
2. **Same—Same—Same—Administrator.**—The administrator, and not the heirs of the plaintiff, is the proper party to revive the proceeding.

The case is fully stated in the opinion of Judge Allen.

Steger, for the appellants.

There was no counsel for the appellees.

2 *ALLEN, P. The case of Nash v. Upper Appomattox Co., 5 Gratt. 332, decided that the proprietor, whose lands were injured by the erection of a dam across the river, might sue out the writ of ad quod damnum, authorized by the 9th section of the act of February 23d, 1835, Sess. Acts, p. 82, although no previous writ to condemn land for the abutments and other purposes had been sued out by the company. This was a proceeding under the 9th section of said act, for the purpose of ascertaining and assessing damages alleged by Elizabeth Harding to have been sustained by her in consequence of the erection of a dam by the company, occasioning the water to back up and rise and remain higher along her low grounds on the river, than it would have done but for the dam; whereby she was unable to drain her low grounds; and the water in the creeks, branches and ditches was prevented from passing off freely into the river, occasioning accumulations of sand, whereby said creeks, &c., were more liable to overflow, and the lands thereby rendered more subject to inundation and of less value; and that such damages were never foreseen or estimated by the jury impaneled when the dam was erected; and had never been satisfied, in any way.

An inquisition was taken on the 2d of June 1841, assessing the damages to five hundred dollars; which being returned to the County court, the appellants filed exceptions to the writ and inquest, and moved to quash the same; and the motion was continued at their instance. At a subsequent term, the death of the plaintiff in the writ was suggested; and on motion of George M. Harding, her administrator, a scire facias was awarded to revive the cause in his name, as administrator as aforesaid. At a subsequent term, on the motion of said George M. Harding and others, the heirs of said Elizabeth Harding, it was ordered that the order awarding the 3 writ of scire facias to revive in *the name of said George M. Harding, as administrator, should be set aside; and, on motion of the heirs, a writ was awarded to them to revive the cause in their names. Upon the return of this writ the appellants appeared and demurred thereto. The County court overruled the demurrer; and after hearing the testimony, overruled the motion to quash the writ and inquisition, and entered judgment in favor of the heirs for the damages assessed: The judgment being affirmed by the Circuit court, the appellants have appealed to this court.

Two questions are presented by the appeal: First, Whether the case could be revived at all? And secondly, If it could be revived, whether the revival should be in the name of the personal representative or the heir at law?

If this had been an action on the case for a nuisance to the freehold of the plaintiff below, the rule that actio personalis moritur cum persona, might have applied; for such causes of action died with the person. 1 Wms. Saund. 217, n. 1; Harris v. Crenshaw, 3 Rand. 14. And although the 64th section of the statute, 1 Rev. Code, p. 390, was an extension of the statute de bonis asportatis, 4 Ed. 3, ch. 7, so as to embrace actions brought against, as well as those brought by, executors and administrators, it has not been construed as extending to injuries done to the freehold or to the person. The cause of action in such a case imputes a tort; it arises ex delicto; the plea must be not guilty; and if either party died before verdict, the action could not be revived.

But it seems to me the rules applicable to an action on the case for a nuisance do not apply to this proceeding. The legislature, by the act under consideration, section 2,

authorized and required this company to construct dams on the river, from the head of their canal near Petersburg to the
4 town of Farmville, so as *to afford a navigation of two feet depth of water at all seasons of the year. To comply with this requisition it was necessary to take private property in some instances absolutely; and to subject it in other instances to a charge or easement materially impairing its value. By this law, the jus publicum in the navigation of this stream has been conferred on the company for the purpose of improving the navigation; and such being the case, private rights must yield to the public, upon just compensation being made. As was remarked by President Tucker in the Tuckahoe Canal Co. v. Tuckahoe Railroad Co., 11 Leigh 42, 74, "It may be truly said that this jus publicum, this eminent domain, is the law of the existence of every sovereignty;" and "though the sovereignty has granted its land, or its privileges, without any express reservation to take them for public uses, yet that right is necessarily implied." As every proprietor holds subject to this public right, and as the legislature, in the exercise of the right of eminent domain, can alone prescribe the mode of making just compensation, it cannot be said that a wrong is done to the owner when such compensation is reserved for him, and a mode prescribed for ascertaining the amount and securing its payment. So far from assimilating it to a proceeding for a tort, and to be treated like a cause of action which arose ex delicto, it may more properly be likened to a cause of action arising ex contractu; as growing out of the implied obligation to surrender to the public use, upon the engagement of the public to make just compensation.

In the law under consideration, the right is conferred on the company to acquire private property by purchase, and to settle by contract any damages which their works might occasion to adjoining lands; or if they could not agree with the proprietor of the lands necessary for abutments, or which may probably be damaged or affected,
5 the 8th section required them to *take out a writ of ad quod damnum; and upon paying the value of the lands located for abutments, and the damages assessed, and costs, the law declares the company shall become seized in fee simple of the lands used for the abutments, and be authorized to erect the dam. Whether the company adopts this course, or by purchase and agreement with the proprietors acquires the necessary land for abutments, and settles by contract the probable damages, in either event, the 9th section of the act gives a remedy to the proprietor who sustains damages not foreseen, estimated, and satisfied. In this proceeding the right to erect the dam, or the legality of the dam when erected, is not in contest. It cannot be treated as a nuisance; and the whole effect is to ascertain the extent to which the individual has been required to surrender private property for public uses, upon the undertaking of the public to make just compensation; and to fix and assess the amount of such compensation. Under the general law in regard to mills, it was not essential to give judgment for the amount so ascertained before the court could give leave to erect the dam; the leave to erect the mill being valid, though no order was made directing the payment of damages; but the payment of such damages to the persons entitled, is imposed by law as a condition to protect the party against the suit of the person injured. Coleman v. Moody, 4 Hen. & Munf. 1; Anthony v. Lawhorne, 1 Leigh 1. Under the 8th section of the law under consideration, no provision is made requiring the court to give judgment for the value of the lands and damages assessed. The inquest was to be returned and recorded, and upon payment of the sums assessed the company became seized of the lands and was authorized to erect the dam.

The 9th section had reference principally to injuries which were made apparent
6 by the erection of the *dam, and therefore not foreseen by the jury where there had been a jury, or settled by contract with the proprietors. As payment was not necessary to protect the company from the suit of the party injured, as in the case of the damages assessed under the preceding section before proceeding with the works, this section provides that the jury shall enquire of and assess the damages; and thereupon the person suing the writ shall be entitled to the damages and costs; and the court shall enter judgment for the same. The right of the proprietor grows out of the appropriation of his property; and the statute provides a cheap and expeditious mode to ascertain the amount of his compensation, and to enforce the payment. I do not think that the rule in relation to actions ex delicto for injuries to the freehold, applies to this proceeding; but on the contrary, that it may be revived in the name of the representative entitled to the compensation.

But it seems to me the personal representative, and not the heirs, was the party entitled to receive the amount of the compensation assessed, and to revive the proceeding for the purpose of getting judgment and execution.

The property taken or subjected to the easement in favor of the company, belonged to the intestate. Her lands were rendered more liable to inundation, and the permanent value impaired to that extent during her life time. The easement was imposed and the right to compensation arose, as soon as the extent of the reflow was made manifest by the erection of the dam; and from the time that the proprietor provided for in this 9th section evinced a determination to claim the compensation for the loss, by instituting his proceeding under this act to have the amount ascertained, the claim become a personal demand; as much so as it would have been if the damages had been assessed and the inquisition returned
7 and recorded, as provided *for in the 8th section. The act declares that the

jury shall assess the damages, and thereupon the person suing the writ shall be entitled to the damages. The damages for permanent injuries, such as those set forth in the writ, can be assessed but once. Having once obtained compensation to the extent that the property has been impaired in value by the easement, he cannot recover again for the continuance of the easement. The heir inherits and holds the land subject to this easement as long as the dam is legally continued; and cannot recover that which never descended upon him. It is like the action on a covenant of seizin for eviction or breach in the lifetime of the ancestor. There the action survives to the personal representative, because, as was said in Lucy v. Levington, 2 Levinz 26, the eviction being to the ancestor, he cannot have an heir to this land.

Nor do I conceive that this can be changed by the action of the administrator. It appears from the recitals in the order of the County court, that he was one of the heirs uniting in the motion to set aside the order awarding the writ of scire facias to revive in the name of the administrator, and awarding the writ to revive in the names of the heirs. The scire facias to revive was intended to continue the action in the name of the representative who legally succeeded to the rights of the intestate. New parties, having no claim to intervene in the controversy, cannot be permitted to take the place of the proper representative to continue the controversy and to collect the money. It would be the institution of a new proceeding instead of a continuance of the old. The heirs as such have no right to the subject; it is assets to be paid out and distributed in the due course of administration. I think, therefore, the demurrer to the scire facias should have been sustained; and that the order made on the 3rd of July 1843, setting aside
8 the previous order *awarding a scire facias to the administrator to revive the cause in his name, and awarding a scire facias to the heirs to revive the cause in their name, should be set aside: and leave given to the administrator of said Elizabeth Harding to sue out a scire facias to revive the cause in his name; and for further proceedings.

MONCURE, LEE and SAMUELS, Js., concurred in the opinion of Allen, J.

DANIEL, J., dissented.

Judgment reversed.

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9 *Frazer's Adm'r v. Bevill & als.

April Term, 1854, Richmond.

1. **Executors and Administrators—Assent to Legacies—Case at Bar.**—Executors or administrators with the will annexed, who are legatees of slaves under the will, agree to a division of the slaves, and each takes possession of those allotted to him. This is an assent to the legacies by the executors or administrators.

2. **Same—Same—In Favor of Legatee for Life—Effect upon Contingent Legatee.**—To one of these legatees the slaves are given for life, and if he should die without heirs, then over to a grandson of the testator. The assent to the legacy in favor of the first taker is an assent in favor of the contingent legatee over.

3. **Suit by Contingent Legatee against Legatee for Life—Evidence—Competency of Witnesses.**—In a suit by the contingent legatee against the legatee for life and a purchaser of one of the slaves under an execution against him, the other administrator is a competent witness for the contingent legatee, to prove the division of the slaves, and the assent to the legacies by the administrators.

4. **Executors and Administrators—Sale of Property for Debt—Right of Contingent Legatee.**—The fact that the slave was sold to satisfy a debt which was originally the debt of the testator, but upon an execution issued on a forfeited forthcoming bond given by the administrator, he having ample assets in hand as administrator to pay it, does not entitle the purchaser to hold the slave in absolute property, free from the claim of the contingent legatee.

5. **Equity Practice—Life Estate in Chattels—Right Contingent—Legatee to Have Security for Return of Property.***—The purchaser claiming the slave and her increase as his own property, and the legatee for life never having had any children, it is the right of the contingent legatee to apply to a court of equity, and to require the purchaser to give security to have the slave and her increase forthcoming at the death of the legatee for life without issue.

6. **Executors—Retracting Assent.**—QUÆRE: When an executor may, and when he may not, retract his assent to a legacy.

***Life Tenant in Chattels—Security for Return of Property upon Termination of Life Estate—When May Be Required.**—In Houser v. Ruffner, 18 W. Va. 251, it is said: "I know of no law, which requires a life tenant to give security for the return of money or other property upon the termination of the life estate, unless those in remainder or reversion show such special circumstances, as call for the intervention of a court of equity by bill of *quia timet*. Chisholm v. Starke, 3 Call 25; Holliday *et ux.* v. Coleman, 2 Munf. 162; Mortimer v. Moffatt *et ux.*, 4 H. & M. 503; *Frazer v. Bevill et al., 11 Gratt. 9;* Dunbar's Ex'rs v. Woodcock's Ex'rs, 10 Leigh 628; Weeks v. Weeks, 5 N. H. 326; Scott v. Price, 2 Serg. & R. 59."

In Bartlett v. Patton, 33 W. Va. 74, 10 S. E. Rep. 22 the principal case is cited as authority for the proposition that, now, there is no question that a life estate to one with remainder to another in personalty may be given. See, in accord, Madden v. Madden, 2 Leigh 377; Dunbar v. Woodcock, 10 Leigh 628.

Co-executors—Liability—General Rule.—The principal case is cited in Caskie v. Harrison, 76 Va. 97, as authority for the proposition that, one executor cannot be charged with a devastavit of his companion any further than he is known to have been knowing and assenting at the time of the devastavit, and merely permitting his executor to possess the assets without concurring in the misapplication does not render him responsible for receipts of his co-executor.

See monographic *note* on "Executors and Administrators."

7. **Setting Up in Second Suit Claim Inconsistent with First.**—QUÆRE: Whether a party may set up in a second suit, pretensions inconsistent with the allegations of his bill and his pretensions in his first suit.

Frederick Reese of the county of Dinwiddie, died in 1829. By his will which was duly admitted to probat, after a legacy of two hundred and fifty dollars to Amy Featherston, he gave to his son Herbert Reese all his land, and one-half of the
10 balance of his estate: *But if he should die without heirs, then at his death the land, with all the other property, should go to his grand son Frederick A. Frazer and his heirs. The testator gave to his daughter Martha Frazer the remaining half of his personal estate. Herbert Reese and Martha Frazer qualified as administrator and administratrix, with the will annexed, and gave separate bonds.

In 1830 a judgment was recovered against the personal representatives of Frederick Reese, which, principal, interest and costs, amounted to one hundred and thirty-six dollars and sixty-six cents; one-half of which was paid by Martha Frazer. Upon the execution which issued upon this judgment Herbert Reese gave a forthcoming bond with Price Pollan as his surety; which bond having been forfeited, an execution was awarded thereon, and was levied on a slave named Eliza found in the possession of Herbert Reese, and which had been a part of the estate of Frederick Reese. This slave was sold by the sheriff under the execution, and was purchased by Archer J. Bevill. At the time of this sale, as appeared by the accounts of the administrators settled by the court of probat, Herbert Reese was a debtor to the estate, after crediting him with the payment of one-half of this judgment, in the sum of two hundred and twenty-eight dollars and forty-two cents, and Martha Bevill was debtor in the sum of sixty-five dollars and eighty-five cents. These accounts showed that the testator was very little indebted at his death.

In 1845 Frederick A. Frazer filed his bill in the Circuit court of Dinwiddie, in which he set out the will of Frederick Reese; and stated that the administrators sold the personal estate except the slaves, which proved more than sufficient to pay the debts; that the slaves were divided, as directed by the will, between Herbert Reese and
11 Martha Frazer, and that *the slave Eliza fell to the share of Herbert Reese; that she had been sold to Bevill and had since had several children. That Bevill claimed a fee simple in said slave and her increase; and had avowed his purpose to use and control, sell and dispose of the said slaves as he thought proper; and claimed an absolute right to them. That plaintiff was apprehensive, and with good reason, that Bevill would send the slaves out of the state, or sell them to a trader to be taken away, so that the plaintiff would be entirely without remedy upon the happening of the contingency upon which his interest depended; a contingency very likely to occur, as Herbert Reese was then, and had ever been, childless. And making Bevill, Herbert Reese and Martha T. Frazer parties defendants, he prayed that Bevill might be restrained from sending the slaves out of the state; that he might be required to give bond and security to have the slaves forthcoming at the death of Herbert Reese; and for general relief.

The bill having been sworn to by the plaintiff, the court made an order restraining Bevill from removing the slaves beyond the jurisdiction of the court, or from anywise disposing of them until the further order of the court: And directed that unless Bevill should enter into bond with good security in the penalty of eight hundred dollars, payable to the plaintiff, and with condition to comply with and perform the decree which the court might make in the cause, the sheriff should take the slaves into his possession, and put or hire them out to the best advantage till the further order of the court.

The bond was given by Bevill; and he then answered the bill. He said that at a sheriff's sale made about the year 1830, he purchased the slave Eliza, then a small girl; that she had since had three children; and that they were all in his posses-
12 sion. That *the slave was sold for the purpose of satisfying debts due from the estate of Frederick Reese; that judgments had been recovered against his personal representatives, executions issued thereon, and the said slave was levied on and publicly sold to satisfy them. That it was most remarkable that the plaintiff had delayed so long to assert his right, if any he ever had; that he had no new cause, for that he must still be postponed, if he could succeed, until the life estate was extinguished. That he was advised and confidently believed, that the plaintiff had no shadow of title to the slaves mentioned in his bill, and then in possession of the defendant; and he considered himself most unnecessarily harrassed by this suit. The other defendants did not answer.

The execution under which the slave Eliza was sold, was filed, and the sheriff's return was, "Levied on one negro girl, held as the property of Herbert Reese." The deposition of the deputy sheriff who levied the execution was taken. He says he levied the execution on a negro girl named Eliza, who he was told by Herbert Reese at the time, was the property of Frederick Reese's estate. He took her from the house and possession of Herbert Reese. That he offered the slave for sale at the June court, but that some of the legatees of Frederick Reese contended that Herbert Reese was bound for the debt himself; and that the negro ought not to be sold, as they would be scattered about at the death of Herbert Reese. That in consequence of these remarks no persons would bid, and he therefore kept her until July court, when she was again put up, and was sold. That Bevill was present at the June court when

the objections were made: No objections were made at the July court, and Bevill purchased the slave at one hundred and seventy dollars. That at the sale it
13 was publicly announced that she *was sold to satisfy an execution in favor of Martin Blake against Herbert Reese, administrator of Frederick Reese deceased.

The deposition of Martha T. Frazer, the administratrix, was also taken and filed. She said, that in February 1829 a division of the slaves of Frederick Reese took place; and in that division six slaves, one of which was this slave Eliza, were allotted to Herbert Reese. That this division was made by consent of parties; and each took possession of the slaves allotted to him and her; and that she still had hers. This deposition was objected to by the defendant Bevill, on the ground that the witness was one of the personal representatives of Frederick Reese deceased.

The cause came on to be heard on the 31st of March 1847, when the court, without passing upon the objection to the competency of Mrs. Frazer as a witness for the plaintiff, dissolved the injunction and dismissed the bill. And the plaintiff having died after the decree, his administrator applied to this court for an appeal, which was allowed.

Macfarland and Rhodes, for the appellant.
J. Alfred Jones, for the appellee.

DANIEL, J. I do not think that the exception to the deposition of Martha T. Frazer was well taken. The fact that she was one of the administrators of her father's estate did not, of itself, render her incompetent to testify to the assent of herself and of her coadministrator to the legacy in respect to a portion of which the suit was brought.

In the case of Smith & wife v. Townes' adm'r, 4 Munf. 191, which was an action of detinue brought by a legatee against a stranger, for the purpose of recovering a slave bequeathed to the legatee, this court held that it was competent for the
14 plaintiff to prove by the executor, *(if he had no objection to being examined), his assent to the legacy. I see nothing in the case under consideration to justify us in refusing to apply the same principle to the testimony of Mrs. Frazer. It is true that the recovery of the slaves in controversy from Bevill would be a satisfaction pro tanto of the claims of the appellant against the administrators, for Frederick R. Frazer's share of the estate under his grandfather's will; and Mrs. Frazer's testimony proves one of the important facts upon which the right to recover from Bevill must rest. Still, I do not perceive that Mrs. Frazer has any such interest in the event of the suit as can affect her competency as a witness. For even if the appellant, in the event of his failure to recover the slaves of Bevill, could be permitted to turn round and repudiate the grounds on which he sought that recovery, deny his own allegation of the assent of the administrators to the legacy, and seek to recover of the administrators on the ground of a devastavit or wrong, in improperly permitting a sale of the female slave Eliza, I do not see how Mrs. Frazer (from any fact disclosed in the record), could be subjected to any liability. Apart from her own evidence there is nothing to show that the slave Eliza had ever been in her possession. The other evidence in the cause shows that the debt, in satisfaction of which the slave was sold, was originally a debt due by the estate. That upon the suing out of the original execution she paid one-half of the amount, and charged it to the estate in her administration account. That for the remaining half her brother Herbert Reese gave a delivery bond with Price Pollan as security, and made a like charge in his account. And that the sale was made under an execution which issued on a judgment on the delivery bond. The sheriff's return states that this execution was levied "on one negro girl held as the property of Herbert Reese;" and in
15 his deposition the sheriff states *that the girl "was taken from the house and possession of Herbert Reese, and that he (Reese) stated at the time, that she belonged to his father's estate." And it appears from the separate administration accounts, that there was, at the time of the sale of the slave, a small balance (some sixty-five dollars) in the hands of Mrs. Frazer, and a much larger balance (some two hundred and twenty-eight dollars, after taking credit for the half of the original execution), in the hands of Herbert Reese, arising from sales of the personal estate of the testator. In this state of facts, if there was any devastavit, or wrong, or illegal conduct, in allowing the sale of the slave for which a representative of this estate might be called to account, the liability therefor rested with Herbert Reese alone. He held the possession of the slave, and his office of administrator gave him a right to that possession; and if he permitted it to pass from him, so as illegally and injuriously to affect others, without the knowledge or assent of Mrs. Frazer, no damage or loss arising therefrom can be visited upon her, it being well settled that one administrator cannot be charged with the wrong of his companion, or be made further liable than for the assets which came to his hands. Peter v. Beverley, 10 Peters' R. 532; Morrow's adm'r v. Peyton's adm'r, 8 Leigh 54.

The decision of the suit could therefore neither increase nor diminish her liabilities, let it eventuate as it might, and she stood indifferent between the parties.

She states that in 1829 the slaves belonging to her father's estate were divided between her and her brother; and that, in the division, the slave Eliza was (with others) allotted to her brother Herbert Reese. That the division was made by consent of parties, and that she and her brother each took possession of the slaves allotted to them respectively. In Drayton

v. Drayton, 1 Desau. R. 557, executors who were residuary legatees divided the
16 estate of their testator between *them. It was held that this was equivalent to payment of the legacies, and that the executors severally held their shares as legatees simply. This is precisely the case here; and the division in 1829 is, I think, equivalent to the most formal assent to the bequests to Herbert Reese and Mrs. Frazer. And it is well settled that an assent to a particular interest is an assent to the bequest over. 2 Lomax on Ex'ors 130; Lynch v. Thomas, 3 Leigh 682. And in the case of Acheson v. McCombs, 3 Ired. Ch. R. 554, it was decided that when by a will personalty is given to one, with remainder to another upon the happening of a certain event, and without any trust in the executor, the assent of the executor to the immediate legacy is an assent to the bequest in remainder; and such bequest becomes a legal estate upon the happening of the contingency.

The division of the slaves in 1829 operated then, as I conceive, as an assent by the administrators to the executory limitation in favor of Frederick R. Frazer; and I do not see how his title could be divested by sale under an execution issued, whether against the goods and chattels of Herbert Reese, or against the goods and chattels of the testator Frederick Reese.

It is argued that it is competent for an executor under certain circumstances to retract his assent to a legacy: And that Herbert Reese, by representing to the sheriff when he made the levy, that the slave belonged to his father's estate, and by suffering her to be sold as such, must be taken to have retracted his assent, so far as this slave is concerned, and to have consented that she should be sold as the property of the estate. In a suit brought by Herbert Reese to recover this slave, such an argument would be entitled to much consideration, if indeed it would not be conclusive against his right to recover. To permit him to recover from a bona fide purchaser under such circumstances,
17 *would be to allow him to derive benefit from his own fraud. But the argument, as applied to the rights of Frederick R. Frazer is, I think, without force. It seems to be true, that whilst as a general proposition an assent once given to a legacy can never afterwards be retracted, there are exceptions to the rule: As when the assent has not been completed by payment, in the case of a general legacy, or possession, in that of a specific one, and its recall is not attended with injury to a third person, as to a bona fide purchaser from the legatee on the faith of such assent, it is said, that it is only reasonable, that the executor, under particular circumstances, should have the power of retracting it; as when he assents upon a reasonable ground for considering that the assets are sufficient to meet all demands, but unknown debts are unexpectedly claimed, which occasions a deficiency. 2 Williams on Ex'ors 849. It is obvious, however, that not one of the reasons on which the exception is based exists for applying the exception here, so as to affect the rights of the legatee in remainder. The division of the slaves in 1829, as before stated, was accompanied by immediate possession on the part of Herbert Reese; and that possession enured at once to the benefit of the legatee in remainder. And Herbert Reese, so far from being met by an expected deficiency of assets, in fact held in l is own hands a large balance, more than ample to satisfy the execution. No retraxit of his assent to the legacy could, therefore, have divested the title of Frederick R. Frazer. It is to be observed also that whilst from the deposition of the sheriff it would seem that he, at the sale, regarded the execution under which he sold as one against the estate of the testator, and treated the girl as the property of the estate, the execution was, as before stated, in fact against the goods and chattels of Herbert Reese and his surety in the delivery bond, Price Pollan,
18 and the return states *a levy on the girl as the property of Herbert Reese. Whatever may have been the impressions of the sheriff, at the time of the sale, as to the legal effect of the process under which he was acting, or as to the title of the property sold to satisfy it, I think it clear that under the circumstances the purchaser could acquire nothing but the interest of Herbert Reese in the slave: And consequently, that Frederick R. Frazer had such an interest in the slave Eliza and her increase, as to entitle him, upon alleging and showing just cause to apprehend danger of their being eloigned, so as to jeopard his recovery of them when the time for the enjoyment of his legacy should arrive, to ask and have such orders in chancery as would be likely to insure the forthcoming of the property, on the happening of the contingency provided for in the will.

The counsel for the appellees, whilst he objected here to the jurisdiction, did not seem to lay much stress on the objection, his main argument being directed to the question of title; and all objection to the want of power in the chancellor to act on the case made, is, I think, met and answered by the decision of this court in the case of Chisholm v. Starke, 3 Call 25. In that case, the testator bequeathed his slaves to his wife, remainder to her children. The wife married again, and the second husband sold one of the slaves to a bona fide purchaser, who had no notice of the right of those in remainder; and he, before receiving such notice, sold the slave to another person. The bill filed by the remaindermen in that case did not allege any purpose on the part of Chisholm to remove the slaves out of the state. It simply alleged that Richardson the second husband had frequently endeavored to sell the slaves as his absolute property; that he had sold one of them to Chisholm, who lived at a distance in the state; that he had attempted to sell others; and pre-

19 tended that the increase of the *slaves was his. The chancellor decreed that Richardson should give bond, conditioned for delivering to the plaintiffs the slaves in his possession and their increase, living at the death of his wife, and that Richardson and Chisholm should give bond for delivering the slave which had been purchased by Chisholm. Upon an appeal by Chisholm, this court reversed so much of the decree as required the bond of him, on the ground of his having stated in his answer, which was not disproved, that he was a fair purchaser for valuable consideration, without notice of the title of the appellees, and had sold the slave before suit brought, and before any notice of the appellee's claim to or interest in the said slave; and ordered that the bill should be dismissed as to him, but decreed that Richardson should give bond for the forthcoming of all the slaves. The court evidently regarded the conduct of Richardson, in setting up an absolute title to the slaves, in selling one of them, and threatening and endeavoring to sell others, as ground sufficient to justify the requiring of a bond from him for the delivery of the property on the termination of the life estate; and exonerated Chisholm, on the ground only of his being a purchaser without notice, and of his having sold again before suit or notice of the title of those in remainder. The conduct of Herbert Reese, in permitting the slave to be sold under the circumstances shown in the case, was such, I think, as to have justified the court in requiring a bond from him; and with respect to Bevill, there is an absence of all the circumstances which induced the court, in the case of Chisholm v. Starke, to excuse the purchaser: He does not in his answer deny notice of the division of the slaves, and of the claim of the appellant's intestate: He does not deny having avowed the purpose (as charged in the bill) to use, control and sell and dispose of the slaves as his own absolute property: He does 20 not deny that the appellant *had good ground for believing that he would send the slaves out of the state. In his answer he simply states that the slave Eliza was levied on and sold to satisfy executions against the estate of Frederick Reese, and that he purchased her at the sheriff's sale, and denies that the plaintiff has any title whatever to the slaves; refers to the delay of the plaintiff in asserting his right, and says that he has no new cause, as he must, in any event, still be postponed until the life estate is extinguished. Independent of his failure to deny notice of the claim of the appellant, in his answer, the testimony in the cause renders it highly probable that he did have knowledge of the claim, and he is still in possession asserting right to treat the property as his own, free from all limitation.

I think that the Circuit court erred in dismissing the bill; and that it ought, instead thereof, to have made a decree defining the rights of the appellant in accordance with the foregoing views; and to have made such orders as were necessary to insure the forthcoming of the property on the happening of the contingency provided for in the bill.

The other judges concurred in the opinion of Daniel, J.

The decree was as follows:

It appears to the court that in February 1829 the slaves of the testator Frederick Reese were, by consent of the parties, divided between the appellees Herbert Reese and Martha T. Frazer; and that in the division the female slave Eliza was allotted to the said Herbert Reese. And the court is of opinion that said division operated as an assent by the administrators to the bequests in the will, as well in favor of Frederick R. Frazer as of the said Herbert Reese and Martha T. Frazer; and that the 21 facts alleged in the *bill and proved by the evidence, were such as to entitle the said Frederick R. Frazer to ask and have from the appellee the said Herbert Reese, and the appellee Bevill, bond with sufficient security and in a proper penalty, conditioned for the forthcoming of the said slave Eliza and her descendants, on the happening of the contingency in the will of the testator mentioned: And that the Circuit court consequently erred in dismissing the bill. So much of the decree of the 31st day of March 1847, therefore, as dismisses the bill, is reversed with costs, &c. And the cause is remanded for further proceedings in conformity with the principles above declared.

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22 ***Pates v. St. Clair.**

April Term, 1854, Richmond.

1. **Forthcoming Bonds—Original Judgment Invalid—Effect.***—An award of execution on a forfeited forthcoming bond cannot successfully be objected to on account of the invalidity of the original judgment, unless such judgment is null and void.

2. **Costs—Liability of Person for Whose Benefit Suit Brought.**†—It was not improper, even before the

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***Forthcoming Bonds.**—See monographic *note* on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

Judgments—Collateral Impeachment.—The judgment of a court possessing competent jurisdiction in the proceeding before it and over the person against whom it is rendered, is binding and conclusive: and however irregular or erroneous it may be, yet so long as it remains unreversed, it cannot be drawn in question in a collateral proceeding: nor can any allegation be made against its validity. This proposition, laid down in the principal case by LEE, J., at the beginning of his opinion, seems well established in Virginia. See *foot-note* to Andrews v. Avory, 14 Gratt. 229, and *foot-notes* there referred to.

See generally, monographic *note* on "Judgments."

†**Costs—Liability of Person for Whose Benefit Suit Brought.**—See monographic *note* on "Costs" appended to Jones v. Tatum, 19 Gratt. 720.

The principal case is cited in Wartman v. Yost, 22 Gratt. 606, as authority for the proposition that the

act of 1849, Code, p. 706, § 9, to render judgment for costs in favor of the defendant against a person for whose benefit a suit was brought, when the defendant succeeded in the case.

3. **Judgments—Construction of.**‡—In a suit brought in the name of one person for the benefit of another, a judgment stating that the parties appeared by their attorneys and by consent the suit was dismissed and judgment for defendant's costs against the person for whose benefit the suit was brought, it must be held that the consent is the consent of the latter, and that the judgment is proper.

At the April term 1848 of the Circuit court of Bedford county, in an action on the case then depending therein in the name of Demarcus Foutz, who sues for the benefit of John D. Pate plaintiff, against Wingfield J. St. Clair defendant, a judgment was rendered in the terms following, viz: This day came the parties, by their attorneys, and by their consent, it is considered by the court that this suit be dismissed; and that the defendant recover against the said John D. Pate, for whose benefit this suit is brought, his cost by him about his defence of this suit expended. On this judgment an execution issued against the goods of Pate; and he executed a forthcoming bond with William H. Pate as his surety: And the bond was forfeited. St. Clair gave a notice to the Pates that he would move for award of execution upon the bond; and when the motion was made, John D. Pate moved the court to quash the bond, upon the ground that the original judgment was null and void. The
23 court overruled *the motion, and awarded execution upon the bond: And thereupon the Pates applied to this court for a supersedeas, which was awarded.

Grattan, for the appellants.
Cabell, for the appellee.

LEE, J. The judgment of a court possessing competent jurisdiction in the proceeding before it and over the person against whom it is rendered, is binding and conclusive; and however irregular or erroneous it may be, yet so long as it remains unreversed, it cannot be drawn in question in a collateral proceeding; nor can any allegation be made against its validity. Horsy v. Daniel, 2 Levinz R. 161; Hayward v. Ribbans, 4 East's R. 311; Prince v. Nicholson, 1 Marsh. R. 280; 1 Chit. Pl. 100, 320. So that the only ground on which the plaintiffs in error, in any view, can be permitted to contest the validity of the original judgment in this proceeding is, that it was ipso facto void, and furnished no foundation for the execution upon which the forthcoming bond given by them was taken. But surely, this cannot be affirmed of a judgment for the defendant's costs against a party for whose benefit an action is brought in the name of another, and so expressed to be upon the record. Nor do I think the judgment in this case should be held to be irregular or erroneous. Courts of law will for many purposes take notice of the person for whose benefit a suit is brought, though in the name of another. Thus they will not permit the nominal plaintiff to dismiss the suit or release the action. Per Judge Green, Garland v. Richeson, 4 Rand. 266, 268; 1 Tuck. Comm. 347. See also opinion of Judge Buller in Masters v. Miller, 4 T. R. 320, 339. So a receipt given by the nominal plaintiff may be avoided by proof that it was given after the assignment. Henderson v. Wild, 2 Camp. R. 561. And admissions made by him after assignment will not be ad-
24 mitted *in support of demands set up against the claim by way of setoff. Frear v. Evertson, 20 John. R. 142. So though the nominal plaintiff have become bankrupt, the action may be maintained in his name. Winch v. Keeley, 1 T. R. 619. And where a bond was given, payable to the nominal plaintiff, but which was in fact for the use and benefit of another, a claim against that other was allowed by way of setoff. Bottomley v. Brooke, cited 1 T. R. 621. And it seems that it makes no difference that the party was not originally interested in the claim, as in the case last cited: for whether he was merely a trustee originally, or became so by a subsequent assignment of the claim, the court equally takes notice of the rights and relations of the parties. Winch v. Keeley, above cited. So in an action for a balance due on account in the name of the original creditor, for the benefit of a third party to whom it had been assigned with the defendant's consent, the defendant was allowed to offset claims he held against the assignee. Winchester v. Hackley, 2 Cranch R. 342.

Where a party, then, brings a suit for his own benefit, though in the name of another, and afterwards abandons his action, no reason is perceived why the court might not (even prior to the Code of 1849) properly render a judgment for the defendant's costs directly against him, thus noticing him for the purpose of holding him to a just responsibility, as well as for the purpose of protecting him against the acts or admissions of the nominal plaintiff, or any collusion between him and the defendant. Indeed we see that where a suit has been brought in a fictitious name, or in the name of a person without his privity and consent, or of a deceased person, the court will interfere in a summary way, and

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Virginia courts look to the real, and not the nominal parties to a suit.

In Davis v. Noll, 38 W. Va. 70, 17 S. E. Rep. 792, it was said: "No man can give away negotiable securities, to the detriment of existing creditors, any more than he can give away his horse or house. In such cases the law, avoiding the illegal transfer, treats the fraudulent holder as the agent or trustee secretly suing for the benefit of his principal, and allows all just offsets against such principal. 2 Daniel, Neg. Inst. p. 451; *Pates v. St. Clair, 11 Gratt. 24;* Smith v. Lawson, 18 W. Va. 240."

‡**Judgments.**—See monographic *note* on "Judgments."

will hold the party by whom the suit was prompted, or even the attorney in the case, responsible for costs. Gynn v. Kirby, 1 Stra. R. 402; The People v. Bradt, 7
25 John. R. 539; Ketcham v. *Clark, 4 John. R. 484; Howard v. Rawson, 2 Leigh 733, and authorities there cited.

By the Code of 1849 (p. 706, § 9), it is expressly provided that where there shall be judgment for the defendant's costs in a suit brought in the name of one person for the benefit of another, such judgment shall be against that other. And in the case of Devers v. Ross, 10 Gratt. 252, this court, on reversing the judgment of the Circuit court, rendered the judgment for costs against Flowers, for whose benefit the suit had been brought, although the case had been decided in the Circuit court, and brought to this court by supersedeas before the Code of 1849 was enacted. Indeed, prior to the enactment of that Code, it was the practice of some of the Circuit courts to render the judgment for the defendant's costs (where such a judgment was to be given) against the beneficial party on the record; and considering the extent to which the courts have gone in noticing him for certain purposes, I can perceive no well founded objection to it.

But if the propriety of such a judgment in a general way were more questionable than I think it is, certainly any court may notice the beneficial party on the record for the purpose of receiving his consent to such a judgment. Here, the plaintiff in error John D. Pate, for whose benefit the suit was brought, was the active party by whom it was prompted and dismissed. The attorney in the cause was his attorney, and the consent given to the dismission of the case and to the judgment for costs, may be fairly referred to him, and should be construed as his consent.

I am of opinion to affirm the judgment.

The other judges concurred in the opinion of Lee, J.

Judgment affirmed.

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26 *Markle's Adm'r & als. v. Burch's Adm'r.

April Term, 1854, Richmond.

Statute of Limitations—Departure from State—Case at Bar.*—A debt, if it had any existence, was contracted in 1819, when the debtor lived in Virginia, and was by parol. He shortly afterwards removed from the state, and remained out of it until his death in 1826. In 1840 a proceeding by foreign attachment was instituted to recover the debt. HELD: The statute of limitations is a good defence to the proceeding.

The case is fully stated in the opinion of Judge Samuels.

*For the construction of the statute of limitations with reference to the debtor's removing from the state, see the principal case cited in Ficklin v. Carington, 31 Gratt. 226, and *note*.

Baxter, for the appellants.

Cooke, for the appellee.

SAMUELS, J. This cause is brought here by appeal from a decree of the Circuit superior court of law and chancery for Bedford county, in a suit wherein John Hancock, administrator of Mary Burch, was complainant, and John Markle, Nicholas Robertson, administrator of Charles Markle deceased, and others were defendants. The suit was originally brought, in the County court of Bedford county, by Mary Burch in her lifetime, and afterwards taken to the said Circuit court, and, on the death of complainant, revived in the name of her administrator. The subpœna instituting the suit issued November 14th, 1820, against John Markle and John Fizee, with an endorsement thereon in these words:

"Memo.—This suit is against John Fizee, to recover of him money due to the other defendants, and said John Fizee is hereby forbid to pay away or out of his hands the
27 sum of two hundred dollars, if so much he *owes said John Markle, until the final decision of this suit, or until the order of Bedford court.

Wm. Cook, Plff's Atto."

Complainant's bill was filed May 14th, 1823; and although the allegations therein are somewhat equivocal, yet it must be held to assert that John Markle, the absent defendant, was indebted to complainant; and to seek to apply a debt alleged to be due from John Fizee the home defendant, to said absent defendant, in satisfaction of complainant's demand. The bill alleged that complainant Mary Burch was tenant for life of a small tract of land, the reversion whereof belonged to Charles Markle; that in the year 1818 Charles Markle and his son John Markle being about to remove to the state of Missouri, John Markle, who transacted his father's business, and sold his property at pleasure, was anxious to sell said tract of land, but found some difficulty in selling it with the incumbrance of complainant's life estate thereon. That complainant was induced to sell and convey her life estate to John Fizee, for a consideration promised to her by John Markle. Charles Markle is named as defendant in the bill, but not in the process; nor is there any distinct allegation of fact which could subject him to any demand of complainant. From the want of precision in stating the terms on which complainant sold her property, it is doubtful what conisderation she was to receive. It is clear enough, however, that whatever it was, it was to be paid by John Markle. It is not alleged that Charles Markle made any contract whatever in regard to the purchase of complainant's life estate. It appears clearly, moreover, that Fizee's bonds for the price of the land were made payable to John Markle; and that the money due on these bonds was the subject attached in this suit. It is quite
28 probable, perhaps certain, upon the record on the original bill, *that Charles Markle permitted his son to

sell the reversion for the son's own benefit.

Certain proceedings were had upon the original bill up to the August term of the County court in 1823, the result of which was, that one William R. Porter, who claimed the fund attached, was permitted to receive it upon giving bond with condition to comply with any future order or decree in the cause.

No step whatever appears to have been taken in the cause from October 1823 until November 1840, when leave was granted to complainant to amend her bill, making new parties.

In the amended bill complainant changes the ground taken in the original bill. She now alleged that John Markle's action on the subject of the purchase was only as agent for Charles Markle; that the price to be paid in money was a debt due from Charles Markle, and accordingly sought to subject his property to the payment thereof. The parol evidence taken when the cause was pending on the original bill was strong to show that John Markle was the debtor; the evidence of the same witnesses, taken pending the amended bill, tends to show that Charles Markle was the debtor; the evidence in writing to wit, John Markle's stipulation to pay, Charles Markle's deed, the bonds of Fizee executed to John Markle, shows, satisfactorily, that John Markle was dealing with complainant on his own account, and that the purchase money for the life estate was due from him to complainant, as alleged in the original bill. The decree subjected Charles Markle's estate to complainant's debt; and from this decree this appeal is taken.

After an acquiescence of seventeen years in the allegations of the original bill, sustained by the written evidence, it would require much stronger evidence than complainant offered to sustain her amended bill, especially after Charles Markle's death.

29 *If the complainant had established a debt against Charles Markle, it must have originated in 1819, when the deed to Fizee was executed, and when Charles Markle was in Virginia.* The first attempt to subject Charles Markle's estate was made in 1840; and the defendants rely upon the statute of limitations. There is nothing in the pleadings or proofs to prevent the operation of the statute, if the debt ever existed. In Wilkinson, &c. v. Holloway, 7 Leigh 277, four of the five judges who decided that case, held that the debt due to the attaching creditors was a bond debt, and that therefore the statute was no bar to the recovery. The debt in this case, if any, is upon simple contract merely.

I am of opinion to reverse the decree and dismiss the bill, with costs of both courts to the appellants.

The other judges concurred in the opinion of Samuels, J.

Decree reversed.

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30 *Braxton, Adm'r &c. v. Harrison's Ex'ors.

April Term, 1854, Richmond.

1. **Bonds—Assignment—Subrogation—Case at Bar.**—W, administrator of G, assigns the bond of T to the executors of H, in discharge of a debt due from G to H. The executors of H sue T, and recover a judgment upon the bond; and he thereupon enjoins it on the ground that G was indebted to him for a legacy left by R, of whom G had been executor: And this injunction is afterwards perpetuated. HELD: That the executors of H are entitled to be substituted to the rights of T against G's estate; and are not confined to their remedy upon the assignment of W.
2. **Injunction—Consent to Perpetuation—Case at Bar.**—In this injunction suit the executors of H and W and the administrator *de bonis non* of G, are parties, and they consent to the decree perpetuating the injunction; and also to a decree directing the executor of W, and the administrator *de bonis non*, to settle their accounts of administration upon G's estate. HELD:
   1. **Same—Same—Decree between Co-defendants.***—That it is a case in which there may be a decree between co-defendants in favor of the executors of H against G's estate.
   2. **Same — Same—Account.**—That to ascertain whether there were assets of G's estate to pay the debt, the court might direct the accounts.
   3. **Same—Same—Same.**—If the propriety of a decree against the assets of G's estate was otherwise doubtful, the consent of the representatives of W and G clearly authorized it.
3. **Same—Same—Binding—Case at Bar.**—Though upon a hearing it might have been improper to perpetuate the injunction, yet the administrator *de bonis non* of G having consented to the decree; and all the parties appearing to have acted in good faith, the executors of H are not thereby deprived of their remedy over against G's estate in the hands of a subsequent administrator *de bonis non* of G.
4. **Same—Same—Case at Bar.**—Ten years after the perpetuation of the injunction, the second administrator *de bonis non* of G entered into an agreement under seal, with the executors of H, to pay the debt out of the assets of G's estate, when they should be received; and the executors agreed to wait with him twelve months, and to release their costs in the injunction suit, and dismiss it as far as they were concerned. But the administrator was not to be bound personally; and the executors were at liberty, if the money was not paid at the end of the year, to cancel the agreement, and proceed to enforce any of their existing legal remedies. The administrator did not collect assets

31 *within the year; and the executors afterwards sued upon this agreement. HELD:

   1. **Same—Same—Statute of Limitations—Case at Bar.**—That though the right of the executors of H to proceed against G's estate accrued when the injunction was perpetuated, yet the pendency of the injunction suit carried on for their benefit.

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*Note by Reporter.—Charles Markle removed to Missouri a short time after the contract was made, and remained there until his death in 1826.

*See Glenn v. Clark, 21 Gratt. 35, and *foot-note*.

prevented the running of the statute of limitations against them.

2. **Executors and Administrators—Promise to Pay Debts Out of Estate.**†—That although it is generally true, that an executor or administrator cannot create a new cause of action against the estate, yet he may make a valid promise to pay a debt not barred by the statute of limitations, out of the assets of the estate, upon which a suit may be maintained.

3. **Same—Same—Consideration.**—That there was a sufficient consideration in this case to sustain the agreement made by the administrator *de bonis non* of G; and suit could be maintained upon it by the executors of H against the administrator for satisfaction out of the assets.

4. **Equity Practice—Marshaling Assets—Case at Bar.**—That it was proper to sue in equity to have an account of or marshaling of assets; and this especially as the agreement being under seal, it was doubtful whether an action at law could be maintained upon it.

The following statement of the case is made by Judge Moncure:

In 1810, Benjamin Harrison being a creditor to a large amount of the estate of Philip L. Grymes, Robert West, the administrator of Grymes, paid the debt by an assignment of bonds taken at the sale of the personal estate; and in the settlement of the administration account the estate was credited with the amount of the bonds, and debited with the amount of the debt. Among the bonds assigned was one of Morgan Tomkies. In due time after this bond became due in October 1810, Harrison's executors brought suit upon it, and obtained judgment in October 1812. A forthcoming bond was given, on which judgment was obtained in May 1813. In October following, Tomkies enjoined the judgment in the Superior court of chancery at Williamsburg; stating in his bill, that as administrator of Catharine Wyatt and guardian of her only child, he had become entitled
32 to a legacy of three *hundred pounds, given to her by her father John Robinson, of whom Grymes was executor; that no part of the legacy had been paid, though considerable estate of Robinson had come to the hands of Grymes. That he, Tomkies, had instituted a suit which was then pending in said court, for the recovery of the legacy. That he had been induced to become a purchaser at the sale of Grymes' estate, and to become bound for the purchases of his ward at the sale, by the promise of West not to transfer the bond until the claim for the legacy should be ascertained; and by an understanding with him that the amount of the bond, or so much of it as might be necessary, should be set off against the legacy, or the balance which might be ascertained in the said suit to be due thereon; and that West, in violation of his said promise and agreement, had assigned the bond to Harrison's executors, who had recovered judgment and sued out execution thereon: and praying for an injunction of the judgment until the report of the commissioner in the suit brought for the recovery of the legacy as aforesaid, and for general relief. Harrison's executors, and West, administrator of Grymes, were made defendants. In April 1814, Harrison's executors filed their answer, stating that their testator was a creditor by bond of Grymes for a considerable amount; that one of them attended the sale for the purpose of obtaining payment; that the negroes were sold on credit, and nothing better could be done than to receive bonds executed by purchasers at the sale to the amount of the debt; and that he accordingly received by assignment from West, administrator as aforesaid, several bonds, among which was that of Tomkies. They profess ignorance of the facts stated in the bill on which the complainant's claim to relief was founded. In June following, West, administrator of Grymes, filed his answer, positively denying all the grounds of
33 equity *contained in the bill, and expressing a belief that nothing was due on account of the legacy. In October following, a motion was made to dissolve the injunction. But the court overruled the motion, and ordered that unless the parties were satisfied with a certain report mentioned in the order, and would consent to a copy of that report being evidence in the case subject to exceptions, a commissioner should take an account of Grymes' administration of Robinson's estate, and ascertain the balance due on the said legacy, and make report to the court. In September 1815, the death of the plaintiff Tomkies was suggested, and a scire facias awarded to revive the suit in the name of his executor. In June 1818, the suit was revived by consent in the name of Robins, administrator of the plaintiff, against George West, executor of Robert West, who was admin-

†**Executors and Administrators—Promise to Pay Debt Out of Estate.**—The proposition laid down in the principal case, that an executor or administrator cannot create a new cause of action against the estate, yet he may make a valid promise to pay a debt not barred by the statute of limitations, out of the assets of the estate, upon which a suit may be maintained, is approved in Switzer v. Noffsinger, 82 Va. 524.

See also, Seig v. Acord, 21 Gratt. 365, and *note*; Smith v. Pattie, 81 Va. 654; Code 1873, ch. 146, sec. 11.

And in Boyd v. Oglesby, 23 Gratt. 684, it is said that the administrator or executor may make settlements and compromises with creditors, and give them confessions of judgments, citing *Braxton v. Harrison, 11 Gratt. 54;* Wheatley v. Martin, 6 Leigh 62, 71.

See monographic *note* on "Executors and Administrators."

Death of Executor—Administrator d. b. n.—Revival of Suits.—In Jones v. Reid, 12 W. Va. 369, it is said: "When the executor died, the cause was properly revived against the administrator *de bonis non*, because there was no other party, who could possibly represent the estate of William O. Reid, deceased, and defend it against the claim of plaintiff. Sheldon *et al.* v. Armstead's Adm'r *et al.*, 7 Gratt. 264; *Braxton v. Harrison, 11 Gratt. 30.*"

See monographic *note* on "Executors and Administrators."

istrator of Grymes, who was executor of Robinson, and George Healy, administrator of Grymes; and thereupon the cause coming on by consent to be heard on the bill, answers, exhibits and depositions, the defendants consenting that a copy of the accounts filed in the case of Chowning & wife v. West, adm'r of Grymes, settling the transactions of Grymes on the estate of Robinson, might be taken as the account in the case; the court, on consideration thereof, and with the consent of the parties, perpetuated the injunction; and, with the like consent, decreed that the defendant George West should settle the administration account of his intestate on the estate of Grymes, and the defendant Healy should settle his administration account on the same estate, before a commissioner of the court, who was directed to state, settle and report the same. Sundry proceedings were afterwards had without effect, to compel George West to settle the account directed to be settled by him as aforesaid. From a report filed in the case it appears that
34 his reason for failing to do so *was, that the vouchers relative to Robert West's administration of Grymes' estate were in the hands of Commissioner Ladd for a settlement of the account in another case, and could not be given up until he had reported on them. In July 1823, the suit was transferred to the Superior court of chancery for the Richmond district. In April 1827, George West being dead, and Healy no longer administrator of Grymes, a scire facias was awarded to revive the suit against Price Perkins, administrator de bonis non of Robert West, and Carter Braxton, administrator de bonis non of Grymes.

In this state of the case of Tomkies v. West, an agreement of compromise was entered into between John F. May, acting for the surviving executor of Harrison, and Braxton. Mr. May, it seems, had been retained by Harrison's executor to prosecute the suit after its removal to Richmond; and in December 1826 wrote a letter to Braxton, stating his views of the case, and of the liability both of West's and Grymes' estates to Harrison, and proposing, as Harrison's executor was old and averse to trouble and litigation, that bond with security should be given for the payment of the debt at some future time, when it might be expected that it could in a legal course be recovered. This letter commenced a negotiation which terminated in the agreement aforesaid, bearing date the 31st of January 1828. That agreement, which is under the hands and seals of the parties, states that they had compromised the matters in difference between Grymes' administrator and Harrison's executor in the suit of Tomkies v. West, in which they were both parties; by which compromise it was agreed that Braxton, or his successor, should pay to Harrison's executor the amount of the original judgment against Tomkies on his bond assigned to Harrison's executors as aforesaid, out of the assets of Grymes, so soon
35 as *Braxton should have a sufficiency to pay the same in his hands. That he should have twelve months in which to make such payment; that, upon its being made, George E. and William B. Harrison, legatees of Benjamin Harrison, would execute a bond with good security, to refund to Braxton the amount so paid, provided any debt of superior dignity should be legally established against Grymes' estate, and there should not be assets sufficient for the payment thereof; that after such payment Harrison's executor would renounce all costs of the suit of Tomkies v. West, and give a discharge for the same, and, as far as he was concerned in the suit, enter a dismissal thereof; that if the said debt should not be fully paid at the termination of the stipulated period, Harrison's executor should be at liberty to resort to any legal means for the recovery thereof; and that nothing contained in the agreement should be construed to bind Braxton in any other capacity than that of representative of Grymes. At the foot of the agreement is a memoranda signed by Braxton, by which it was further agreed that if Harrison's executor should at the end of six months see fit to cancel the agreement, he might do so upon requiring Braxton to cancel the duplicate thereof in his possession.

In November 1828, Braxton wrote a letter to George E. Harrison, in answer to one received from him, in which letter this language is used: "In answer, I have to remark that the arrangement made between Mr. May and myself, relative to the debt due from Mr. Grymes' estate to your father, was done with the intent to end a perplexed and disagreeable law suit. On my part, as the present representative of Mr. Grymes, I was fully convinced of the justness of the claim, and wished for no other litigation. At the time this arrangement was entered into, I expected to obtain an immediate decree in favor of Mr. Grymes'
36 *estate against one of the former administrators for a considerable amount. Under this expectation, I only wanted time to enable me to realize the money arising from that claim." The writer then states that his expectation had been disappointed; and after referring to other sources of payment, including Mr. Grymes' land, which he says he would sell and pay the debt if he could, he uses this language: "Had the decree been obtained in January last, you should have had the money beefore this. Whenever the money is made, the debt to your father's estate shall be forthwith settled."

In October 1829, Braxton wrote another letter to Harrison, in which this language is used: "I expect a decree at the next chancery term for the Richmond district, against the preceding administrator on Mr. Grymes' estate, and his securities, who are very ample, for a very large amount, between sixteen and seventeen thousand dollars. There are other very large claims due the estate of Mr. Grymes; but these are the first that I expect will be tangible.

Now, out of the first money collected you will be wholly, or for the greater part of your claim, satisfied."—"The compromise between Judge May and myself terminated a source of litigation that would have consumed as much time and expense as any one with which I have become acquainted, considering the number and distance of the various parties. That compromise bound the parties to settle on specified terms, and if they did not do so in twelve months, then the representatives of your father's estate were to be at liberty to pursue their original remedy. Now, I hardly imagine that it would possibly be expected a suit of the complex nature of the one that the compromise ended could be matured, sooner than the expectations I have mentioned will be realized. I hope, however, your necessities may not press you
37 before payment can be made. *The personal estate of Mr. G. in my hands is very inconsiderable. If a judgment was now had, before satisfaction of it could be obtained it would be necessary to bring a suit to subject the lands of Mr. G."

Braxton having failed to pay the debt to Harrison's executor, the latter, in April 1833, in conjunction with George E. and William B. Harrison, sons and distributees of Benjamin Harrison, filed their bill in the Circuit court of Middlesex, for the purpose of enforcing the execution of the agreement aforesaid; setting out the material facts in relation to the agreement, and the debt for the payment of which it was entered into; charging that personal estate of Grymes to a considerable amount had come to the hands of Braxton as his administrator; that a large amount of real estate was then held by Braxton and wife in her right as sole heir and devisee of Grymes; that the estate of Grymes, both real and personal, was bound for the payment of the said debt, of which no part had been paid, and that the said George and William B. Harrison were then entitled to the whole of the said debt by the consent of Harrison's executor; making Braxton, administrator de bonis non with the will annexed of Grymes, and Braxton and wife defendants to the bill; and praying for suitable relief. The agreement and said two letters of Braxton were filed as exhibits. And a bond was executed by the said George E. and William B. Harrison and a surety, in the terms prescribed by the agreement, and filed with the bill.

In July 1833, Braxton as administrator, and also for himself and wife, filed an answer. He sets out the substance of the letter received by him from Mr. May in December 1826; says that at no time prior to the agreement had he ever examined the suit of Tomkies v. West, nor did he at the time of the agreement have any knowledge of that suit derived from any other source than the letter; and that, entertaining
38 no doubt *that the facts of the case were truly stated by Mr. May, and that his opinion as to the law arising on the facts was sound and correct, he consented to execute, and did execute, the agreement. He says that according to his understanding of the agreement, if the debt should not be paid in twelve months from its date, Harrison's executor was to be at liberty to resort to any legal means for the recovery of the debt which he might have used if the agreement had never been made: in other words, might go on with the suit of Tomkies v. West. And he insists, that without any further enquiry this suit ought to be dismissed, and the plaintiffs turned over to that suit for any relief to which they might be entitled. But if that course should not be taken, he says the court will have to determine how far he was bound, anterior to the agreement, as the representative of Grymes' estate: in other words, whether the plaintiffs have any equitable claim against that estate. He then sets out the facts in regard to the assignment of Tomkies' bond, the proceedings at law upon it, and the proceedings in the injunction suit; and insists that when Harrison's executors delivered up to West, as administrator of Grymes, the evidence of debt which they held, and gave a receipt in full for the debt, the estate of Grymes became entirely exonerated. The claim henceforth was a claim on the bond against the obligors; or, if it could not be collected of them by due diligence, on the contract of assignment against West individually, and not as administrator of Grymes; as no administrator can make any new contract binding upon his decedent's estate. He further insists that it is manifest from the record in the suit of Tomkies v. West, that the injunction never would have been perpetuated, if the executors of Harrison had not consented to it. He then says that since March 1830 he has discovered most material testimony in the record of a suit in
39 the *County court of Middlesex, in which Wyatt and wife were plaintiffs, and Grymes, executor of Robinson, defendant, commenced in 1797, and abated by the death of Grymes in 1805; which suit was brought for the recovery of the same legacy claimed by Tomkies in the injunction suit. The tendency of that testimony is to show that Wyatt had given Philip Samson an order on Grymes for the legacy, and that Samson had received the amount of it, in whole or in part. Other matters are stated in the answer, but need not be here further referred to. The letter of May to Braxton was filed as an exhibit.

In July 1846, the deposition of May was returned and filed by the plaintiffs. He makes the following, among other statements: "There had been some communications, perhaps verbal as well as written, between Mr. Braxton and myself; and some time after them Mr. B. met me in this city, and we examined together the chancery papers in the old suit of Tomkies v. West, and finally entered into the agreement manifested by that paper. I recollect the circumstances of our having the papers before us, because at that time I discovered, first, according to my present recollection,

that the decree perpetuating the injunction purported to have been made by the consent of Harrison's executors as well as Grymes' executor, which Mr. Braxton and myself both concluded to have been a mistake in the draft of the note for a decree."—"The papers in that suit were certainly before us at the time that agreement was entered into, and the subject of the consent order was then mentioned in our conversation; and my recollection is that Mr. Braxton and myself examined the papers, on at least two different days during his then visit to Richmond before we entered into the agreement."

In June 1847, the cause coming on to be heard in the Superior court of chan-
40 cery for the Richmond circuit, *(to which it had been transferred,) on the bill, &c., and upon the original record of the case of Tomkies v. West, pending in the same court, including the record of the case of Wyatt & wife v. Robinson's ex'or, filed therein as an exhibit on the 28th of January 1831, the court was of opinion, and decided, that the estate of Grymes was justly indebted to the estate of Harrison in the sum of one thousand and seventy-seven dollars and twenty cents, with interest from the 11th of October 1810 till paid, and nine dollars and fifty-one cents costs, according to the stipulations of the agreement aforesaid. But as no decree could be rendered for the payment of the money without a settlement of the accounts of Braxton as administrator of Grymes, the court decreed, that unless the defendant Braxton should admit assets in his hands of the estate of Grymes sufficient to satisfy the said claim, then the said defendant should render, before one of the commissioners of the court, an account of his administration of the said estate. And the said commissioner was directed to ascertain and report to the court what real estate and its value was left by Grymes at his death and passed to his heirs or devisees.

Robinson, for the appellant:

It is probable that Harrison was a creditor of Philip L. Grymes. This debt West the administrator of Grymes paid, took a receipt for the payment, and has received a credit for it in his administration of Grymes' estate. The debt was then discharged; and if any liability exists on that account, it must arise out of a new contract. This debt of Harrison was paid in part by the assignment by West to Harrison's executors of the bond of Tomkies; and any existing liability to Harrison's executors must arise out of that assignment. If Harrison's executors used due diligence to recover the money from Tomkies
41 and failed, then West was *liable on his assignment. Harrison's executors did sue Tomkies, and obtain a judgment against him, which he then enjoined on the ground that as administrator of Wyatt he held a claim against Grymes' estate. To this suit Harrison's executors and West were parties; and the injunction was perpetuated by their consent. This result, it is most obvious from an inspection of the record, could not have occurred but by the consent of Harrison's executors; and therefore they might have obtained their money from Tomkies. And if West's consent bound him, still Grymes' estate should not have been subjected; and as West was only liable as assignor, the action against him was barred in five years, and in fact no action was ever instituted against him. Nor could the decree for an account in that cause have the effect to prevent the bar of the statute; because there could be no decree upon that bill between codefendants. 2 Rob. Pr. 397-8; Yerby v. Grigsby, 9 Leigh 387; Crawford v. McDaniel, 1 Rob. R. 448; Eccleston v. Lord Skelmersdale, 1 Beav. R. 396, 17 Eng. Ch. R. 396; Goodwin v. Clewley, 2 Beav. R. 30, 17 Eng. Ch. R. 30.

When the decree perpetuating the injunction was made, Harrison's executors should have been left to their action on the assignment. This right of action arose in 1818, more than nine years before the suit was revived against Braxton as representative of Grymes; and it was then irregularly revived, because in fact there was no case to revive. Tomkies had obtained all he asked, and he could not amend a bill to set up a claim of Harrison's executors against Grymes' estate.

Such was the condition of things as to Braxton and Grymes' estate when May wrote his letter to Braxton; a letter which, whatever was the purpose of the writer, did mislead Braxton; and he was misled when he executed the agreement, as is plainly shown both on the face of the agree-
42 ment and the letters filed. We *do not insist that the action of May was fraudulent; but parties coming into equity for relief, the court must apply to them the principles applicable to other cases of the specific execution of contract. For these principles the court is referred to 2 Rob. Pr. 169, 170; 1 Story's Equ. Jur. § 750. Certainly equity will not execute an agreement where there is neither a meritorious nor valuable consideration; nor will it even aid a defective conveyance. Darlington v. McCoole, 1 Leigh 36. Here, though this agreement is called a compromise, yet it is all on one side, and is without consideration. The whole amount of the claim of Harrison's executors is their judgment against Tomkies, and that is to be paid in full. As to the costs, they were not coming to Harrison's executors, but to Tomkies, and the executors had no control over them. But moreover, the agreement expresses on its face, that Braxton did not bind himself further than he was bound before. Is this then a contract which a court of equity will enforce? There must be mutuality in the contract, and for that reason the contracts of infants will not be enforced even at their suit. Flight v. Bolland, 3 Cond. Eng. Ch. R. 675. Does anybody imagine that an action at law could be maintained against Braxton upon this agreement, in his individual character? And if not, cer-

tainly an action could not be maintained upon it against him as administrator. If an action against him as administrator could be maintained, then probably there might be a bill to enforce it, and for an account of assets. But if such an action cannot be maintained upon it, then there cannot be a bill in equity founded upon it.

In fact, the bill in this case is not based upon the agreement, but upon the case as it existed before the agreement was made. The plaintiffs claim as assignees and upon the doctrine of subrogation. The first ground cannot be good against
43 Grymes' estate if not *good against the assignor West: And we have already shown that the statute bars the claim against him. Then as to the right of subrogation. The bond due to Harrison has been paid, and paid out of Grymes' estate. Whatever right exists must arise as before said, out of the assignment. When that right is barred, any right arising out of it must be at an end. But if Harrison's executors are entitled to be subrogated to West, they can only have the same rights which West has against Grymes' estate. But West has no such right, because he assented to the decree perpetuating the injunction; or if he had any, certainly he was only entitled to a credit in his account of administration for the amount.

Irving, for the appellees:

I take it to be clear law, that where a bond is assigned as the bond in this case was, and it is not a valid bond, it is no payment, but there is a failure of consideration, and the assignee has a right to come back upon his debtor upon the foot of his original debt. In such a case the assignment of the bond is not a payment.

There is nothing in the record of Tomkies v. Haxall which shows negligence in the prosecution of the claim by Harrison's executors against Tomkies. The counsel for the appellant has argued the cause without reference to the fact that Grymes' administrator was a party in that cause, and a party consenting to the perpetuation of the injunction in that cause. And it cannot be successfully maintained, that when the assignor and assignee are united in the defence, and the assignor assents to the defeat of the claim, the assignee shall be precluded from his remedy against him. But in fact there was no proof in the cause which would have authorized the dissolution of the injunction. There was proof that
Wyatt's legacy due from Grymes had
44 *been assigned to Tomkies, and there was no proof that it had been paid. The old case of Tomkies v. Grymes was not discovered for twelve years after the consent decree. There is no proof that its existence was known to Harrison's executors; and it was not even known to Braxton when he filed his first answer in the case of Tomkies v. Haxall.

But it is insisted that the statute of limitations bars the claim of Harrison's executors; and this because there could be no decree between codefendants in Tomkies against Haxall. The authorities cited by the counsel on the other side are against him. The whole question in controversy in that case was, whether the bond of Tomkies assigned by West to Harrison's executors was due. In this question the interest of Harrison's executors and Grymes' administrator was the same; and when it was held that the bond was not due, everything was ascertained which was necessary to entitle Harrison's executors to a decree over against Grymes' administrator.

But the present suit is upon the agreement between May on behalf of Harrison's executors and Braxton. This agreement is under seal, and relates to a matter of which Braxton was fully informed. If, therefore, the case of Tomkies v. Haxall is at an end, and the claim arising out of it is barred by the statute, Grymes' estate is bound by this new agreement, because it admits the debt as still due. But it is said there is no mutuality in the contract. Braxton only bound himself to pay what he admitted to be due out of the assets of the estate. He obtained a delay of twelve months, which he deemed of material advantage to him, and was discharged from the costs of the suit; and he settled a protracted controversy.

It is argued that we claim through West, and that he is not entitled to recover against Grymes' estate: And this is the vice of the argument on the other side.
45 *We do not claim through West. We say that the bond of Tomkies not being a valid debt, the assignment of that bond to Harrison's executors was not a payment; but that so much of our original debt due by bond, is a still subsisting debt, which we are entitled to have paid out of the estate of Grymes the debtor.

Robinson, for the appellant, in reply:

It is argued by the counsel for the appellees, that the debt due from Grymes to Harrison had never been paid. It has been taken in receipted as paid, and the administrator of Grymes has been allowed a credit for its payment. It was paid in part by Morgan Tomkies' bond; and whatever rights the plaintiffs have in this case must arise out of that contract of assignment. They may have taken it without recourse, and in that case they must certainly lose it. It is, therefore, this contract which is the origin of their rights. It may be that in the case of a forged bond the payment might be treated as a nullity; but here was a valid bond, proved to be so by the judgment upon it. When then West passed this bond to Harrison's executors, he passed to them value. But if it is said it was a forged bond, or that it was subject to setoff, then this is to be proved. Here West in his answer says a part of this setoff, and he believes all of it, had been paid. Then is it enough for Harrison's executors to consent to the decree, and to use it to prove their claim against Grymes' estate.

If any question of law is settled, it is

settled law that Harrison's executors have no claim upon the foundation of the original debt. Thacher v. Dinsmore, 5 Mass. R. 299; Bank of St. Albans v. Gilliland, 23 Wend. R. 311; Shore v. Shore, 22 Eng. Ch. R. 378. If there had been a surety in the original bond, could his liability be revived? This subject is well treated
46 in *Wiseman v. Lyman, 7 Mass. R. 286. Then when West transferred Tomkies' bond in discharge of Grymes' debt, the remedy of Harrison's executors is upon his undertaking whether express or implied upon the transfer. In a transfer of a forged note there is an implied warranty of its genuineness; but there is no such warranty that the parties are solvent. Edmunds v. Digges, 1 Gratt. 359. If, therefore, West had paid the amount in bank notes, Harrison's executors would have had no remedy either upon the original bond or the notes. And in Mays v. Callison, 6 Leigh 230, it is said that it might be submitted to the jury whether upon all the facts there was a warranty that the bond had not been paid: That was an action by an assignee against his assignor. The liabilities of an assignor are stated in Turneys v. Hunt, 8 B. Monr. 401. In all such cases, where the bond assigned is a valid instrument, as was the bond in this case, the question of the assignor's liability resolves itself into a question of due diligence; and upon that question there can be no doubt in this case, unless the injunction concludes it; which it does not. McClung v. Arbuckle, 6 Munf. 315. It is clear that if due diligence had been used the injunction would not have been perpetuated: For, certainly West had a right to enforce the payment by Tomkies of his bond. White v. Banister, 1 Wash. 166; Pulliam v. Winston, 5 Leigh 324. This would have been the case if West had sued Tomkies; and the case is still stronger when the suit is by an assignee; as no equity could be set up against the bond unless there had been notice of it before the assignment. Here there was no such equity; for West denies expressly the equity set up in the bill; and there was no proof of it in the cause. Then it was the fault of Harrison's executors that the injunction was perpetuated; and they therefore can have no equity to compel Grymes' estate to pay the debt.

47 *There is but one answer to this argument: That is, that Grymes owed Tomkies. This is necessary to their recovery, and they must prove it. The proofs we think ought to satisfy the court that Tomkies had no valid claim against Grymes' estate; but whether or not this be so, Harrison's executors do not prove that he had. They attempt to obviate this objection by the concurrent consent of West's and Grymes' administrators. But this does not excuse Harrison's executors, unless they show that Grymes' estate has not been injured by the perpetuation of the injunction.

But if Harrison's executors had a right to recover from Grymes' estate the amount of Tomkies' bond, that recovery was to be had either in the suit of Tomkies v. Haxall, or by a new action. If they could not recover in that suit, then their claim was barred after five years from the perpetuation of the injunction. If they could have recovered in that suit, then this suit was improperly instituted: And this objection is distinctly taken in the answer of Braxton. This conclusion is inevitable if the case of Heywood v. Covington, 4 Leigh 373, is to be respected.

But the agreement between May acting for Harrison's executors and Braxton is relied on to sustain this claim. If this new agreement is to alter the rights and liabilities of the parties, then Braxton was misled. The letters show that he derived his information from May. There was, moreover, no consideration for the agreement. It is said Braxton obtained a year's indulgence. But this is no consideration. Forbearance to an executor is only a consideration where he binds himself; and this he expressly declined to do. There were in fact no assets in his hands at the time; and if there were assets, it was not the interest of the estate that indulgence should be given. As to the dismissal of the suit, that was not within the control of Har-
48 rison's *executors; and in fact it is not yet dismissed: And the same may be said of the costs.

It is argued that the agreement and letters dispense with the proof of due diligence, and that the debt was just. It would be most unjust that these papers should have this effect. Braxton knew the facts or he did not. If he did not, then he could not be bound. If he did know, a court of equity will not permit an executor to injure the estate by his admissions. Since the statute, Code, p. 548, § 6, his admissions could not affect Grymes' estate. According to the weight of authority, no executor can preclude the estate from setting up any defence by his admissions. Thompson v. Peter, 12 Wheat. R. 565; Tullock v. Dunn, 21 Eng. C. L. 478; Scholey v. Walton, 12 Mees. & Welsb. 510; Fritz v. Thomas, 1 Whart. R. 66; Reynolds v. Hamilton, 7 Watts' R. 420. If the claim was not just without the agreement and letters, it is not just with them. This agreement then gives no strength to the plaintiffs' claim either to the right or to the remedy; and therefore the bill should be dismissed.

MONCURE, J., after stating the case, proceeded:

It was contended by the counsel for the appellants in this case, that conceding that the bond of Tomkies was assigned by West to Harrison's executors in payment of a debt due by Grymes to them, and that they used due diligence to recover the amount of the bond, but failed to do so by reason of its being satisfied by a debt due by Grymes to Tomkies; still they would have no claim to relief, even in equity, against Grymes' estate; and would have to rely alone on the recourse which his contract of assignment

might give them against West individually.

It will be a sufficient answer to the above proposition to say, that if the bond
49 of Tomkies was satisfied *by a debt due by Grymes to Tomkies, it was a debt of the highest dignity; being due by Grymes, who was executor of John Robinson, to Tomkies, as assignee of a legacy given by said Robinson to his daughter Mrs. Wyatt. This debt was not charged to the estate of Grymes in the administration account of West; and having, in effect, been paid by Harrison's executors, they are entitled to be substituted in equity to the place of the creditor, and to have the debt, to the extent to which they are entitled to it, paid out of the estate of Grymes.

It was further contended, that if Harrison's executors could have had any recourse against the estate of Grymes for the amount of Tomkies' bond, it could only have been on the terms of using due diligence to collect the bond; and that they did not use due diligence, in as much as they consented to the decree perpetuating the injunction of the judgment on the bond, without which consent the injunction would not have been perpetuated.

It is not pretended that there was any want of diligence on the part of Harrison's executors, except in giving their consent to the decree of perpetuation. They seem to have been prompt, not only in asserting their claim against Grymes' estate on the day of sale, but in suing on the bond of Tomkies shortly after it became due, and obtaining a judgment at law, and then a judgment on a forthcoming bond, when they were enjoined from further proceedings. They promptly filed their answer to the bill of injunction, and moved to dissolve it; but their motion was overruled, and an account was ordered. Afterwards, by consent of parties, the cause came on to be heard, the same account settled in another case was taken as the account in the injunction suit, and the injunction was dissolved. Whether it would have been dissolved but for such consent, it is impossible to say, and unnecessary to
50 *decide. There was filed with the bill an affidavit of Wyatt, the only child and distributee at law of the legatee Mrs. Wyatt, sustaining its allegation; to the reading of which affidavit as evidence no exception was taken. The record of the suit of Wyatt & wife v. Grymes, in the County court of Middlesex, was not an exhibit in the injunction suit, and had not then been discovered. It is true the answer of West denied the equity of the bill, and was sustained in part by a deposition. In the condition in which the case was, the injunction should, I think, have been dissolved. But the court did not think so, and overruled the motion for that purpose, and ordered the account. This was an indication of the opinion of the court, that if upon taking the account, Grymes should be found to owe as much on account of the legacy as the amount of the judgment, the injunction should be perpetuated. And when afterwards the same account was taken in another suit of another legatee of Robinson, and it was thereby ascertained that Grymes had received ample estate of Robinson to pay all his legacies, the representatives of West and of Grymes, who were defendants in the injunction suit, doubtless wishing to save the trouble and expense of retaking the same account, and believing that there was at least as much due on the legacy to Mrs. Wyatt as was equal to the amount of the judgment against Tomkies, consented to the perpetuation of the injunction. There was nothing then in the case to show that any part of the legacy had been paid. West had said in his answer that he had a voucher for the payment of one hundred pounds, and that it was probable nothing was due on account of the legacy; but there was no proof to sustain these allegations.

And when the cause came on to be heard, it presented but one difficulty; and that was in regard to the right of Tomkies
51 to have his bond set off against *the legacy. So far as Grymes' estate was concerned, it was simply a question whether so much of the legacy as was equal to the amount of the bond should be paid to Harrison's executors or some other person. If the injunction should be perpetuated, it would be due to Harrison's executors: If dissolved, to Tomkies, or some other person. It was, therefore, of no consequence to Grymes' estate whether it was perpetuated or dissolved. It was desirable of course to end the litigation; and it could best be ended by a consent decree; to which, it seems from the record, the consent of Harrison's executors was obtained. The representatives of West and of Grymes seem, therefore, to have acted in good faith in consenting to the decree. Certainly there is nothing to impugn the good faith of Harrison's executors in giving their consent, if in fact they did give it; as must be taken to be the fact, since it so appears by the record. They might lose, but could not gain, by giving their consent. By doing so, they gave up all claim against Tomkies, and consented to retain only their recourse against Grymes' estate. They could safely do this if they chose, with the consent of the representatives of West and of Grymes. An assignee may safely be governed by the instructions of the assignor in the management of the assigned claim: and ordinarily he could not disregard them without endangering his recourse against the assignor. When an obligor in an assigned bond enjoins a judgment on the bond on the ground of some equity existing between himself and the assignor, the assignee is generally ignorant of the facts, and leaves them to be litigated between the obligor and assignor. He has a right to require strict proof of the facts, because he has a right to enforce the bond if due, as well as to have his recourse against the assignor. But he may, if he choose, waive the former right and retain the latter, if the assignor admit the ground of

52 equity and consent *to a decree of perpetuation. The consent of the assignee to the decree has no other effect than as a waiver of his right to proceed further on the bond, and cannot affect his recourse against the assignor, who also consented. Nothing would be plainer than this in a case in which an assignor is acting in his own right, and there can be no difference in a case in which he is acting as administrator; supposing him to act in good faith, or that the assignee has no notice or reason to believe that he is acting otherwise. An administrator has an undoubted right to confess a judgment, or consent to a decree, if he believes that the interest of the estate he represents requires it. Whether, therefore, the injunction would have been perpetuated or not without the consent of Harrison's executors, yet as West's and Grymes' representatives also consented, and as all parties seem to have acted in good faith in the matter, Harrison's executors did not thereby forfeit their recourse against the estate of Grymes, but became entitled, by the perpetuation of the injunction, to demand of that estate the amount of the judgment against Tomkies.

It was further contended, that the right of Harrison's executors, if any, to have recourse against Grymes' estate, accrued at the time of the perpetuation of the injunction in 1818, and could not be enforced in the injunction suit, but only by a new and independent suit; so that when the agreement of compromise was made in 1828, on which this suit was brought, the claim of Harrison's executors was barred by the act of limitations.

It is true that the right of Harrison's executors to have recourse against Grymes' estate accrued at the time of the perpetuation of the injunction; but it is not, I think, true that such right could not be enforced in the injunction suit. I think the case came within the reason and operation
53 of the rule, that "where a *case is made out between defendants by evidence arising from pleadings and proofs between plaintiffs and defendants, a court of equity has a right and often is bound to make a decree between the defendants." See 2 Rob. Pr. 397, and the cases cited; Fox v. Taliaferro, 4 Munf. 243; Dades' adm'r v. Madison, 5 Leigh 401. Though a suit be disposed of as to the plaintiff, it may be retained until proper accounts can be taken, in order to render to one of the defendants the relief to which he may be entitled against the other. Morris, &c. v. Terrell, 2 Rand. 6. A defendant may in some cases object to a decree against him in favor of his co-defendant, on the ground that there is no issue made up between them, and their peculiar matters of difference have not been ascertained and settled. But the party entitled to make such objection may certainly waive it, and consent to a decree against him; and it may often be his interest to do so. In this case both West's administrator and Grymes' administrator (Healy) consented, not only to the perpetuation of the injunction, but to a decree, "that the defendant George West settle the transactions of his intestate on the estate of Philip L. Grymes, and that the defendant George Healy also settle his transactions on the estate of the said Philip L. Grymes, before one of the commissioners" of the court, who was directed to settle, state and report the same. This decree could only have been made on the admission of the administrators of West and Grymes, that the estate of Grymes was liable to Harrison's executors for the amount of the enjoined judgment, and by a decree in that suit, so soon as it could be ascertained, by a settlement of the accounts, that there were sufficient assets to meet the liability. It is a mistake to suppose that the injunction suit was brought, not only to enjoin the judgment, but also to recover the balance of the legacy claimed by Tomkies. A suit had been brought
54 by *Tomkies for that legacy, and was pending when the injunction suit was brought. And the only object of the latter suit was to enjoin the judgment on the assigned bond until a decree could be obtained in the other suit, and to obtain relief to the extent of that judgment. When the injunction was perpetuated, Tomkies obtained all the relief which he sought, or to which he was entitled, in the injunction suit. Its further prosecution, therefore, could only have been for the benefit of Harrison's executors. This suit was pending for the benefit of Harrison's executors when the agreement of compromise was made in 1828, and their claim was not then barred by the act of limitations.

It was further contended, that the agreement of 1828 is of no effect: 1. Because an administrator can create no new cause of action, nor revive an old one, against his decedent's estate. 2. Because the agreement was made on the mere representation of the counsel of Harrison's executors, which, though not fraudulent, yet tended to mislead and did mislead the administrator of Grymes; and in ignorance of the fact that the decree of perpetuation was by their consent, and of the existence of the record of the suit of Wyatt & wife v. Grymes in Middlesex county court. 3. Because it was founded on no consideration, and was intended to give no new remedy to Harrison's executors, in case it should not be performed by Braxton, but leave them to resort to such remedies as they had, if any, when the agreement was entered into.

As to the first objection, it is certainly true, as a general rule, that an administrator can create no new cause of action against his decedent's estate. But he has all the powers which are necessary to a proper discharge of the duties of his office. He may make settlements and compromises with creditors of the estate, and give them confessions of judgment; and
55 *though he may thereby render himself liable for a devastavit, yet they will be entitled to the benefit of his acts, if they deal with him in good faith. He

may submit to arbitration matters in dispute in respect of the personal estate, and render it liable for the performance of the award. 1 Lomax on Ex'ors 356. As was said by Judge Cabell in Wheatley v. Martin's adm'r, 6 Leigh 62, 71, "It is competent to an executor or administrator to submit to arbitration any controversy concerning the estate, whether the estate claims to be a debtor or creditor. This results, necessarily, from the full dominion which the law gives him over the assets, and the full discretion which it vests in him for the settlement and liquidation of all claims due to or from the estate. And although a mere submission to arbitration will not bind the executor or administrator personally, to pay the sum awarded out of his own estate, yet the award is binding on him in his fiduciary character, and consequently on the assets of the estate which he represents. Pearson v. Henry, 5 T. R. 6; Lyle v. Rodgers, 5 Wheat. R. 394." An executor or administrator may be sued as such, on promises to pay a debt of the estate. A count, on an account stated by a defendant as executor respecting moneys due from the testator, or from the defendant as executor, may be supported, and joined with counts on promises by the testator. Chitty on Contr. 275; 1 Chitty's Plead. 205; Secar v. Atkinson, 1 H. Bl. 102; 2 Saund. 117 e, note 2; Whitaker v. Whitaker, 6 John. R. 112; Carter v. Phelps' adm'r, 8 Id. 343. This doctrine has been fully recognized in Virginia. Epes' adm'r v. Dudley, adm'r, 5 Rand. 437; Bishop v. Harrison's adm'r, 2 Leigh 532. In the latter case Judge Cabell said, "It is perfectly clear that in an action against an executor or administrator, such counts," that is, counts on promises by the executor as such, and counts on prom-
56 ises by the testator, "may be *joined; and that that is the proper mode of declaring against executors or administrators to save the statute of limitations." See also 2 Lomax on Ex'ors 419. Whether before the Code took effect, an executor or administrator might have revived a debt barred by the act of limitations, is a question which may admit of controversy, and about which there is some conflict of authority. The cases of Peck v. Botsford, 7 Conn. R. 172; Fritz v. Thomas, 1 Whart. R. 66; and possibly Thompson v. Peter, 12 Wheat. R. 565, decide or assume that he could not. In all these cases the debt had been long barred when the promise was made; and vague and loose admissions were relied on as evidence of a promise, which might not have been sufficient even if made by the party who owed the debt. The observations of the court should be taken in reference to the cases in which they were made. Chief Justice Marshall, in saying, in Thompson v. Peter, that "declarations against him," the executor or administrator, "have never been held to take the promise of a testator or intestate out of the act; indeed the contrary has been held;" surely did not mean to say that an executor or administrator could not be sued on his promise to pay a debt of his testator or intestate not barred at the time of making the promise, and that such promise would not prevent the operation of the act; for he knew that the law was well settled otherwise. He probably only intended to say that mere declarations, such as were proved in that case, and as contradistinguished from a promise of an executor, had never been held to take the promise of the testator out of the act. Chief Justice Gibson did not mean to say so in Fritz v. Thomas, for he had expressly said otherwise in Collins v. Weiser, 12 Serg. & Raw. 97, in which he held that an administratrix was liable as such on an implied promise for money paid, laid out and expended. His remarks in Fritz v. Thomas, in regard to
57 *the danger of making an estate liable on vague and indefinite admissions and promises of the executor or administrator, who is often ignorant of the transaction, are certainly very just; and courts and juries should be cautious in weighing the evidence of such admissions and promises. Admissions which would have been held sufficient to take a debt due by the person making them out of the statute, have been held insufficient for that purpose when made by an executor or administrator.

In Tullock v. Dunn, 21 Eng. C. L. R. 478, Chief Justice Abbott said, "As against an executor, an acknowledgment merely is not sufficient to take a case out of the statute, there must be an express promise." 2 Lomax on Ex'ors 418. But that an executor or administrator might be sued as such on his promise to pay a debt of his testator or intestate not barred at the time of making the promise, is too well settled to admit of controversy. In this case, when the agreement was made there was, as I have attempted to show, a debt due by Grymes' estate to Harrison's executors, not barred by the act of limitations, but in a course of continued prosecution from the instant of the accrual of the cause of action. By the decree perpetuating the injunction and directing a settlement of the administration of Grymes' estate, that estate was rendered liable, in whosesoever hands it might come, for the claim of Harrison's executors. A judgment against an administrator, even though it be confessed by him, may be revived against an administrator de bonis non. A suit may be brought against the latter on a promise made by the former to pay a debt of his intestate. Bishop v. Harrison's adm'r, 2 Leigh 532. "It is clearly competent to an executor," says Judge Cabell in that case, "by his promise to pay a debt of the testator, to exempt the case from the operation of the statute of limitations; and it is no devastavit
58 *in him to do so. If the executor die or be removed before he has paid the debt, it still remains a debt due from the testator; and the obligation to pay it devolves on the administrator de bonis non, who comes in the place of the executor, and is the representative of the testator."

When, therefore, Healy, by whose consent the decree had been rendered, was removed from the administration, and Braxton was appointed administrator de bonis non, Harrison's executors had a right to have the suit revived against the latter, and accordingly sued out a scire facias for the purpose. In this state of things Braxton, who was suing Healy and his securities for the assets in his hands, and was expecting soon to recover them, and who also, in right of his wife, was sole residuary devisee and legatee of Grymes, agreed, on certain terms, to pay the debt to Harrison's executors out of the assets when recovered. I think the agreement is clearly binding upon him as administrator of Grymes, unless it is invalid on the second and third objections made to it, or either of them.

As to the second objection, that the agreement was made on the mere representation of the counsel of Harrison's executors, and in ignorance of the fact that the decree of perpetuation was made by their consent, and of the existence of the record of the suit of Wyatt & wife v. Grymes. May, the counsel of Harrison's executors, was guilty of no fraud or misrepresentation, and Braxton was not taken by surprise, in making the agreement. After the suit of Tomkies v. West had been removed from Williamsburg to Richmond, May was retained to prosecute it as counsel for Harrison's executors. He examined the case, and wrote to Braxton in December 1826, stating his views of it, and proposing an agreement, saying that his client was "old and averse to trouble and litigation." The agreement was accordingly made
59 about a year thereafter. *In the letter, nothing was said about the consent of Harrison's executors to the decree of perpetuation. I have attempted to show that such consent, given without fraud, which is not imputed to them, did not affect their right to recourse against Grymes' estate. It is probable that May had not adverted to the fact, or did not deem it material, when he wrote the letter. But the fact was known to Braxton before he entered into the agreement, as is proved in May's deposition. Braxton had ample time and opportunity to make himself acquainted with all the facts. He appears to have done so, at least so far as to examine the record in Tomkies v. West, which was the only source from which May professed to derive his information. May proves that Braxton and himself examined the papers, on at least two different days, before they entered into the agreement.

In Braxton's letters to Harrison, written in November 1828 and October 1829, nearly one and two years after the date of the agreement, the former expresses his satisfaction therewith, and his desire and intention to perform it on his part. It is needless to enquire how far the record of the suit of Wyatt & wife v. Grymes tends to show that the legacy or any part of it had been paid by Grymes in his lifetime, or what would have been its effect, had a copy of it been filed as evidence in the suit of Tomkies v. West when the consent decree was rendered. When that record was discovered by Braxton, more than ten years had elapsed since the decree of perpetuation, and several years since the date of the agreement; and it was then too late to give it any effect on either. It would have been too late to affect the agreement, even if it had been a compromise of a doubtful claim. The compromise of a doubtful title, when procured without such deceit as would vitiate any other contract, concludes the parties, though ignorant of the extent of their
60 *rights. Per Gibson, chief justice, in Hoge v. Hoge, 1 Watts' R. 163, 216. As was said by the master of the rolls in Pickering v. Pickering, 2 Beav. R. 31, 17 Eng. Ch. R. 31, "When parties whose rights are questionable have equal knowledge of facts, and equal means of ascertaining what their rights really are, and they fairly endeavor to settle their respective claims among themselves, every court feels disposed to support the conclusions or agreements to which they may fairly come at the time, and that, notwithstanding the subsequent discovery of common error."

As to the third and last objection, that the agreement was founded on no consideration, and was intended to give no new remedy to Harrison's executors in case it should not be performed by Braxton, but leave them to resort to such remedies as they had, if any, when the agreement was entered into. If, at the date of the agreement, Grymes' estate was already liable to Harrison's executors for the amount of the judgment against Tomkies, as I have before endeavored to show, then the existence of that liability was of itself a sufficient consideration for the agreement; it being in effect an account stated by an administrator of a debt due by his testator, and a promise to pay the amount out of the assets; which, we have seen, is a good cause of action against an administrator in his representative character. But even if that liability had been doubtful, it was at least a subject of controversy in a pending suit at the time the agreement was entered into, and was a good consideration for a compromise. "There can be no doubt that the resignation of a colorable claim, conflicting with that of another person, and the settlement of the dispute between the parties without suit, constitute a good consideration;" and "in these cases, inequality of consideration does not, of itself, form any objection." Chitty on Contr. 26. But it is said there was in effect no consideration
61 *in this case, the promise being to pay the entire debt claimed by Harrison's executors. The promise, it will be observed, was not to pay the debt out of the proper estate of Braxton, but out of the assets of his testator when enough for the purpose should come to his hands. And, out of abundant caution, it was further expressly declared in the agreement that nothing therein contained should be construed to bind the administrator of Grymes

in any other than his representative capacity. What would be a reasonable compromise for the administrator to make on account of his testator's estate, was a question which depended upon all the circumstances. If Harrison's executors had confidence in their claim, they could not be expected to give much, if any of it, up; or to do more for the sake of ending litigation than give a little more time for payment; especially as the security of the debt was not to be increased. And if Grymes' administrator had good reason to apprehend that the whole debt would be recovered of his testator's estate (and he says in one of his letters that when he entered into the agreement he was fully convinced of the justness of the claim), he might well be willing to end the litigation by agreeing to pay the debt in a limited time, and out of the assets when in hand. Such a compromise, under such circumstances, could not be said to be without a sufficient consideration to sustain it. If, under such circumstances, Grymes' administrator had confessed a decree when assets for the whole amount of the debt, the decree would have bound the estate; and there is at least as much reason in its being bound by his agreement to pay the debt when assets and after a limited period. Harrison's executors had obtained a decree in the suit of Tomkies v. West for the settlement of Healy's administration account on Grymes' estate. Healy had been removed and Braxton appointed administrator in his place;
62 and the suit *had been revived against the latter. Braxton was prosecuting a suit, and expecting very soon to obtain a decree, against Healy and his sureties, for a large amount of the assets of Grymes. He was fully convinced of the justness of the claim of Harrison's executors, and wished to end the litigation in Tomkies v. West, and to have sufficient time to obtain his expected decree, and realize the amount, or at least enough to pay the claim.

In this state of things, the agreement was made, and the objects which Braxton seems to have had in view were thereby secured. It stipulated that Braxton should have at least twelve months for the payment of the debt, and then should only be bound to pay it as administrator, and out of the assets when received; that upon the payment of the money a bond of indemnity should be executed by Harrison's legatees to Braxton; and Harrison's executors would dismiss the suit of Tomkies v. West, as far as they were concerned, and relinquish the costs. That suit was, in effect, their suit after the decree of 1818, and the further prosecution of it was at their costs. Morris, &c. v. Terrell, 2 Rand. 6. They had a right, therefore, to stipulate for its dismission, even absolutely; and for the relinquishment of the costs. I think these stipulations constituted a sufficient legal consideration for the agreement on the part of Grymes' administrator. The memorandum annexed to the agreement giving Harrison's executors the right to cancel the agreement at the end of six months, upon requiring Braxton to cancel the duplicate thereof in his possession, does not alter the case. It is not pretended that the agreement was ever in fact canceled. On the contrary, it appears that it was not, and that for nearly two years thereafter, Harrison's executors were urging, and Braxton was promising, a compliance therewith on his part. I also think that the agree-
63 ment gives, and was intended *to give, a new remedy thereon to Harrison's executors for the nonperformance thereof by Grymes' administrator, and does not leave them to resort to their old, as their only, remedy. Being a valid agreement, a remedy thereon for a breach of it would seem to follow as a necessary consequence. An intention to preclude such a remedy, if it would not be wholly repugnant and void, ought at least to be plainly indicated, to have any legal effect. There is nothing in the agreement in question to indicate such an intention: though in reserving liberty to Harrison's executors, in case of nonpayment of the debt at the termination of the period stipulated, to resort to any legal means for the recovery thereof, it was doubtless intended not to extinguish the old remedy, but to give them a right to resort to the old or new at their election. The stipulation that nothing contained in the agreement should be construed to bind the administrator in any other than his representative capacity, plainly assumes that it was intended to bind him in that.

It was further contended, that no action at law could be sustained upon the agreement; that in coming into a court of equity for relief, the plaintiffs must be subjected to those principles which are applicable to a suit for specific performance; and that according to them Harrison's executors were not entitled to relief.

It is unnecessary to decide in this case, whether an action at law could have been sustained upon the agreement. If it could, the counsel for the appellant seemed to admit that a suit in equity might have been proper to obtain an account of the assets, and have them marshaled, if necessary. But conceding that it could not, that fact would seem to strengthen, rather than weaken, the right of Harrison's executors to come into equity for relief. It was expressly declared by the agreement that
64 the estate of Grymes should be *bound for the debt, and not the administrator personally: And if, by reason of the seals annexed to the agreement, the debt could not be recovered of the estate at law, surely a court of equity, which looks to substance and not form, ought, for that very cause if no other, to afford relief; unless there be something to prevent it, in the latter part of the proposition above stated. I do not think that there is. Whatever equity Grymes' administrator may have against Tomkies, or even against West or Healy, he can have none against Harrison's executors. They have acted in good faith, and ask for nothing to which they are not

in conscience entitled. They are bona fide creditors of Grymes, whose estate is ample for the payment of the debt; and yet they have been endeavoring in vain to obtain payment, for nearly fifty years since the death of Grymes, and nearly twenty-five since the date of the agreement. They have performed their part of the agreement, so far as it was to be performed before the payment of the debt; and are ready to perform the residue upon such payment. And they now ask that it may be performed on the other side. I know of no principle of equity on which relief can be denied them.

Lastly, it was contended that if Harrison's executors were entitled to obtain relief, for the breach of the agreement, by a further prosecution of the suit of Tomkies v. West, they could obtain it only in that way, and not by a new suit on the agreement; on the principle of the case of Heywood v. Covington's heirs, 4 Leigh 373. I do not think that principle applies to this case. There, a suit was brought in the County court for a sale and partition of real estate of an intestate among his heirs. A sale was accordingly made under a decree in the suit; and the purchaser refused to complete his purchase. Pending the suit in the County court, the heirs brought
65 a suit against the *purchaser in the Superior court for specific execution. This court decided that the Superior court could not entertain the bill pending the suit in the County court. There the sale was made, not by the heirs by an agreement in pais; but by a commissioner of the court; in effect by the court; in a pending cause. The purchaser, by buying under a decree, had subjected himself to the orders of the court in that cause: and the appropriate and only remedy against him, at least during the pendency of the cause, was by some proceeding therein. But here, the parties to a pending cause, or some of them, enter into an agreement out of court; the main object of which is, not to prosecute the suit further, but to put an end to it. And though liberty is reserved to Harrison's executors, in a certain event, to resort to their original remedy, yet that was intended as a benefit to them, and not to deprive them of the right, at their election, to sue upon the agreement. I think they had not only a right to bring such a suit, but that it was a more suitable remedy, under all the circumstances, than a further prosecution of the old suit of Tomkies v. West. By the terms of the agreement that suit is to be dismissed, and the costs of Harrison's executors therein relinquished, when the debt is paid. The court below can provide for the performance of this part of the agreement, if necessary, in the final decree which may be made in this case.

Upon the whole, I think the decree is right, and ought to be affirmed.

SAMUELS, J., was of opinion that the decree should be reversed, and the bill dismissed without prejudice to the appellee's remedy in the case of Tomkies' adm'r v. West's adm'r & others.

LEE, J., was of opinion that Har-
66 rison's executors *were bound to show that it was proper to perpetuate the injunction in the case of Tomkies' adm'r v. West's adm'r & others. That their remedy was in that suit. That the statute of limitations applied to this case. That moreover the agreement between Braxton and May as the agent of Harrison's executors, afforded no foundation for a suit; and if it did, the circumstances under which it was made forbade a court of equity to be active in its execution: There was no consideration for the agreement, as all the debt was to be paid, and Harrison's executors could not release the costs of the plaintiff in Tomkies' adm'r v. West's adm'r & others.

ALLEN and DANIEL, Js., concurred in the opinion of Moncure, J.

Decree affirmed.

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67 *Martin, Adm'r &c. v. Kirby, Adm'r &c. & als.

April Term, 1854, Richmond.

1. **Wills—Construction of—Words of Survivorship.***—In a devise or bequest over to survivors at the death of a devisee or legatee for life, in the absence of the expression of a particular intent on the part of the testator, the survivorship has relation to the death of the testator.
2. **Same—Same—Same—Case at Bar.**—Testator gives all his estate, real and personal, to his wife, for and during her widowhood: And he directs that at her death all his estate shall be sold and equally divided between all his surviving children or their heirs. HELD: That the children living at the death of the testator took a vested interest in the estate.

***Wills—Construction of—Words of Survivorship.**—In Cheatham v. Gower, 94 Va. 383, 26 S. E. Rep. 853, it was said, at p. 386: "It is unquestionably a settled rule of construction in this state, 'that after a bequest or devise of an estate for the life of the first taker, words of survivorship in a will are always to be referred to the period of the testator's death, when no special intent appears to the contrary.' Hansford v. Elliott, 9 Leigh 79; *Martin, Adm'r, v. Kirby, &c., 11 Gratt. 67;* Stone v. Lewis, 84 Va. 474, 5 S. E. Rep. 282; Sellers' Ex'or v. Reed *et als.*, 88 Va. 377, 13 S. E. Rep. 754; Gish v. Moomaw, 89 Va. 347, 15 S. E. Rep. 868; Chapman v. Chapman, 90 Va. 409, 18 S. E. Rep. 913; Crews v. Hatcher, 91 Va. 382, 21 S. E. Rep. 811; and Stanley v. Stanley, 92 Va. 534 (24 S. E. Rep. 229)." The principal case was also cited as authorizing this proposition in Stone v. Nicholson, 27 Gratt. 1, 18, and *foot-note*; Brown v. Brown, 31 Gratt. 511, 515; Cowan v. Epes, 2 P. & H. 526; Stone v. Lewis, 84 Va. 476, 5 S. E. Rep. 282; Gish v. Moomaw, 89 Va. 359, 15 S. E. Rep. 868 (a history of the Virginia cases on this subject is given here).

Same—Vesting of Estate.—The construction above grows naturally out of the familiar principle that the law favors the vesting of estates, and where a legacy is given, which is not to be enjoyed in pos-

This was a bill filed by John T. Martin, administrator de bonis non with the will annexed of John Piggott deceased, to obtain a construction of the will of said Piggott, and directions in the distribution of the estate. John Piggott died in 1809. By his will, after directing the payment of his debts, he gave to his wife Hannah Piggott, for and during her widowhood, all his estate, real and personal: But if she should die before his youngest son Robert came of age, his executor should make provision out of his estate, sufficient to board and school him until he arrived at the age of sixteen years; at which time he was to be bound out to a trade. He gave to his grand son John Cowles one hundred dollars when he arrived at the age of twenty-one years: And then came this clause:

"And lastly, my will and desire is, that my whole estate shall be sold at the death of my wife, and equally divided between all my surviving children or their heirs."

The testator had lost one child (Mrs. Cowles) before he made his will; and at his death he left a widow and seven children.

The executor paid off the debts
68 *and put Mrs. Piggott into possession of the estate, which consisted of both real and personal property; and she retained possession until her death in 1844. In the mean time all the children had died, some of them leaving children, others intestate and without children, and one had in his life time conveyed his interest in his father's estate in trust to secure a debt.

After the death of the widow, John T. Martin qualified as administrator de bonis non with the will annexed of John Piggott; and having sold all the property, he applied to the court to give a construction of the will, and direct the distribution of the fund. When the cause came on to be heard, the court below held that all the children of John Piggott who survived him, took vested interests under the will, and decreed distribution accordingly. And from this decree Martin applied to this court for an appeal, which was allowed.

Stanard and Bouldin, for the appellant.
Steger, for the appellee.

LEE, J. Where a devise or testamentary gift is made to several, with words of survivorship annexed, or where the gift is to such of a class as shall survive, it becomes important to ascertain to what period the words of survivorship are intended to refer. Where no previous particular estate is interposed, but the gift is to take effect in possession immediately on the death of the testator, the established rule of construction is, to refer the words of survivorship to that event, and to regard them as designed to provide against the contingency of the death of the objects of the testator's bounty in his life time. Where, however, the gift is not to take effect in possession immediately upon the death of the testator, but a previous estate for life, or other par-
69 ticular estate, is interposed, *there is much greater difficulty in determining the construction by which the period of the survivorship is to be ascertained. The cases on the subject are numerous, and would seem not to be by any means all accordant. Indeed there would seem to have been a marked change in the current of the English decisions bearing upon it. In the earlier cases, almost without an exception, it will be found that the words of survivorship have been held to refer to the period of the testator's death. Wilson v. Bayly, 3 Bro. Par. Cas. 195; Stringer v. Phillips, 1 Eq. Cas. Ab. 293; Rose v. Hill, 3 Burr. R. 1881; Roebuck v. Dean, 2 Ves. jun. R. 265; Perry v. Woods, 3 Ves. R. 204; Maberly v. Strode, 3 Ves. R. 450; Brown v. Bigg, 7 Ves. R. 279; Garland v. Thomas, 4 Bos. & Pul. 82; Edwards v. Symonds, 6 Taunt. R. 213; Long's lessee v. Prigg, 8 Barn. & Cress. 231, 15 Eng. C. L. 206. On the other hand, numerous cases are to be found, affirming a different rule, and referring the words of survivorship to the death of the tenant for life, or other prior particular estate. Such are the cases of Brograve v. Winder, 2 Ves. jun. R. 634; Newton v. Ayscough, 19 Ves. R. 534; Hoghton v. Whitgreave, 1 Jac. & Walk. 146; Daniell v. Daniell, 6 Ves. R. 297; Wordsworth v. Wood, 2 Beav. R. 25, 17 Eng. Ch. R. 26; Cripps v. Walcott, 4 Madd. R. 11; Pope v. Whitcombe, 3 Russ. R. 124, 3 Cond. Eng. Ch. R. 323; Gibbs v. Tait, 8 Sim. R. 132, 11 Cond. Eng. Ch. R. 359; Browne v. Lord Kenyon, 3 Madd. R. 410; Neathway v. Reed, 17 Eng. Law & Eq. R. 150. It is true, Judge Parker, in delivering his opinion in Hansford v. Elliott, 9 Leigh 79, seems to think that most of the cases may be explained upon the particular circumstances attending them, and that they are not irreconcilable with those which refer the period of survivorship to the death of the testator; and that at all events the weight of author-
ity is in favor of that doctrine. I
70 confess my *examination of the English cases had brought my mind to a different conclusion. It seemed to me that many of the two classes of cases were directly conflicting and irreconcilable; and that whatever might be the safest and soundest construction, and that best adapted to promote the intention of the testator, the preponderance of the English authorities was in favor of the rule making the words of survivorship relate to the expiration of the previous particular estate, being the period of the distribution of the

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session until some future period or event, it will, where no special intent to the contrary is manifested in the will, be held to be vested in interest immediately on the death of the testator rather than contingent upon the state of the things that may happen to exist at the period of payment or distribution. As authority for this proposition, see the principal case cited in Brent v. Washington, 18 Gratt. 526, 529, and *foot-note*; Corbin v. Mills, 19 Gratt. 438, 472, and *foot-notes*; Taliaferro v. Day, 82 Va. 91; Stokes v. Van Wyck, 83 Va. 733, 3 S. E. Rep. 387; Chapman v. Chapman, 90 Va. 410, 18 S. E. Rep. 913.

subject of the gift, rather than to the death of the testator.

It may admit of very grave question whether this is a subject upon which anything like a fixed rule of construction can be established. The question, and the only legitimate enquiry, is, what is the intention of the testator. As was said by Sir William Grant, in Newton v. Ayscough, 19 Ves. R. 534, the period to which the survivorship relates depends not upon any technical words, but upon the apparent intention of the testator collected from the particular disposition or the general context of the will. Lord Alvanley expressed the same opinion in effect in Russel v. Long, 4 Ves. R. 551. And in Cripps v. Walcott, 4 Madd. R. 11, Sir J. Leach, speaking of the construction which refers the survivorship to the period of division, evidently considers it as only applying in the absence of a manifestation of a special intent. Where that appears it must prevail and control the construction. What may be the true intention of the testator in any case is best deduced from the terms and provisions of the will when viewed in the light of the surrounding circumstances which attended the execution. To seek to determine it by applying arbitrary rules and technical principles, with which testators, and those who write their wills, are, in a very large majority of cases, utterly unacquainted, would be most unprofitable and hazardous.

71 *This subject came under review in this court in the case of Hansford v. Elliott, above cited; and whatever may be the rule of the English courts, this court would seem to have adopted that which refers the words of survivorship to the death of the testator; and this is declared to be (in cases in which no special intent to the contrary is manifested), the safest and soundest construction, that most consonant to the intention of the testator, and best supported by the authorities. The bequest in that case was of the whole of the testator's personal estate to his wife during her widowhood, with a provision that if she again married, her interest was to be reduced to one-third, to be held for her life: and at her death the personal estate was to be equally divided among the surviving children of the testator thereafter named, &c. The court (four judges concurring) held that the word "surviving" referred to the death of the testator, and not to that of the tenant for life: and so the children of the testator who survived him, but died before the death of the tenant for life, took vested estates in remainder.

It is true that Judge Parker, in delivering his opinion (in which three of the other judges concurred), says that if the rule were otherwise than as he had maintained it to be, he should still be of opinion that the words of the will in that case sufficiently showed a special intent that the interest should vest at the death of the testator. But he enters fully into the general question, and upon a review of the authorities, concludes that the true rule is that of the earlier English cases which have been hereinbefore referred to. This case must therefore be regarded as authority in cases in which no special intent appears in the will, and as ruling such as are not essentially distinguishable from it.

The counsel for the appellant insists that this case is so distinguishable from

72 Hansford v. Elliott, that the *doctrine of that case cannot be applied to this. It is true the terms of the will in that case are in some respects different from those of the will under consideration; but I have been unable to perceive how the difference is so essential as to withdraw this case from the influence of the reasoning and the conclusions which were adopted in that. In Hansford v. Elliott, the bequest was of personal property: here, it is a gift of real and personal property; but it is first to be converted into money by sale, and in that form divided. In that, the limitation was to individuals by name: here, it is to the surviving children as a class. But from the case of Long's lessee v. Prigg, 8 Barn. & Cress. 231, which was a case of a devise to surviving children as a class, we see that no difference in the result will flow from this distinction; the same doctrine being held applicable to devises to individuals nominatim and as a class. In Hansford v. Elliott the property is given for the comfort and support of the wife and children, and this is supposed to indicate an intention to vest the estate in the children to be supported. The inference is of little cogency at best; but a similar feature may be traced in the present case; for from the provision in favor of his son Robert in the event of the death of his wife before he should be old enough to be bound as an apprentice, the testator would seem to intend that the mother should make provision out of the means left to her, for the wants of such of the children as needed her assistance. That no disposition is made by the will in this case of the whole or any part of the property given to the wife during her widowhood, in case of her second marriage, is a circumstance of little weight as tending to evince the intention of the testator. He may have used the expression "during her widowhood" in the sense of "during her life," not anticipating the contingency of a second marriage; and this would seem not improbable

73 *from the fact that the provision for Robert which immediately follows in the same sentence of the will, is only in the event of the wife's death before he attained the age of sixteen years, no allusion being made to the possibility of her second marriage; whereas there would seem to have been exactly the same reason for such a provision in the latter event as in the former. Such, I incline to think, is the meaning which should be given to the words "during her widowhood;" but if they are to be construed according to their literal import, so that the estate given to the widow would be held to be determined upon

a second marriage, I think no such embarrassment would result as the counsel seems to suppose. The remainder being vested would not be void, but the effect would be to hasten the period of distribution by substituting that of the second marriage of the wife for that of her decease.

The argument drawn from the consideration that in Hansford v. Elliott, if none of the children had survived the tenant for life, a total intestacy would have been the consequence (a result which the testator could not be supposed to have intended), while in this case the construction contended for by the counsel would not be attended with such a result, can have little force or effect to withdraw this case from the influence of the reasoning in the former. It is a sufficient answer to it to remark, that such an intestacy would not be the result of either construction contended for in this case. Indeed one of the reasons which suggests itself for the preference of the rule which refers words of survivorship to the death of the testator to that which looks to the death of the tenant for life, is, that in a large majority of cases, the former will be less likely than the latter to occasion a total intestacy, and thus bring about a state of things which the testator manifestly did not intend to exist.

74 *It is true that in the cases of Brograve v. Winder, Hoghton v. Whitgreave, and Newton v. Ayscough, as in the present case, the property was directed to be sold and the proceeds divided at the death of the tenant for life. But I can perceive no particular significancy in this circumstance as bearing upon the question who were the objects of the testator's bounty. All that is fairly to be deduced from it is, that the testator chose that the property should be kept together, and his wife continue to use it in the same condition in which he should leave it, and in which she with him had been previously accustomed to enjoy it. But whatever weight might be attached to it where the property consisted of consols or other stocks, as in the cases of Newton v. Ayscough and Neathway v. Reed, I think it can have little force in a case like the present, where the property consisted of land and negroes and other articles of personal property. That a testator, after giving such property to his wife during her life, should direct it to be sold at her death, and the proceeds divided among his surviving children, does not, in my judgment, furnish any indication that his meaning was to restrict his bounty to those of them who should chance to be then still living, to the disinherison of the families of such of them as should have died before the death of the tenant for life.

It will be seen, in a learned work on the subject of wills (2 Jarm. on Wills 647), the author regards such a provision in a will as furnishing no real distinction between it and the cases in which the words of survivorship had been referred to the death of the testator. And he attributes to Sir William Grant probable disapprobation both of the reasoning which led to the adoption of the rule in those cases, and of this distinction (without a difference) which had been engrafted upon it by Lord Loughborough. The case to which he refers as evincing the view probably entertained by Sir William Grant, is Daniell v. Daniell, 6 Ves. R. 297.

75 *I think, therefore, the circumstances relied on fail to show any special intent on the part of the testator in this case in the use of the words "surviving children," to refer them to the death of the tenant for life; and that the case cannot be distinguished, in any essential particular, from Hansford v. Elliott. I think, too, the rule prescribed in that case (so far as any rule can be applied to a subject of this character), is perhaps the soundest and safest rule, and best adapted, in a large majority of cases, to promote the intention of testators. But whatever might be my opinion as to this, I think it should be adhered to as the settled doctrine of this court, notwithstanding the different result of the recent English cases.

In the case of Hansford v. Elliott, President Tucker dissented from the opinion of the other judges upon this question. But it will be observed upon examining the opinion delivered by him, that had that case contained a particular feature which is found to exist in this, he would have concurred in the judgment of the court. He said that if it had appeared the testator had lost a child before the date of his will, the natural construction of the word "surviving" would be to refer it to that event. In this case, it does appear that the testator had lost a daughter, Mrs. Cowles, before the making of his will, and that circumstance was doubtless in his mind at that time, because he makes a bequest of one hundred dollars to her son. And according to the opinion of Judge Tucker, the expression "surviving children" should be construed to mean those who were living at the date of the will; who would thus take a vested interest at the death of the testator. In the case of Neathway v. Reed, Lord Justice Knight Bruce seems disposed to give the same construction to the words of survivorship which is given by Judge Tucker in the case supposed by him, and which is the actual case here. It is

76 unnecessary, *however, to consider the case in this view any farther, because it does not appear that any change took place in the condition of the testator's family between the date of his will and his death, so that the same persons would be designated by the words "surviving children," whether they be referred to the one period or to the other.

In conclusion, I would remark that the particular bequest under consideration cannot be read in the sense given to it by the construction contended for by the appellant's counsel, without a plain departure from the literal import of the terms employed. Those terms are "between all my surviving children, or their heirs." Heirs

of whom? Certainly not of any child or children that might be living at the death of the tenant for life. Nemo est hæres viventis. The appellant's counsel says the terms used are not to be understood according to their literal import, and that the true meaning is that the property is to be divided between such of the children as should be living at the death of the tenant for life and the heirs or descendants of such as should have died; the latter to take per stirpes, unless all the testator's children should then be dead; in which event, the grand children would take per capita. But this construction would embrace exactly the same persons as participants in the testator's bounty as if he had said, "to my children and their heirs," entirely omitting the word "surviving," and changing "or" into "and." Yet some effect must be given to this word "surviving," because some meaning must if possible be assigned to every word in the will. Turner, lord justice, in Neathway v. Reed. I take it, that where some meaning can be given to a word, it must receive it, unless it will occasion some incurable repugnance between different parts of the will, or violate the plain intention of the testator. And although it may be admissible to re-
77 place the disjunctive with *the conjunctive, if necessary to effectuate the testator's intent, such necessity must first be clearly shown to exist. According to the appellant's reading of the will, the word "surviving" does not serve to designate the persons who are to take in remainder, which is its natural and proper function; but if it have any effect, it is to convert what would otherwise be a vested interest into a contingent remainder, against the known preference of the law to construe an estate to be the former rather than the latter. On the other hand, if we will suppose that the testator, in using the words "my surviving children, or their heirs," could not have had in mind only those of his children who should be living at the death of the tenant for life, but must have intended to provide for the children or descendants of such of them as, though then surviving at the date of the will, or who might be surviving at his decease, might yet die in the lifetime of the tenant for life, all difficulty is avoided, and the natural and literal import of all the words used is preserved: and the effect is to confer a vested interest upon all the children who were living at the death of the testator.

I am of opinion to affirm the decree.

ALLEN, MONCURE and SAMUELS, Js., concurred in the opinion of Lee, J.

DANIEL, J., dissented.

Decree affirmed.

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78 *Callis & als. v. Kemp & als.

April Term, 1854, Richmond.

1. **Ejectment—Verdict—Certainty of—Case at Bar.*** —In ejectment the jury set out the wills of a grand father and father; and if the son who is dead took under his father's will, they find for the plaintiff: If he took under the grand father's will, they find for the defendants. The verdict is sufficiently certain; and submits the single question upon the construction of the wills to the court.

2. **Same—Claim for Whole Tract of Land—Verdict for Undivided Interest.†**—Though in ejectment the plaintiffs in their declaration claim the whole of a tract of land, the jury may find for the plaintiffs for an undivided interest in it.

3. **Same—Same—Verdict for Part—Requisites of Verdict.‡**—Though where less land is recovered than is demanded, the boundaries of the land recovered should be designated, yet where an undivided interest in it is recovered, it is impossible to set out the boundaries: but the interest being certain, that is sufficient.

4. **Wills—Estates Tail—Effect of Statute.§**—In 1799 testator lends to his son B a tract of land during his natural life; and if he should die without lawful issue, testator gives the land to his grand son H B, to him and his heirs forever. But should my

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*Ejectment—Verdict—Certainty of.—In Lewis v. Childers, 13 W. Va. 10, it is said: "And the jury may find for the plaintiffs, or such of them, as appear to have right to the possession of the premises or any part thereof, and against such of the defendants, as were in possession thereof, or claimed title thereto, at the commencement of the action. Sec. 23, ch. 90, Code of this state of 1868; *Callis et al. v. Kemp et al., 11 Gratt. 78.* And when the plaintiff appears to have no such right, the verdict as to such plaintiff shall be for the defendants. Sec. 24 of same Code."

But in that case it was held that the verdict was too uncertain for judgment to be pronounced upon it.

See monographic *note* on "Ejectment" appended to Tapscott v. Cobbs, 11 Gratt. 172.

†**Same—Claim for Whole Tract—Verdict for Less.**—In Marshall v. Palmer, 91 Va. 345, 21 S. E. Rep. 672, it is said that, one may sue in ejectment and recover less than he claims in his declaration, citing Clay v. White, 1 Munf. 162, Callis v. Kemp, 11 Gratt. 78, and 2 Tucker's Com., 174; but he cannot recover more than he proves that he has title to. And in this case it was held one joint tenant cannot recover, in an action of ejectment in his own name, as sole plaintiff, the interest of himself and his co-tenant.

See also, Postlewaite v. Wise, 17 W. Va. 23, approving the principal case.

See monographic *note* on "Ejectment" appended to Tapscott v. Cobbs, 11 Gratt. 172.

‡**Same—Same—Verdict for Part.**—The proposition laid down in the third headnote of the principal case, where the verdict is for part of the land sued for, the boundaries of the part recovered should be designated, is approved in Slocum v. Compton, 93 Va. 375, 25 S. E. Rep. 3, citing the principal case, and Gregory v. Jacksons, 6 Munf. 25.

See monographic *note* on "Ejectment" appended to Tapscott v. Cobbs, 11 Gratt. 172.

§**Wills—Estates Tail—Effect of Statute.**—In the principal case, the testator, in 1799, lent to his son a tract of land during his natural life, and if he should die without lawful issue, he gave the land to his grandson, and his heirs forever; and it was further provided that if the son should leave lawful issue, he may dispose of the said land, to such of his issue, as

son B leave lawful issue, my will and desire is that he may dispose of said land to such of his issue as he may think fit. HELD: That B took an estate tail in the land, which by the statute was converted into a fee.

This was an action of ejectment in the Circuit court of Gloucester county, by the lessee of Kemp and others against James Callis and others. The declaration claimed four several tracts of land, one of which is described as containing five hundred acres, more or less, known as Summers' or Seymour's, formerly Damold's, and it also claimed a water grist mill known by the name of Burton's mill, and land attached thereto, containing twenty-four acres.

On the trial the jury found generally for the plaintiffs twelve undivided thirteenths of three of the tracts described in the declaration; and they found for the plaintiffs twelve-thirteenths of one-half of the
79 grist *mill and the land attached thereto. They further found that Philip H. Burton, under whom the plaintiffs claimed, at the time of his death, was an infant under the age of twenty-one years, and possessed of and entitled to one other tract of land in the plaintiffs' declaration mentioned, and described as containing five hundred acres, more or less, known as Summers' or Seymour's formerly Damold's, and the remaining half of the grist mill known as Burton's mill, and the remaining half of the tract of land thereto attached, being about twelve acres. That the said tract of five hundred acres known, &c., and the said last mentioned half part of the mill and land thereto attached were devised by Henry H. B. Burton, who was the grand father of the said Philip H. in the year 1799 in manner and form following:

I lend to my son Henry Burton the tract of land which I purchased, which was a part of the late Dr. Summers' estate (formerly Damold's) during his natural life; and if he should die without lawful issue, I give and devise the said tract of land to my grand son Henry Burton, to him and his heirs forever: But should my son Henry leave lawful issue, my will and desire is that he may dispose of said land to such of his issue as he may think fit. I likewise lend to my son Henry Burton, during his natural life, my half of the mill that was purchased of Captain Charles Tomkies; and if he should die without lawful issue, I give my half of the above said mill to my son Simon Burton's sons, Charles and Henry, to them and their heirs forever: But should my son Henry leave lawful issue, it is my will and desire that he shall have the power to dispose of his part of the above said mill to any of his issue he shall think fit. The jury find further that said Henry Burton took possession of said tract of land known as Summers', &c., and half of the said mill called Burton's, under the will of his
80 father Henry *H. B. Burton, and remained in possession thereof until his death; and they set out his will in hæc verba; by which, after a legacy of three slaves, all his stock and household furniture to his wife, he gives the residue of his estate, real and personal, to his son Philip H. Burton; and expresses it as his wish that his wife shall keep the whole of his estate together until his son arrived at the age of maturity, for their support and his education. The jury further found that Mrs. Burton died before the institution of this suit; that Philip H. Burton was the legitimate child of Henry Burton, and that he died an infant before this suit was instituted. And they found that if the law be, under the foregoing facts, that Philip H. Burton derived title to the said tract of land known as Summers', &c., and the last mentioned half of the mill and tract of land, under the will of his father Henry Burton, then they found for the plaintiffs twelve-thirteenths of the undivided tract called Summers', and twelve-thirteenths of the last mentioned one-half of the said mill and land thereto attached: But if the law be that Philip H. Burton derived his title to this land and half of the mill and land thereto attached by virtue of the will of his grand father Henry H. B. Burton, then as to the tract known as Summers', and the last mentioned half of the mill and the land thereto attached, they found for the defendants.

Upon this verdict the court below rendered a judgment for the plaintiffs; and the defendants applied to this court for a supersedeas, which was awarded.

R. T. Daniel, for the appellants, insisted:

1st. That the special verdict was too uncertain and defective to warrant any judgment thereon. It is found that Philip H. Burton died an infant, seized of the property in controversy, having derived the same from his father's or his grand
81 father's will, according *to the construction of these instruments. The verdict does not find the relationship of the lessors of the plaintiff to Philip H. Burton, which will entitle them to take under the 11th section of the statute of descents; but simply that they claim under Philip H. Burton. If the lessors of the plaintiff are

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he may think fit. And it was held that the son took an estate tail in the land, which by the statute was converted into a fee.

This was followed in Hood v. Haden, 82 Va. 597, and Tinsley v. Jones, 13 Gratt. 299, both citing the principal case. See also, 4 Va. Law Reg. 465, 2 Min. Inst. (4th Ed.) 454 *et seq.* See, on the subject, Goodrich v. Harding, 3 Rand. 280; Bells v. Gillespie, 5 Rand. 273; Broaddus v. Turner, 5 Rand. 308; Hill v. Burrow, 3 Call 297 [343]; Carter v. Tyler, 1 Call 143 [165]; Tate v. Tally, 3 Call 354; Eldridge v. Fisher, 1 H. & M. 559; Smith v. Chapman, 1 H. & M. 240; Ball v. Payne, 6 Rand. 73; Callava v. Pope, 3 Leigh 111 [113]; Jiggetts v. Davis, 1 Leigh 368; Doe v. Craigen, 8 Leigh 449; Bramble v. Billups, 4 Leigh 96 [90]; Doe v. Andersons, 4 Leigh 126 [118]; Wright v. Cohoon, 12 Leigh 378 [370]; Moore v. Brooks, 12 Gratt. 135; Sydnor v. Sydnors, 2 Munf. 263; Roy v. Garnett, 2 Wash. 9; McClintic v. Manns, 4 Munf. 328; Deane v. Hansford, 9 Leigh 253; Nowlin v. Winfree, 8 Gratt. 346; Wine v. Markwood, 31 Gratt. 43, 51, and *note*.

descendants of Henry H. B. Burton's, the grand father, brothers or sisters, and not of Henry Burton's, the father, brothers or sisters, then they are not the class of persons described in the statute entitled to take in exclusion of the kindred on the part of the mother of Philip H. Burton the infant; which kindred the defendants may be; although that matter is also omitted from the finding of the jury. If the lessors are not the persons described in the 11th section of the statute of descents, then it is wholly unimportant whence Philip H. Burton the infant intestate, derived the property; for it will go as if he had died an adult, viz: to the defendants, supposing them to be brethren of the half blood ex parte materna, and the lessors to be only grand uncles and aunts or their descendants ex parte paterna. The consanguinity of the lessors and the defendants should have been found by the jury. A special verdict leaves no room for presumption. Bolling v. The Mayor of Petersburg, 3 Rand. 563. No material fact can be supplied by intendment. Tunnell v. Watson, 2 Munf. 283. And though a verdict may find generally for either party, dependent upon a particular point of law, and such verdict is not strictly a special verdict, McMichen v. Amos, 4 Rand. 134, yet the facts on which the question depends must be so stated as to enable the court clearly to resolve the question. This is a special verdict, not a general verdict with a point of law reserved.

2d. That the special verdict finds no possession in the defendants. Cropper v. Carlton, 6 Munf. 277.

3d. That the finding was defective
82 in awarding *twelve-thirteenths of the property, the whole being demanded, and not finding as to the other thirteenth, or who held it.

4th. That under the true construction of the clauses of the will of Henry H. B. Burton, the grand father of the infant intestate, in regard to the estates therein referred to, executory limitations are created in favor of the issue of Henry Burton the son, and not estates tail in Henry Burton, turned into a fee by the statute. The estate is given for life to Henry Burton, with remainder over to others by name, in the event that Henry Burton did not by will leave the property to some of his issue. The language of the will shows plainly that the term issue is not used as indicating persons who were intended to take under the will absolutely; but only as persons among whom Henry Burton might exercise the power of appointment vested in him by the will. That power he exercised in favor of his son Philip H. Burton, who therefore took not from his father but from his grand father.

Robinson, for the appellees:

Upon the first and second points made by the counsel for the appellants, he insisted that the verdict was not a special verdict; but was absolute as to some parts of the subject; and as to another part submits a single question to the judgment of the court. That the principle was similar to that in McMichen v. Amos, 4 Rand. 134. On the third point made, he referred to 1 Rob. Pr. 461.

On the fourth point made by the counsel for the appellants, he insisted, that although the devise was to Henry Burton for life, yet the estate was given after his death to his issue; and by the rule in Shelley's case this is the same as if given to him and his issue: 2 Jarm. on Wills 335: And that clearly creates an estate tail. Id. 236;
83 2 Lomax Dig. 225; 3 Lomax *Dig. 203, 4; Id. 207, pl. 11. That it was clear under these authorities that Henry Burton took an estate tail: And this was converted into a fee by the statute.

ALLEN, P. In the errors assigned in the petition and the argument of counsel, an objection was taken to the verdict as being too uncertain and defective. The finding is a general one for the plaintiff, unless upon a single point of law reserved, the court should be of opinion that the law is for the defendants in respect to a portion of the land claimed in the declaration and described in the verdict. Such a verdict was held to be regular and proper in the case of McMichen v. Amos, 4 Rand. 134. The question was directly presented in that case, and decided; and the character of the suit, a pauper case for freedom, in which form is disregarded, had no influence on the decision of this point. Judge Cabell, in giving the opinion in which the other judges concurred, says that such a verdict is a "conclusion drawn by the jury from the facts, in favor of one or the other party: subject, however, to the opinion of the court on the case specially stated by the jury. Such a general conclusion for one party, necessarily carries with it the idea that that party must prevail unless the law upon the special case referred to the court, shall be against him. All facts not found in the special case are excluded from the consideration of the court, or negatived by the general finding in his favor." In this case the jury has found for the plaintiffs if Philip H. Burton took under his father's will, and for the defendants if his title was derived under his grand father's will. The title of Philip H. Burton, as derived from one or the other source, is to be regarded as an established fact; and it being further found that the said Philip H. Burton died an infant, the verdict also necessarily establishes that the lessors of the plaintiff stood in such
84 relation *to him as that under the act of descents of 1819, they were entitled to succeed to him if he took under the devise of his father; and the wills of the grand father and father are both set forth in the verdict. All the facts, therefore, to enable the court to determine this question, are set forth with precision.

And so as to the second error assigned, that the special verdict finds no possession in the defendants. By the general finding all facts necessary to entitle the plaintiff

to a verdict are to be considered as found, subject to the opinion of the court on the case specially stated.

As to the objection that the verdict is defective in finding for the plaintiff twelve-thirteenths of the property, the whole being demanded in the declaration, and containing no finding as to the other thirteenth: It is not necessary that the plaintiff in ejectment should recover all that is demanded in the declaration. He may recover less; Clay v. White, 1 Munf. 162; Ablett v. Skinner, 1 Siderfin 229; Burgess' lessee v. Purvis, 1 Burr. R. 326; Lewis' lessee v. McFarland, 9 Cranch's R. 151; and though where less is recovered than was demanded, the boundaries of the part recovered should be designated, where as in this case, the verdict was for an undivided interest, no boundaries could be designated; but there is no uncertainty as to the interest recovered. The sheriff would under the execution give possession of the undivided interests recovered, leaving the defendants in possession of the residue. Roe ex dem. Saul v. Dawson, 3 Wils. R. 49.

On the merits it is maintained that upon the will of Henry H. B. Burton the grand father, and under what it is argued amounts to an appointment to Philip, in the will of Henry the son, Philip took under the will of his grand father a fee simple estate: The person taking under a power, deriving his estate not from the person executing the power, but under the original
85 *devise creating the power. The grand father by his will lent the land in controversy to his son during his natural life. The case referred to of Williamson v. Ledbetter, 2 Munf. 521, decides that the use of the word lend is not of itself sufficient to confine the limitation to the period of the devisee's death. For whether the word lend or give is used, an estate for life is vested in the first taker. The will contains no express devise to the heirs or heirs of the body, nor is any estate given directly to the issue: the issue must take by implication.

The will provides that if the son should die without lawful issue, he gave the lands to his grand son, to him and his heirs forever. The testator intended to give something by this clause to the grand son; but the interest so intended to be given was made to depend on the son's dying without issue. Taking these words alone, it is clear the testator intended that his son should take such an estate for life in the first instance as would be transmissible to his issue; and to effectuate that intent, the words "die without issue," have always been construed as controlling the previous devise for life, and as enlarging the estate from an estate for life to an estate tail. The testator, although he gave but a life estate to the son, clearly intended that the grand son should not take whilst there was any issue of the son; and there being nothing to limit the devise to the issue living at the testator's death, the words must be referred to an indefinite failure of issue. The words "should his son leave lawful issue, he might dispose of his land to such of his issue as he may think fit," do not of themselves show an intention to restrict the previous words to a failure of issue at the death of the first taker. In case of personal property, words of that description may have been received as evidence of an intention to restrict the words "dying without issue" to a failure of issue at
86 *the death; but such construction of the words has not been extended to real property, as it would defeat the leading intent to provide for the issue so long as there should be any issue. Blackborn v. Edgley, 1 P. Wms. 605; Soulle v. Gerrard, Cro. Eliz. 525; King v. Melling, 1 Vent. 230; S. C. 2 Levinz 58; Atkinson v. Hutchinson, 3 P. Wms. 258; Forth v. Chapman, 1 P. Wms. 663.

That the power of disposing to such of his issue as he should think fit would not operate to restrict the general words, is shown, by the case of Ball v. Payne, 6 Rand. 73, where a similar power of disposing amongst or to either of the heirs of the body, was contained in the devise; but the tenant for life was held to take an estate tail which by our statute was converted into an estate in fee simple. Upon the whole, it seems to me that according to the cases of Bells v. Gillespie, 5 Rand. 273; Broaddus v. Turner, 5 Rand. 308; Jiggetts v. Davis, 1 Leigh 368; and the cases there referred to, the son in this case took an estate tail by implication, which by the statute was enlarged into a fee; and that the estate so vested in Henry Burton, passed by his will to his son Philip H. Burton, who thus derived title under the will of his father, and not under the will of his grand father, by the supposed appointment in the will of his father.

I think the judgment should be affirmed.

The other judges concurred in the opinion of Allen, J.

Judgment affirmed.

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87 *Colvin v. Menefee.

April Term, 1854, Richmond.

1. **Instructions—Erroneous—Effect.***—An instruction given by the court, which upon the statement of the evidence given by the party excepting, could not be injurious to him, is no ground for reversing the judgment.

***Instructions—Erroneous—Effect.**—Perfect harmony of opinion does not exist either in Virginia or West Virginia in regard to the rule of action of the court in reversing judgment on account of erroneous instruction: though the proposition laid down in the first headnote of the principal case, as far as it goes, seems in accord with great weight of authority in both states.

In the case of Wiley v. Givens, 6 Gratt. 277, it was held that where the instruction given to the jury is erroneous, the appellate court cannot undertake to determine that the verdict, notwithstanding the

2. **Deeds of Trust—Statute of Limitations—Case at Bar.**†—A deed of trust given to secure a debt provides that the grantor shall hold possession of the property until a certain day. Before that day the grantor makes an agreement under seal with a third person, by which he agrees to take a certain price for the property; and if the money with its interest was not returned within twelve months, the agreement was to stand as a bill of sale; and he delivers possession of the property. The trustee who has had no notice of this agreement, takes possession of the property and sells it, within five years from the time to which the grantor was entitled to hold it, and within five years of the time which the agreement gave the grantor to return the purchase money; but not within five years of the time of the sale and delivery of the property to the party under the agreement. HELD: The title of the purchaser of the grantor was not protected by the lapse of time, and the trustee was entitled to take possession and sell under the trust deed.

This was an action of assumpsit in the Circuit court of the county of Rappahannock, brought by James M. Colvin against Alexander F. Menefee. The object of the suit was to recover the price of a slave named Milley, which had been sold by Menefee as trustee in a deed, and which Colvin claimed to have been his property.

On the trial of the cause the defendant asked for an instruction, which was given by the court; and the plaintiff excepted.

The bill of exceptions showed, that by a deed bearing date the 5th of August 1837, William Harmons conveyed to Menefee certain real and personal property, of which the slave Milley was a part, in trust to secure certain debts therein specified;

88 *and the deed provided that Harmons should be permitted to retain possession of the property until the 1st of August 1839. This deed was duly recorded in the clerk's office of the County court of Madison, where Harmons then lived and held the said slave in his possession. On the 16th of October 1838 Harmons entered into a written agreement under seal with Colvin, by which he agreed to take two hundred and fifty dollars for the slave Milley: And if the money with its interest was not returned to Colvin within twelve months, the agreement was to stand as a bill of sale, clear of all incumbrance. This agreement was made at the house of Colvin in the county of Culpeper, at which time the slave was in the county of Madison in the possession of Harmons or Milton Kirtley, under a temporary pledge for the loan of money from Kirtley to Harmons. Within three or four days thereafter, Harmons sent the slave Milley to Colvin, to be held by him under the contract aforesaid of the 16th of October 1838; and Colvin held possession of her in the county of Culpeper until the end of the year 1842, when he removed from Culpeper to Madison county, and carried the slave with him, and retained possession of her until the end of the year 1843, holding and claiming title to her under the said contract. Some time in the year 1843 Harmons

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erroneous instruction, is right upon the evidence and therefore affirmed the judgment; but the judgment must be reversed and the cause remanded for a new trial. Pasley v. English, 10 Gratt. 243, 244, seems to approve this statement of the rule, though the exact question was not before the court in that case. But, in Rea v. Trotter, 26 Gratt. 585, 600, Wiley v. Givens is cited and expressly approved as laying down the correct rule upon the subject.

On the other hand, in the principal case, JUDGE LEE says: "The party asking the reversal of the judgment on the score of an erroneous instruction on the trial, must at least show that he has probably sustained injury thereby." See also, Preston v. Harvey, 2 H. & M. 55.

Again, many cases, citing the principal case, hold it to be a settled rule that, though there has been an erroneous instruction, if the court can see from the whole record that even under correct instructions a different verdict could not have been rightly found, or that the acceptant could not have been prejudiced by the erroneous instruction, it will not for such error reverse it. See Bell v. Alexander, 21 Gratt. 9; Larue v. Cloud, 22 Gratt. 513, 518; Edmunds v. Harper, 31 Gratt. 645; Brighthope Ry. Co. v. Rogers, 76 Va. 451; Snouffer v. Hansbrough, 79 Va. 181; Payne v. Grant, 81 Va. 173; Moore v. City of Richmond, 85 Va. 543, 544, 8 S. E. Rep. 387; Bernard v. R., F. & P. R. Co., 85 Va. 794, 8 S. E. Rep. 785; Newberry v. Williams, 89 Va. 302; 15 S. E. Rep. 865; Richmond Ry., etc., Co. v. Garthright, 92 Va. 631, 24 S. E. Rep. 267; *foot-note* to Burns v. Waddill, 32 Gratt. 588. See, in accord, Kincheloe v. Tracewells, 11 Gratt. 587, 609; Hunter v. Jones, 6 Rand. 541; Western, etc., Co. v. Reynolds, 77 Va. 174; Benn v. Hatcher, 81 Va. 25; B. & O. R. Co. v. McKenzie, 81 Va. 72; R. & D. R. R. Co. v. Norment, 84 Va. 167, 4 S. E. Rep. 211; Com. v. Lucas, 84 Va. 303, 4 S. E. Rep. 695; Wager v. Barbour, 84 Va. 419, 4 S. E. Rep. 842; Richmond, etc., Co. v. Bailey, 92 Va. 554, 24 S. E. Rep. 232.

In Danville Bank v. Waddill, 27 Gratt. 448, after reviewing what is said in Wiley v. Givens, and Rea v. Trotter—cited above in the first paragraph—the court lays down the converse of the above proposition as settled law, saying: "Whatever may be said of the ruling in these two cases, it will not be disputed, that whenever an erroneous instruction is given, or what is the same thing, a correct one refused, the judgment will be reversed, unless the appellate court can see from the whole record, that even under correct instructions a different verdict could not have been rightly found, or unless it is able to perceive that the erroneous ruling of the trying court could not have influenced the jury." In this case, the court further held that the onus is upon the appellee to show that the error did not and could not affect the merit. See, in accord with this proposition, Kimball v. Borden, 95 Va. 207, 28 S. E. Rep. 207. And see also, the late case of Jackson v. Com., 97 Va. 762, 33 S. E. Rep. 547, in which JUDGE KEITH, delivering the opinion of the court, said: "All error is presumed to be prejudicial, and while it (the court of appeals) has approved verdicts rendered upon erroneous instructions, it does so with great caution, and only where it clearly appears that no injury could have resulted from the error." This is in harmony with the proposition laid down in

†See monographic *note* on "Deeds of Trust."

removed from Madison to Culpeper county; and some time in the year 1844, before the 13th of March of that year, the slave Milley was found in the possession of Harmons in Culpeper, and was taken possession of by the defendant, who sold her under the deed of trust aforesaid, on that day, for the price of four hundred and eighty-one dollars; for the recovery of which this suit was brought. Upon this state of facts the court on the motion of the defendant instructed the jury, that if they believed these facts, the said Colvin was to be regarded as having constructive notice of the
89 *deed to Menefee, of the 5th of August 1837; and that it was not necessary for the protection of Menefee's title to have the said deed recorded in Culpeper at all. And if the jury should believe that the plaintiff held possession of the slave Milley under the said contract, his possession, so far as Menefee was concerned, was the same as the possession of Harmons up to the 16th of October 1839; and that the statute of limitations did not commence to run against the said Menefee until the 16th of October 1839: The statute runs only in cases where the possession is adverse. In this case the possession was not adverse until the expiration of one year from the date of said contract.

Under this instruction the jury found a verdict for the defendant, upon which the court rendered a judgment. And thereupon Colvin applied to this court for a supersedeas, which was awarded.

Morson, for the appellant:

This case comes upon an instruction given by the court below, that in as much as the conditional sale allowed one year for the repayment of the purchase money of the slave, that this time is not to be taken into account in considering the bar of the statute of limitations. It cannot be said that there was not a conflict between the sale and the trust deed. The grantor assumed a power not given him by the deed; and the purchaser took in conflict with it: And if this be so, the plaintiff is entitled to recover in this action. The adverse holding which is contemplated is a holding with a claim of right, and with a different title from the other side; and where there is such an adverse holding the statute runs. Bradstreet v. Huntington, 5 Peters' R. 401.

Under the decisions of our courts it is not necessary to plead the statute of limitations in an action of detinue, and five years'
90 peaceable possession of slaves *gives title. Newby's adm'rs v. Blakey, 3 Hen. & Munf. 57; Brent v. Chapman, 5 Cranch's R. 358; Shelby v. Guy, 11 Wheat. R. 361; Elam v. Bass' ex'ors, 4 Munf. 301; Garland v. Enos, 4 Munf. 504. The court is also referred to the case of Sheppards v. Turpin, 3 Gratt. 373, the facts of which resemble in a considerable degree the facts of this case.

Robinson, for the appellee:

Here was a deed of trust duly recorded,

Danville Bank v. Waddill, 27 Gratt. 448, and, with its converse laid down in the last preceding paragraph, is supported by the great weight of authority in Virginia.

In West Virginia also, there is some conflict on this question, though the great majority of decisions accord with the weight of authority in Virginia.

In Strader v. Goff, 6 W. Va. 264, it was said: "When an instruction given and excepted to, is apparently erroneous, the judgment must be reversed, though it be not shown whether it prejudiced the party who excepted, or not. Chapman & Co. v. Wilson & Co., 1 Rob. 267." This proposition was approved in Dinges v. Branson, 14 W. Va. 104.

But in Beaty v. B. & O. R. Co., 6 W. Va. 395, the court, citing and approving the principal case, held that the party excepting must exhibit facts disclosing an error material to the issue, and operating to his prejudice, and showing how he has probably sustained injury thereby in order to have the judgment reversed. In this case, since the court could not see how the party excepting had been injured by the erroneous instruction, it refused to reverse the judgment of the lower court. See also, in accord, Newlin v. Beard, 6 W. Va. 126, citing the principal case.

In Corder v. Talbott, 14 W. Va. 284, it was said: "It is true, as shown by the decisions in Virginia and in this state, that the court will not reverse a judgment, merely because the court misinstructed the jury, when all the facts proven in the case are in the record, and it appears thereby that the appellant could not have been injured by the misinstruction. See Insurance Company v. Hendren, 24 Gratt. 536: *Colvin v. Menefee, 11 Gratt. 87;* Pitman v. Breckenridge, 3 Gratt. 127; Clay v. Robinson, 7 W. Va. 350."

In Mason v. Bridge Co., 20 W. Va. 224, 229, the proposition as laid down in Danville Bank v. Waddill—and set forth above—was approved. The court said at p. 239: "The case of Dinges v. Branson, 14 W. Va. 100 (see third preceding paragraph), belongs to a class of cases in entire harmony with those cited. The record then before the appellate court did not show that the instructions if erroneous could have affected the verdict; and the rule is the judgment will be reversed unless it affirmatively and clearly appears, that the erroneous instruction could not have mislead the jury; the failure of showing, that the exception could not have been prejudicial, rests upon the party, at whose instance the erroneous instruction is granted."

In accord with Mason v. Bridge Co., see also, Nicholas v. Kershner, 20 W. Va. 253, 263; Osborne v. Francis, 38 W. Va. 323, 18 S. E. Rep. 595, both cases citing the principal case as authority. And see State v. Douglass, 28 W. Va. 302.

In Osborne v. Francis, 38 W. Va. 323, 18 S. E. Rep. 595, it was said: "Hence the rule has long been settled that when the court can clearly see affirmatively that the error has worked no harm to the party appealing it will be disregarded (Gilmer v. Higley, 110 U. S. 47, 3 Sup. Ct. 471); and the judgment ought not to be reversed on the ground that the court below admitted illegal evidence, or gave an erroneous instruction to the jury, unless it appears that some injury could possibly have resulted therefrom to the party appealing (Preston v. Harvey, 2 Hen. & M. 55); for the appellant must make it manifest from the record in some way that the

which was a lien upon the property against all persons claiming under the grantor; and of which they were bound to take notice. Colvin then took no title at the time of his purchase; and he relies upon his length of possession as giving it.

The possession of the grantor in the deed was consistent with it; and so was the possession of a purchaser from him. Rose v. Burgess, 10 Leigh 186. That was a stronger case than the present, because in this by the deed the grantor was allowed to remain in possession. The trustee was not authorized to sell until August 1839; and he did take possession and sell within five years from that time.

The possession of Harmons the grantor was in trust for us; and no act of limitations could run in his favor against us. The possession of his assignee must be viewed in the same light, as he was bound to know the existence of the trust. And as Harmons had the right of possession to August 1839 and until the trustee should take possession and sell, it must be presumed that the assignee holds in the same way until by some public notorious act he sets up some other title. If a grantor in a deed may make a private sale so as to bar the trustee, then is it a very ready means to destroy trusts. But the law proceeds on the ground that a person claiming under the grantor stands in his position until he publicly disavows such possession.

91 *When he does this, and is allowed to remain in possession for five years, then he may protect himself by the statute. He is like one coming in place of a tenant; for a grantor or mortgagor, after the time for taking possession under the deed, is a tenant at will. Chambers v. Pleak, 6 Dana's R. 430. And like principles are announced in the case of a trustee in Hendrick v. Robinson, 7 Dana's R. 165.

The doctrine above stated is conclusive of the case, without reference to the terms of the contract. But under the contract the time did not run until the end of twelve months. The purchaser could not bona fide claim title until that period; and without this the possession did not vest title. Kitty v. Fitzhugh, 4 Rand. 600. The instruction given was in fact too favorable to the plaintiff. He proved no adverse possession either before or after October 1839; and therefore he was not entitled to the instruction that there was adverse possession at that time. It is said there was a conflict between the trust deed and the purchaser. But he must bring home knowledge of the contract to the trustee; and there is no pretence of such knowledge. The law presumes that the grantor was acting as he was authorized to do, and not as he was not authorized to do.

The case of Sheppards v. Turpin, 3 Gratt. 373, is in strict conformity to the principles which have been stated. There the property was not sold by the grantor in the deed, but by a public officer, who had taken it under an execution, and sold it at public auction.

Morson, for the appellant, in reply:

The authorities cited by the counsel for the appellee belong to a class of cases essentially different from that before the court. They relate to the relation of landlord and tenant or trustees. This is

92 of a wholly different *character. Here there is no privity between Colvin and the trustee. The title he takes is an adverse title in its inception. This was not an agreement to vest the title at the end of the year if the money was not repaid; but it vested the title at once, and only vested in Harmons the right to repurchase within a year. Harmons alone had the right to do this: Colvin could not compel him to do it.

It is true that the claim of title must be open and proved: And the bill of exceptions states that the possession was held from within three days of the day of sale under a claim of title. One of the canons of the law as to personal property is, that possession is indicative of title; and here there was this possession with a conveyance of the property by deed. To constitute an adversary possession, it is only necessary that it shall be with claim of title; not that the title claimed shall be good. Shanks v. Lancaster, 5 Gratt. 110. And with reference to the statute of limitations, courts do not enquire when the rights of the plaintiff were acquired, but when the defendant's possession accrued. If the party in possession has held five years, that protects him; for if his possession is tortious, there must be some party entitled to seek redress for it.

DANIEL, J. The counsel for the defendant insists, that though the instructions of the Circuit court may have been erroneous, yet this court ought not therefore to reverse; in as much as the supposed error could not have been prejudicial to the plaintiff. He refers to that provision of the deed by which Harmons is permitted to retain possession of the slave till the 1st day of August 1839; and says that the trustee had no right to sell under the deed, and was not bound to institute any action to recover the possession of the slave, until the day last mentioned; and that as

93 he *obtained the possession and made the sale within five years thereafter, the possession of the plaintiff had not, at

ruling against him is wrong. But, that being done, it is taken to be to his prejudice until the contrary is made to appear, and it must appear so clearly as to be beyond all fair ground of questioning that the error did not and could not with any reasonable degree of likelihood have prejudiced the party's rights. See Deery v. Cray, 5 Wall. 795, 807."

The court then gives a long list of Virginia and West Virginia cases on this subject. See especially what is said in this case concerning the decision in Wiley v. Givens, 6 Gratt. 277. See further, on this subject, monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192; 2 Barton's Law Pr. (2d Ed.) 1338-1342, and *notes*.

the date of the sale, matured into a title to the slave, or the proceeds of her sale.

I do not think that this view of the case has been successfully met.

It is true that the bill of exceptions does not purport to set out all the evidence in the cause; and it is also true, that it is not necessary for a party excepting to instructions to state any facts except such as are necessary to present the precise point ruled against him and excepted to; and that it thence follows that the action of the appellate court is properly restricted, (as a general proposition,) to the consideration of the question of law so raised by the facts, and alleged by the party excepting, to have been erroneously decided against him in the court below. Yet I apprehend it is equally true that the fact thus exhibited must disclose an error material to the issue, and operating to the prejudice of the party excepting; that the party asking the reversal of a judgment on the score of an erroneous instruction on the trial, must at least, show that he had probably sustained injury thereby.

Now, I do not perceive in what regard the plaintiff could have been injured by the instructions. The injury, which he imputes to them, is, that they cut him off from making a case on his five years' possession. But the facts which he sets out for the purpose of exhibiting the supposed error of the court, show at the same time, that the fate of his case, as resting on that foundation, must have been the same, though the instructions had not been given. For there is no proof that the trustee had any notice of the transaction between Harmons and the plaintiff, or of the removal of the slave from the county of Madison; and Harmons having, by the express terms of the deed, a right to retain the possession till
94 the 1st of August 1839, I *hold it to be clear that the statute of limitations could not begin to run against the trustee till that period. Joyner v. Vincent, 4 Dev. & Bat. 512.

The plaintiff consequently could not have been prejudiced by the decision of the point ruled against him: For whether we refer the commencement of the running of the limitation to the period fixed by the instructions, on the 16th of October 1839, one year after the date of the agreement between Harmons and Colvin, or to the 1st of August 1839, the result is the same. The sale by the trustee in the spring of 1844 was, in either aspect, before he had lost his right to maintain an action for the recovery of the possession of the slave. The plaintiff's own statement of his case thus showing that his possession and claim of title had not, by lapse of time, ripened into a perfect right to the property, as against the trustee, at the time of the sale, his claim, to recover the proceeds of her sale, as founded on his adversary possession, must consequently have failed, though the instructions had not been given.

As this view of the case disposes of it, it becomes unnecessary to consider other questions discussed at the bar.

I am for affirming the judgment.

The other judges concurred in the opinion of Daniel, J.

Judgment affirmed.

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95 *Williams v. Williams & als.

April Term, 1854, Richmond.

Administrators—Right to Have Proceeds of Land Applied to Debt—Case at Bar.*—W, who is a creditor of T, qualifies as his administrator, and exhausts the personal estate in payment of debts, leaving himself still a creditor. The heirs of T file a bill in the County court for the sale of his land, and the same is sold upon a credit, and a part of it is purchased by W, who executes his bond for the purchase money. W then files his bill in the Circuit court to enjoin the payment of the purchase money of the land to the heirs, claiming that he is entitled to have it applied in satisfaction of his debt. HELD:

1. **Same—Same—Same.**—That W is entitled to have the proceeds of the land applied to the payment of his debt.
2. **Same—Same—Enjoining Payment of Purchase Money to Heirs.**—That the injunction should only go to restrain the payment of the purchase money to the heirs of T; and should not restrain the collection of the money by the County court.
3. **Same—Same—Same—Where Petition Should Have Been Filed.**—Although it would have been more regular for W to connect himself by petition or bill, with the proceedings in the County court, in which the fund had been realized, yet there is no serious objection to the mode of proceeding adopted by him. The County court, instead of directing the money to be paid to the heirs, may direct it to be paid to such person as may be appointed to receive it by the Circuit court: Or one of the suits may be removed to the court in which the other is pending.

In August 1847 Francis Williams filed his bill in the Circuit court of Pittsylvania, in which he charged that Thomas & Robert W. Williams, who were partners, made their negotiable note for six thousand dollars, payable to John McAlister, which was endorsed by McAlister and the plaintiff for the accommodation of the makers, and was discounted for them by the Farmers Bank of Virginia at Danville. That the note not being paid at maturity, was duly protested, and was paid by the plaintiff. That

*Administrators—Right to Have Proceeds of Land Applied to Debt.—In the principal case, it was held that an administrator, who was also a creditor and who had, out of the assets of the estate, paid the debts, could enjoin the payment of the purchase money of the land to the heirs and have it applied to the payment of his debt. This was practically followed in Easley v. Barksdale, 75 Va. 286.

The principal case is cited in Saddler v. Kennedy, 26 W. Va. 642, but shown not to be relevant to that case.

See monographic *note* on "Executors and Administrators."

soon thereafter Robert W. Williams and McAlister became insolvent, and Thomas Williams died. That the plaintiff
96 qualified *as administrator of Thomas Williams, and had disbursed the whole personal estate in the payment of debts; and that there was yet due to him upon said note, as was shown by his administration account which had been settled by commissioners of the court of probat, the sum of two thousand five hundred and seventy-eight dollars and eight-four cents of principal and one hundred and fifty-eight dollars and ninety-seven cents of interest. He further charged that Thomas Williams owned at his death certain real estate which he specified. That the heirs of Williams, with a full knowledge that the personal estate of their ancestor was exhausted, and that a large balance was still due to the plaintiff, had filed a bill in the County court of Pittsylvania for the sale of the said real estate; that the same had been sold under the decree of that court. That at that sale the plaintiff had become the purchaser of one lot at the price of one hundred and seven dollars, and had executed his bond with security to the commissioner; and that the other real estate had been sold to Lewis Hall, for one hundred and ninety-one dollars, who had likewise executed his bond for the amount to the commissioner. That the said commissioner had since died, and there was no representative of his estate. That the said heirs had little or no estate of their own; and notwithstanding the large debt due to the plaintiff, they threatened to enforce payment of the purchase money for the lot purchased by him, and also to collect the amount due from Hall. That he was advised that he was entitled to have the proceeds of the real estate of Thomas Williams applied to the satisfaction of the debt due him. And making the heirs of Thomas Williams and Hall and his surety parties defendants, the plaintiff asked that the heirs might be enjoined from collecting the said purchase money, and that Hall and his surety might be enjoined from
97 paying to them; and that the *proceeds of said real estate might be applied in part satisfaction of the debt due to him; and for general relief.

The injunction was granted: But on the motion of the defendants without filing an answer, the court dissolved the injunction. And thereupon the plaintiff applied to this court for an appeal, which was allowed.

Stanard and Bouldin, for the appellant.

There was no counsel for the appellees.

MONCURE, J., delivered the opinion of the court:

The court is of opinion that the appellant's bill makes out a good case for equitable relief, and entitled him to an injunction to prevent the widow and heirs of the intestate Thomas Williams from receiving the purchase money of his real estate, but not to prevent the collection of the money under the order of the County court. The suit in that court was instituted before the appellant's suit in the Circuit court; and the latter should not interfere with the former suit, except to prevent the payment of the money to the widow and heirs until the appellant's claim can be adjudicated. It would perhaps have been more regular if the appellant, instead of bringing his suit in the Circuit court, had connected himself, by petition or bill, with the proceedings in the County court in which the fund had been realized. But the course which he has pursued is free from serious objection, and need not occasion any conflict of jurisdiction between the two courts; as the County court, instead of directing the money to be paid to the widow and heirs, can direct it to be paid to such person as may be appointed to receive it by the Circuit court. Or if it be more convenient to have both suits in the same court, that object can be effected by a removal of one of them into the court in which the
98 other is pending. *Code, ch. 174, p. 657. The court is therefore of opinion that the court below erred in dissolving the injunction in toto, without plea or answer, instead of dissolving it in part and overruling the motion as to the residue, according to the principles above indicated. It is therefore decreed and ordered, that so much of the order of the court below as is above declared to be erroneous, be reversed, and the residue thereof affirmed, with costs to the appellant against the appellees, who are heirs of the said Thomas Williams; and the cause is remanded for further proceedings.

Decree reversed.

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99 *B. Staton v. Pittman, Sheriff.

Pittman, Sheriff, v. R. Staton.

April Term, 1854, Richmond.

Case at Bar—Fraud against Creditors.*—Judgments had been recovered against N, and executions sued out thereon had been returned "no effects." In this state of things, slaves sold at public auction on a credit were cried out to N, and he induced T to take them and give his bond for the price, upon the understanding that N would afterwards take them and pay T the price; and he told T he was indebted to his sister R for washing, mending, &c., and owed her a good deal of money, and he wished to give the slaves to her as compensation for what he owed her. T kept the slaves about three months, and then N paid T the price of the slaves, and T gave N a receipt in the name of R; and a day or two afterwards T sent the slaves to the house of B the father of R, where R then lived, she being about fourteen years old; and the slaves and R both remained there, she claiming

*Fraudulent Conveyances.—The principal case is cited in Billingsley v. Clelland, 41 W. Va. 258, 23 S. E. Rep. 821, and Burns v. Morrison, 36 W. Va. 425, 15 S. E. Rep. 63. See also, 5 Am. & Eng. Enc. Law (1st Ed.) article Detinue 652, 653.

See monographic *note* on "Fraudulent and Voluntary Conveyances."

them as hers, but it not appearing that B set up any claim to them. Whilst the slaves were thus at the house of B, the sheriff attempted to levy upon them as the property of N, but when he came in sight, the doors of the servants' houses were shut. Afterwards N was taken on a *ca. sa.* and took the insolvent debtors' oath; and then the sheriff brought separate actions of detinue against B and R to recover the slaves. HELD:

1. **Same—Same.**—The arrangement by N was fraudulent as to his creditors.

2. **Same—Same.**—Though N never had possession of the slaves, yet as he paid the purchase money to T, they became the property of N, upon which his creditors would have been entitled to levy their executions; and the subsequent transfer of the possession to R without consideration, and upon a fraudulent arrangement between N and R, did not bar the action of the sheriff for the slaves.

3. **Same—Infants—Judgment.**—Though R was an infant when the action was instituted, yet as she did not set up her infancy to defeat the action, and as it may be reasonably inferred from the evidence that she was of full age when the cause was heard upon a demurrer to evidence, and appeared and defended herself by counsel, she is bound by the judgment.

4. **Same.**—Though the slaves were sent to and remained on the premises of B, yet as his daughter R also lived there, and R claimed
100 *the slaves, but it did not appear that B ever claimed them, the action cannot be maintained against B.

5. **Same—Evidence—Receipts on Bond.**—Upon the trial R, to prove that she gave a valuable consideration for the slaves, introduced a bond executed by N to B, and assigned by B to R, before N's purchase of the slaves. On this bond there were several receipts, the last of which, for the balance of the bond, was dated before the purchase of the slaves by N, and to this receipt there were four subscribing witnesses, none of whom were introduced upon the trial. R having introduced the bond with the receipts upon it, these receipts were in evidence for the benefit of the plaintiff, without his calling a subscribing witness to prove them. And it was for R to show that there was an error in the date of the receipt.

These were two actions of detinue brought in the Circuit court of Buckingham county, one by Thomas Pittman, sheriff, who sued for the benefit of Wardsworth, Williams & Co. against Benjamin Staton; and the other by the same plaintiff for the same parties, against Rosetta Staton. The object of both suits was to recover the same two slaves.

The two cases were tried together, and the jury found verdicts for the plaintiff, subject to demurrers to the evidence by the defendants.

It appears from the evidence of the plaintiff that three judgments had been recovered against Nicholas Staton, the son of the defendant Benjamin, and the brother of Rosetta Staton, in September 1841, upon which executions had soon after been issued and had been returned "no effects." One of these was at the suit of Wardsworth, Williams & Co. Afterwards in 1844, executions had been issued against the body of Nicholas Staton, upon which he was taken in custody, and took the benefit of the act for the relief of insolvent debtors, and was discharged, having surrendered a few trifling articles in his schedule. Previous to this last period, viz: on the 12th of September 1842, at a public sale made at Buckingham court-house, by W. P. Bocock as commissioner, the two slaves in contro-
101 versy were bid off to Nicholas *Staton at two hundred and twenty-two dollars; and on the same day he informed William Tapscott of his purchase and requested him to take them, saying that he would afterwards take them and pay Tapscott for them; and at the same time he told Tapscott that he was indebted to his sister Rosetta Staton for washing, mending, &c. and that he owed her a good deal of money, and wished to buy this woman and child and give them to her as compensation for what he owed her. Tapscott took the negroes and gave his bond to Bocock for the price, and kept them about three months, when Nicholas Staton paid him the purchase money, and Tapscott gave a receipt to Nicholas in the name of Rosetta Staton; and a day or two afterwards sent the slaves to the house of Benjamin Staton. The slaves continued at the house of Benjamin Staton, where Rosetta Staton also lived; she being at the time of this purchase by Nicholas Staton about fourteen years old. At that time Tapscott considered Nicholas Staton very good for the amount of the purchase money of the slaves, and he was always punctual in every transaction he had with him. After the slaves went to the house of Benjamin Staton, the sheriff went there to levy upon them, but after he arrived in sight of the house, the doors of the out-houses were closed, and the entry of the officer prevented.

The defendants introduced Nicholas Staton as a witness, who testified that he first wanted to buy the slaves for his sister Rosetta Staton; that she authorized him to buy them for her; that he owed her a bond, and she told him to buy them and she would give him credit for them; that he did so, and paid off the whole bond. That he owed Benjamin Staton for the hire of negroes, for which he gave the bond to him. That the bond was assigned to Rosetta Staton by Benjamin, before the negroes were purchased; and that the bond had been
102 paid off by the purchase of *the negroes, and a balance paid in money. That he owed Rosetta Staton on other accounts; that she had wove for him and done some sewing for him. He had never heard Benjamin Staton claim the negroes; but that Rosetta Staton had always claimed them as hers, and still did so. The bond referred to by the witness was produced, and there was no question that it was genuine, and had been given for the hire of slaves. It was dated the 1st of January 1840, and payable on the 1st of January 1841, and was for four hundred and fifty

dollars. The assignment by Benjamin to his daughter Rosetta Staton is dated the 1st of January 1842, and purports to be a gift. There are four credits on the bond, the two first of which amount to two hundred dollars, and are not dated. The third bears date the 7th of July 1842, for a due bill on A. Long for one hundred dollars; and the fourth, purporting to be the receipt of the balance of the bond in cash, bears date the 10th of August 1842, and is attested by four witnesses, none of whom were introduced on the trial.

The court rendered a judgment upon the demurrer to evidence against Benjamin Staton, and in favor of Rosetta Staton; and Benjamin Staton in the first case, and the sheriff in the second, applied to this court for a supersedeas, which was awarded.

Stanard and Bouldin, for Benjamin Staton.

Morson, for the sheriff.

Irving, for Rosetta Staton.

LEE, J. It is not to be questioned that if Nicholas Staton was the legal owner of the slaves in controversy, and made the transfer to his sister Rosetta for the purpose of hindering, delaying and defrauding his creditors, the transfer was as to them utterly void; and upon his taking
103 the oath of an insolvent debtor, *the sheriff became entitled to recover the slaves for the benefit of the creditors, from any one unlawfully detaining the possession of them. Upon this subject the cases of Shirley v. Long, 6 Rand. 735, and Clough v. Thompson, 7 Gratt. 26, may be regarded as decisive. And I think the facts proven by the evidence in these causes, and the inferences which a jury legitimately might and should make from them, are such as to present a case which cannot be satisfactorily explained, except upon the hypothesis of fraud on the part of Nicholas Staton in the transaction in question. At the time of the sale made by Commissioner Bocock, he was much embarrassed with debts, there being unsatisfied judgments to a considerable amount standing against him, the executions upon which had been returned "no effects." The slaves are struck off to him as the highest bidder; but being unwilling, for a reason which we are at no loss to understand, to complete the purchase by giving the requisite bond in his own name, he gets Tapscott to take his place as ostensible purchaser, and give his bond to the commissioner for the purchase money, and receive possession of the slaves, stating that he owed his sister Rosetta for washing, mending, &c., and that he wished to give her the slaves to compensate her. That he could have given the bond and the security required, in his own name, if he had chosen, may be fairly inferred from what Tapscott states: for he says he regarded N. Staton as perfectly good for the amount of the purchase money, and he had always found him remarkably punctual in meeting his engagements with him; and no doubt he would have been as willing to become his security if Nicholas Staton had chosen to give his own bond on the credit of the sale, as he was to make himself the convenient instrument in the arrangement which Nicholas Staton preferred to adopt.

Tapscott retains possession for about
104 three months, and Nicholas *Staton then pays over the amount of the purchase to him, taking a receipt in the name of Rosetta Staton, who was at that time about fourteen or fifteen years of age; and in a day or two after, Tapscott sends the slaves to the house of Benjamin Staton, the father of Rosetta, with whom she then lived. Now it does not appear whether at this time the credit of the commissioner's sale had expired, or whether Tapscott had paid for the negroes or not; but from his silence on this point, and from the questionable position which he occupies in relation to this affair, it might not be unwarrantable to infer that he had not then paid for the negroes, and that the payment, when made, was with the funds provided by Nicholas Staton himself.

As to the pretended consideration for the transfer of the slaves by Nicholas Staton to his sister Rosetta, I think it comes in too questionable a shape to afford any sufficient support to the transaction. She was at the time a mere child, and it would seem very improbable that he could owe her any considerable sum for washing and mending. He is introduced as a witness indeed on the part of the defendant in the action, in each case, and he states that he purchased the negroes by the direction of this young girl, and with them paid off the balance of the bond which had been assigned to her by her father. And though he does say that he owed her on other accounts for personal services, yet this is rather auxiliary and cumulative, and the stress of the consideration is placed on the balance due on the bond. But upon the demurrer to evidence, his evidence, so far as it conflicts with that of the plaintiff in the action, is, of course, to be disregarded; and if it were even to be taken into consideration, I think it entitled to not the slightest weight. It is true, the fairness of the bond executed by Nicholas Staton to his father for the hire of the watermen, or of the assignment of it by the father to Rosetta Staton, is
105 not impeached *by the plaintiff, nor do I perceive anything in the evidence upon which either could be successfully assailed. The evidence of Tapscott proves that the hiring of the three negroes for the year 1840, was a real transaction between Benjamin Staton and Nicholas Staton; and the bond of the latter, produced by himself on his examination as a witness, shows that it was given for the amount of their hire. This bond Benjamin Staton had a perfect right to give to his daughter, if he chose so to do; nor is there any one here questioning or entitled to question the validity of such a gift. But when Nicholas Staton spoke of his indebtedness to his sister at the time he procured Tapscott to take his place as ostensible purchaser of

the slaves, and to hold them subject to his disposal, he made no allusion to any bond held by Rosetta upon him, but intimated that what he owed her was for washing, mending, &c.; and upon examining the bond produced by Nicholas Staton, it would seem that the balance due upon it had been paid off in cash, on the 10th of August 1842, before the purchase by Nicholas Staton at the commissioner's sale, and some four months before he paid over the money to Tapscott. So that however justly he may have been indebted to Rosetta on account of that bond previously to the sale, he had at that time ceased to be so, having paid off the balance, and no doubt then having the bond in his own possession.

But it is said that the receipt endorsed on the bond is not proven, and that although there are four attesting witnesses, not one was called to testify concerning it. But what need of proof on the part of the plaintiff in the action? The bond, with the receipt endorsed upon it, is produced by the defendants and their witness, and the plaintiff certainly had the right to take it as they exhibited it. And if there was a mistake in the date of that receipt, as
106 it is suggested *by the counsel there may be, it was for the defendants to show it, I apprehend, not for the plaintiff to show there was none.

I think the indiciæ furnished by the evidence, of the true character of this transaction, are such as fully to warrant a jury in finding that it was a fraudulent arrangement made by Nicholas Staton for the purpose of screening the slaves from the creditors who then held unsatisfied judgments against him, by holding them out to the world as the property of Rosetta Staton; and that she was but a too willing instrument in his hands to effect his fraudulent purpose. But whether a willing or an innocent instrument, I conceive no substantial or valid consideration is shown for the transfer of the slaves to her, and that she can take no benefit from an arrangement tainted with the fraud too justly imputed to Nicholas Staton.

But it is said Nicholas Staton never had title to these slaves: that even if there was no debt due from him to Rosetta, and the money paid to Tapscott for them was his own money and not that of Rosetta, still he never had the possession of the slaves, because they were delivered by the commissioner to Tapscott, and by him directly to Rosetta Staton; and that the most that can be made of the case is that it is one of a resulting trust in the slaves for the benefit of the creditors, which they can only enforce in equity, but of which they cannot have the benefit in an action at law for the slaves themselves, in the name of the sheriff, for want of a sufficient legal title upon which to base such an action and recovery. A purchase alone, it is argued, of the slaves without delivery of possession, will not pass a title to the purchaser.

This view in my judgment cannot be maintained. As already intimated, I look upon Tapscott as but the ostensible, while I regard Nicholas Staton as the real purchaser of the slaves: and Tapscott's
107 possession, if *(as I think a not unwarrantable inference), the slaves were actually paid for with the money provided by Nicholas Staton, might be regarded as his possession, so far as creditors were concerned, subject at most to Tapscott's right to be indemnified against the bond which he had given. But if this were going too far, clearly I think after Nicholas Staton had paid over the purchase money to Tapscott, the possession of the latter during the interval between the payment and the delivery of the negroes to Rosetta Staton, was the possession of Nicholas Staton, and whether Tapscott had yet paid the amount of his bond to the commissioner or not, an execution against Nicholas Staton might properly have been levied upon the slaves during that interval while yet in the hands of Tapscott. To this Tapscott could not object, for having received the money, his interest in the slaves had ceased by his own act and consent. Rosetta Staton could have no right to object: the money paid for the slaves was not hers, and she had not yet acquired the possession of them. So that there was no one who could successfully interpose to arrest a creditor in the pursuit of this property during that period, nor could his right to subject it to his debt be defeated by a subsequent transfer, except upon sufficient consideration, and untainted by the fraudulent purpose reprobated by the law.

I am of opinion, therefore, that the plaintiff did show a sufficient right to recover the slaves for the benefit of the creditors at whose suit Nicholas Staton took the oath of insolvency, against any and all persons unlawfully detaining them; and as Rosetta Staton claims both title and possession, and wholly denies any right in the plaintiff, she is clearly liable in the action against her. Nor do I think that her infancy at the time of suit brought and plea pleaded can protect her from a judgment against her upon the demurrer to evidence. It is undoubtedly true that an infant can-
108 not *appoint an attorney, nor appear or plead otherwise than by guardian; but waiving the question whether the point can be made in this form, or whether the court must take notice of the infancy of the defendant whenever and however it is brought to its knowledge, it is equally true that the disability of infancy is a privilege personal to the party, and which, after he attain his age, he may well waive if he please: And such a waiver must be intended in this case. For taking the evidence most strongly, as it must be taken, against the demurrant, it may be inferred that at the time of the argument of the demurrer and the rendition of the judgment in April 1848, Rosetta Staton had then attained her full age, and as she then proceeded by her attorney to the argument of the demurrer without making the objection of her previous infancy, it is to be considered that

she waived her privilege, and sought the judgment of the court upon the merits of the case.

As it respects Benjamin Staton, however, I can perceive no just ground upon which he should be subjected to a recovery in the action against him. As I have already intimated, there is no impeachment of the fairness of the bond executed to him by Nicholas Staton, or of the assignment of the same by him to his daughter Rosetta. He is not proven to have had any connection whatever with the purchase of the slaves, or with the transfer of them to Rosetta. He has set up no claim to them in any form, nor exercised any act of ownership over them. Nor can he be said in any just sense to have had possession of them or to have detained them from the plaintiff. That he suffered his daughter to keep the slaves that she claimed as hers, at his house where she still lived, is a circumstance too slight and equivocal of itself to charge him with the grave responsibilities of an unlawful detainer from the right owner. It is not incompatible, but strictly consistent with perfect freedom from
109 any participation *in the fraudulent arrangement between the brother and sister, and with entire ignorance of its true character. What more natural than that a father would permit his young daughter to keep slaves, that she claimed as hers by purchase or gift from her brother, upon his premises while she continued a member of his family? He might be totally ignorant of any vice in the arrangement between them; or if a doubt had suggested itself, he might be neither able nor willing to take upon himself the unpleasant task of resolving it. The circumstance alluded to by the witness Haskins of the closing of the doors of the out-houses when he approached with the sheriff for the purpose of levying on the slaves, is left in too much uncertainty to constitute a sufficient ground on which to charge Benjamin Staton. It is not shown to have been done by his authority or with his knowledge, privity or consent. It does not appear that he was even at home at the time. Nothing is shown by which he can be fairly connected with it. That the premises were his cannot make him responsible for what might be done upon them without his authority; and for aught that appears, this closing of the doors might have been the act of the negroes themselves. The plaintiff might have readily placed Benjamin Staton in his true position by demanding to know if the slaves were withheld by his authority, and might then treat him as the nature of his response should direct. He made no such call, however, upon him; and under such circumstances, to charge Benjamin Staton with the consequences of an illegal detainer of these slaves, would be, as it seems to me, to convict a man upon bare suspicion of being privy to and participant in the unlawful act of others, although remaining passive throughout, or at most, doing what perhaps almost any other father might do in similar circumstances, in permitting a child to keep property that she
110 claimed, *upon his premises whilst she was herself a member of his family. The injustice in this case would be gross and manifest. For if the plaintiff in the action should enforce his judgment against Benjamin Staton, by compelling payment of the alternative value and damages found by the jury, and the costs, he will be without indemnity of any kind. Thus he is compelled to pay a large sum towards a debt of Nicholas Staton, for which he was never in any form responsible, for which he has received nothing in the form of an equivalent, nor can claim anything in the way of indemnity: and this for a transaction in which he is in no manner implicated, and without any proof that he has in any manner obstructed the plaintiff in the pursuit of his remedies against those who were justly responsible to him.

I am of opinion, therefore, to reverse the judgment in each case; and in the case of Rosetta Staton, to render judgment against her on the demurrer to evidence, and in that of Benjamin Staton, to render judgment for the defendant.

ALLEN and SAMUELS, Js., concurred in the opinion of Lee, J.

DANIEL and MONCURE, Js., concurred in the opinion of Lee, J., as to Rosetta Staton; but they thought that the judgment against Benjamin Staton was correct.

Both judgments reversed.

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111 *Hunter v. Lawrence's Adm'r & al.

April Term, 1854, Richmond.

[62 Am. Dec. 640.]

1. **Guardians—Power over Bond of Ward—Case at Bar.*** —A bond executed to an executor is transferred by him to a guardian as part of the ward's estate.

***Guardians—Control over Ward's Estate.**—The principal case is cited in Ware v. Ware, 28 Gratt. 674, upon the question of the control of the guardian over his ward's estate.

Same—Conversion of Assets—Liability.—The proposition laid down in the principal case that a guardian violates his trust when he sells or transfers the property of his ward to pay his own debt, is approved and followed in Burwell v. Burwell, 78 Va. 582, citing the principal case, and in Wernick v. McMurdo, 5 Rand. 90; Miller v. Jeffress, 4 Gratt. 477; Tabb v. Cabell, 17 Gratt. 173; Asberry v. Asberry, 33 Gratt. 469. The principal case is also cited and followed in Dobyns v. Rawley, 76 Va. 542.

Same—Sale of Ward's Property—Fraud of Guardian—Purchaser.—In Mills v. Mills, 28 Gratt. 501, and *note*, it is said, that the principle upon which a party dealing with a fiduciary is held responsible, is, that he has co-operated in the fraud of the fiduciary, citing *Hunter v. Lawrence, 11 Gratt. 111.* The principal case is also cited and approved in Jones v. Clark, 25 Gratt. 667, and *note*; Brockenbrough v. Turner, 78 Va. 455, 456.

See monographic *note* on "Guardian and Ward" appended to Barnum v. Frost, 17 Gratt. 398.

Whatever interest the ward has in the bond is subject to the control of the guardian, who may receive the money due thereon if voluntarily paid; may sue for it in a common law court in the name of the executor, for his own use as guardian, and cannot be prevented by the executor; or he may sell and transfer the bond.

2. **Same—Power over Personal Estate.**—As a general rule, a guardian has the legal title of the ward's personal estate; and has the power and authority to sell it.

3. **Same—Selling Property to Pay Individual Debts.**—A guardian violates his trust when he sells or transfers the property of his ward to pay his own debt.

4. **Same—Fraud—Effect as to Innocent Parties.**—The fraud of a guardian in disposing of the property of his ward, is not sufficient of itself, under all circumstances, to invalidate his transactions with innocent parties.

5. **Executors—Fraud—Case at Bar.**—A bond executed to an executor is transferred by him to a guardian as part of the ward's estate; the guardian is himself a legatee for a large amount of the same testator, and is guardian of another legatee; and he receives the amount of these legacies from the executor in bonds and other evidences of debt. Upon the marriage of the last mentioned legatee, he transfers to her husband the bond belonging to the first named ward in part discharge of her legacy, he being at the time in good circumstances and his sureties as guardian being wealthy. The husband takes the bond at par, without knowing or suspecting that it is the property of the first named ward; and takes it without a hope of gain or fear of loss, but simply as a mode of payment convenient to both parties. Years afterwards the guardian becomes insolvent by the failure of speculations in which he is then engaged. HELD:

1. **Same—Same—Liability of Innocent Party.**—The husband, who received the bond, is not responsible to the ward, whose property it was, for the amount thereof.

2. **Same—Same—Same.**—The principle upon which a party dealing with a fiduciary is held responsible, is, that he has co-operated in the fraud of the fiduciary.

6. **Same—Same—Same—Case at Bar.**—A guardian qualifies in 1821. In 1825 he transfers a bond of his ward to a party wholly innocent of any participation in the guardian's fraud, in payment of a debt. The ward comes of age in 1832, and takes no steps to obtain his estate from
112 his guardian until 1840, *when the guardian becomes insolvent. He then sues the sureties of the guardian, and recovers from them the amount due to him from his guardian. In all this time the sureties had done nothing to secure the faithful discharge of his duties by the guardian, or to compel him to pay over to the ward his estate after he came of age. HELD: That even if the party who had received the bond from the guardian, could be held responsible to the ward, he is not responsible to the sureties.

George Pottie the elder, late of the county of Louisa, died prior to April 1815, leaving a widow and five children surviving him. By his will, after giving a few small legacies, he directed that the remainder of his estate, both real and personal, should be divided between his widow and children, as the law directs in cases of intestacy; and he appointed John Thompson of Culpeper his executor. The will was duly admitted to probat, and Thompson qualified as executor.

Several of the children of George Pottie the elder were infants, and in 1821 R. S. Sandridge qualified as the guardian of George Pottie the younger, and Nathaniel Thompson, who had previously married the widow, qualified as the guardian of Isabella Pottie. On the 28th of June of this year the executor John Thompson divided among the legatees the sum of forty-five thousand dollars, Nathaniel Thompson, as the husband of the widow, receiving fifteen thousand dollars, and as guardian of Isabella Pottie, receiving six thousand dollars; and Sandridge, as guardian of George Pottie the younger, also receiving the sum of six thousand dollars.

Although the receipts given by these parties purport to be for so much money, yet in fact these sums were not paid in money, but principally, if not wholly, in bonds and other evidences of debt. Among the bonds so received by Sandridge as guardian of George Pottie the younger, was one for five thousand dollars, executed by Isaac Winston of Culpeper to John Thompson, executor of George Pottie,
113 which bore date on the *13th of November 1820, and was payable on the 13th of November 1825, with legal interest payable semi-annually. This bond was secured by a deed of trust executed by Winston and wife conveying real estate and slaves, and was recorded in the county of Culpeper. The executor did not assign the bond, but simply transferred it, and the only endorsement upon it was one signed by the executor, of the receipt of interest upon it to the 13th of November 1821.

In 1822 Sandridge died, and in November of that year Nathaniel Thompson was appointed guardian of George Pottie the younger. In 1823 Sandridge's account as guardian of George Pottie was settled by commissioners, and returned to the County court of Louisa, and ordered to be recorded. In this account on the debtor side, there is an item as follows: "1822, Dec. 16. To amount of Isaac Winston's deed of trust, returned, $5000." And on the credit side there is the item, "1821, June 28. By Isaac Winston, for bank stock sold him, per deed of trust, $5000." At the time this account was ordered to be and was recorded, John Hunter was, and had been and continued to be until this suit was brought, clerk of the County court of Louisa; but the order directing the account to be recorded, and the record of the account, are proved to be in the handwriting of a deputy then in the office, who had since died.

In 1823 the administrator of Sandridge turned over to Nathaniel Thompson, guardian of George Pottie the younger, the estate of his ward which had been in the hands of Sandridge; and as a part of that estate he delivered to Thompson the bond of Winston. In 1824 Dickinson, one of the

two sureties of Nathaniel Thompson, having, as it is stated on the record, suggested his fears of suffering in consequence of said securityship, Thompson waiving the necessity of a summons, an order was
114 made requiring him to give *other security, whereupon he entered into another bond, with Garland Thompson, jun., Charles Thompson, Oswold McGehee and Henry Lawrence as his sureties.

On the 3d of November 1825 John Hunter married Isabella Pottie; and they being on a visit to Nathaniel Thompson and his wife, the guardian and mother of Mrs. Hunter, on the 17th of November Thompson informed Hunter that he was indebted as guardian to Mrs. Hunter about six thousand dollars; that he held the bond of Winston for five thousand dollars, secured by a deed of trust; that he had recently seen Winston, and that he promised payment of the debt in installments at short intervals; and that as fast as Winston paid him he would pay Hunter in part discharge of what he owed as guardian of Hunter's wife. To this Hunter replied, that as Thompson intended to collect the debt to pay him, he had as well pass the debt to him, as he had no immediate use for the money, and preferred having it in safe hands bearing interest. This suggestion was adopted, and the bond was immediately transferred to Hunter; who held it for near twenty years, receiving the interest regularly upon it, before he collected the principal from Winston.

The foregoing conversation and arrangement occupied between five and ten minutes; and neither at that time, nor before nor afterwards, was Hunter informed by Thompson that he had received the bond from Sandridge's administrator, or that it was held by him as a part of the estate of his ward George Pottie the younger; nor does it appear from any evidence in the cause that Hunter was ever so informed until after the failure of Thompson in 1840. At the time of this transfer of the bond Thompson was in good credit, and in independent circumstances, able to pay up what he owed to Hunter's wife; and the sureties in his bond as guardian were
115 also in good circumstances; *and his circumstances continued good until 1840, when, owing to the failure of speculations in which he had engaged, he became insolvent.

In 1832 George Pottie the younger came of age; but he does not appear to have taken any steps to collect from his guardian Nathaniel Thompson the moneys of his in Thompson's hands until 1840, after Thompson's failure; and although the sureties in the guardian's bond lived in the neighborhood of Thompson, and were well acquainted with him, they do not appear to have made any attempt either to urge the payment by Thompson to Pottie, or to obtain their release from their liabilities as Thompson's sureties. In 1840 Pottie brought a suit upon the official bond of his guardian, and obtained a judgment, a part of which was paid out of a trust fund conveyed by Thompson to indemnify his sureties and pay his creditors, and the balance was paid by the administrators of Lawrence and Garland Thompson, two of the sureties. These payments appear to have been made in 1842 and 1843.

In 1845 this suit was instituted by the administrator of Lawrence against Hunter, to obtain from him repayment of the amount he had been compelled to pay as the surety of Thompson as guardian of George Pottie; and subsequently the administrator of Garland Thompson came in by petition and was made a party plaintiff in the suit. The bill, after stating the death and will of George Pottie the elder, the qualification of Sandridge as the guardian of George Pottie the younger, the transfer to him by the executor of the bond of Winston, the qualification of Nathaniel Thompson as guardian of George Pottie, the transfer of the bond to him by the administrator of Sandridge, the settlement and recording of the guardian account, the marriage of Hunter with Isabella Pottie, and the giving in 1824 of the new bond as guardian of
116 George *Pottie, in which Lawrence became one of the sureties, as hereinbefore detailed, charged that about this period, Hunter having met with considerable difficulty in obtaining the money due to his wife from her guardian Nathaniel Thompson, and being perfectly familiar with all the circumstances of the case, and knowing that the bond of Winston for five thousand dollars was the property of the ward George Pottie, and not the property of Thompson, combining fraudulently with the said Thompson, obtained an assignment by Thompson to him of the said bond, and received the same as pro tanto a discharge of the debt due from Thompson to him, and had since held the said bond as his own property, and still held the same, unless he had changed the debt by receiving payment of the said bond. And it was charged expressly, that these facts were known directly to Hunter, because he was at that time, as he had been for years previous thereto, clerk of the County court of Louisa in which these facts were matters of record, and much if not all the record in his own handwriting. And it was charged that the doubtful condition of Thompson was known to Hunter; that he had full knowledge of the misapplication of the funds to the prejudice of the ward George Pottie or the sureties of Thompson, and that he thus obtained payment of his claim out of money which he knew could not be so applied without defrauding an infant or a surety.

The bill further stated the death of Lawrence, the action by George Pottie on his guardian's bond, and the payments made by the sureties, and making Hunter a party defendant, and calling upon him to answer to all the allegations of the bill, and to discover whether he still had the bond of Winston; prayed that if he still had it he might be compelled to surrender it, and to

pay the interest he had received upon it; or if the bond had been paid, that he
117 might be compelled *to pay the amount thereof to the sureties of Thompson as guardian of George Pottie, and for general relief.

Hunter answered the bill, and denied explicitly every statement in the bill, as to his knowledge that the bond had been transferred by the executor of George Pottie the elder to Sandridge, or by Sandridge's administrator to Nathaniel Thompson, or that Thompson held it as a part of the estate of George Pottie the younger, or in any other manner which would have rendered it improper for Thompson to transfer it, or himself to receive it, in part payment of his wife's fortune, until 1840, when Thompson unexpectedly failed. He denied that Thompson was in difficulties in 1824 when Dickinson asked for other security, or that that proceeding was prompted by a fear of Thompson's failure. He denied that he had found any difficulty in obtaining payment of his wife's fortune from Thompson, and gave the facts attending the transfer of the bond substantially as before stated. He denied that he derived from his position as clerk of the court any knowledge that the bond had been transferred by Sandridge's administrator to Thompson, or of its being in any way or in any respect the property of George Pottie. And he stated the fact that the order for recording the settlement and the record of it was in the handwriting of one of his deputies. He averred that he not only did not know or suspect anything which rendered it improper to receive the bond, but that he could have had no motive to unite Thompson in a misapplication of the bond, because Thompson himself was very able to pay his wife's fortune, and the security in the guardian's bond was ample; and it could not be supposed that he would combine with his wife's mere step father to defraud her brother without the slightest inducement of danger or profit to himself.

The court below, without deciding
118 whether Hunter *was liable to pay the amount he had received upon the bond, directed a commissioner of the court to take an account of what Hunter had received, and also an account of what the plaintiffs had paid as sureties of Nathaniel Thompson as guardian of George Pottie. This report was returned, showing that Hunter had received nine thousand eight hundred and twenty-six dollars and fifty-seven cents. That Garland Thompson's administrator had paid one thousand seven hundred and eighty dollars and twenty-four cents; and Lawrence's administrator had paid one thousand eight hundred and twelve dollars and eighty-one cents. The first sum was received by Hunter prior to February 22d, 1842; and the payments were made by the representatives of Garland Thompson and Lawrence prior to September 2d, 1843.

The cause came on to be finally heard in April 1848, when the court made a decree by which Hunter was directed to pay to the plaintiffs respectively the sums reported by the commissioner to have been paid by them, with interest from the time the money was paid, and their costs. And from this decree Hunter applied to this court for an appeal, which was allowed.

Morson, for the appellant:

There is no case in the books in which a party has been charged with constructive fraud, where there was no earmark on the subject dealt for, upon the ground of some latent equity. In this case Hunter stands as the purchaser of this bond for full value, without notice of any equity in George Pottie. And on this question I refer particularly to the case of Jones v. Powles, 10 Cond. Eng. Ch. R. 310. That was a case of real estate, but this is personalty; and if we look to the law applicable to this species of property, we find as to bills of exchange, the holder for value is not affected
119 *even by crassa negligentia; but that actual fraud is necessary. Goodman v. Harvey, 31 Eng. C. L. R. 212.

We insist, then, that to subject a purchaser for value to a latent equity, there must be more than gross negligence; there must be fraud. This principle is directly applicable to the subject involved in this case; and in all the cases decided in this court the principle of the decisions is that there must be not only proof of a breach of trust by the trustee, but proof of notice of such breach by the party dealing with him. In other words, there must be fraud. Dodson v. Simpson, 2 Rand. 294; Graff v. Castleman, 5 Rand. 195; Broadus v. Rosson, 3 Leigh 12; Fisher v. Bassett, 9 Leigh 119; Pinckard v. Woods, 8 Gratt. 140. The first of these cases can only be sustained on the ground that the party dealing with the executor must have notice not only of the trust but of its breach, before he can be held responsible; and in the other cases, all of them, the decision is founded on the principle that the party dealing with the trustee was conusant of his misconduct.

In this case Mrs. Hunter was entitled to receive from the executor of her father more than the amount of this bond; and six thousand dollars was in fact paid by him to her guardian; and this guardian received in right of his wife, from the same executor, fifteen thousand dollars; and these sums were received in bonds. The presumption therefore is, as the fact is, that Hunter had no notice that this particular bond belonged to George Pottie; and that omnis ritæ acta. If then Hunter may ex equo et bono retain this money, the equities are equal; and the equities being equal melior est conditio defendentis, aut possidentis. But in fact the equities are not equal. The assignment of this bond to Hunter was in 1825; and then Thompson was in good circumstances, and so continued until 1840, without any notice to Hunter in all that time that
120 *he had been dealing with a trust subject, and without any effort on the

part of Pottie to obtain from Thompson his guardian, his estate.

Patton, for the appellees:

It would be very uncandid in me to attempt to show that there was actual fraud in Mr. Hunter, or even in Nathaniel Thompson, in this transaction. But in making the transfer of this bond Thompson was guilty of a gross breach of trust. It is true that this is not a suit by a ward against his guardian; and it is also true that this attempt to subject Hunter has not been made until seventeen years after the transaction complained of, and seven years after George Pottie came of age. But it is also true that in a much stronger case against the relief sought, this court held the purchaser responsible, and that too at the suit of the sureties of the executor. Pinckard v. Woods, 8 Gratt. 140. In that case the delay was nearly as great. The executor was amply solvent at the time, and continued in good credit for years. He was moreover a legatee of one moiety of the estate, which owed no debts; and the bonds sold were less than his interest in the estate. Here it was not a sale by the guardian to a bona fide purchaser for value; nor was it a pledge for money advanced at the time: And not even Hardwicke and Mansfield can satisfy this court that there is no distinction between these cases and a transfer or pledge by the guardian for the payment of his own debt. Hardwicke refers to the only principle upon which a purchase of trust property can be countenanced in a court of equity: That is, that the trustee has the legal title and power of sale; and a purchaser who deals with him in good faith is entitled to presume he is exercising his power in good faith. But when the trust property is not disposed of by a sale, as was the case in Pinckard v. Woods, but to discharge a debt of the
121 trustee, the party dealing with *him takes upon himself the burden of showing that the trustee had a right so to deal with the property.

There could be no doubt in this case of Hunter's liability, if the bond showed upon its face that it belonged to George Pottie. There can be no doubt, after the decision of Pinckard v. Woods, that the guardian had no right to transfer a security which was safe, and leave only his own liability. But further. The fund was then put out just as the court would have directed if the guardian of Pottie had had the money in hand and had asked the directions of the court as to its investment. The court is referred to Field v. Schieffelin, 7 John. Ch. R. 150, for an able review of the authorities on this subject.

The only ground upon which Hunter can stand with any hope of success, is, that the security had no earmark, and that he was a purchaser for value without notice. But in the nature of things there were circumstances which should have awakened suspicion; though I do not say that it did awaken the suspicion of Hunter. Nathaniel Thompson had been the guardian of Mrs. Hunter ever since the death of her father; and Hunter, as clerk of the County court of Louisa, was bound to know that Thompson ought to have invested her estate. When then Thompson told him he had a bond which he was about to collect for the purpose of paying him, he should have known that he had been misapplying her property; and should therefore have suspected that he was about to misapply George Pottie's. He knew that Sandridge's account as guardian of Pottie had been settled, and recorded in his office, though he had never examined the settlement; and therefore he might readily have ascertained to whom this bond belonged.

But further. To entitle himself to the defence of a purchaser for value without notice, he must have acquired
122 *the legal title. But neither the legal nor equitable title to this bond was in Nathaniel Thompson. The legal title was in the executor of George Pottie the elder; and the equitable title was in George Pottie, junior. The bond was transferred, not assigned, by the executor to Sandridge the first guardian of George Pottie, junior; and in the account of Sandridge he is charged and credited with the amount.

I do not mean to say that the guardian could not sell the property of his ward, even a bond, to pay debts, or that he could not collect choses in action. But I do mean to say he cannot transfer it to pay his own debt: And the only principle on which the sale is sustained in any of these cases, is that the trustee has power to sell, and that the purchaser is not bound to enquire further. In this case the guardian had no greater power to dispose of the bond than the slaves of his ward. Could he have paid his debt to Hunter by transferring to him Pottie's slaves, which came into his possession in the same way that the bond came? Would not the slaves be still considered and held to be the slaves of Pottie? Suppose that instead of transferring the slaves at a valuation he had given a deed of trust upon them to secure Hunter's debt, would that have been valid?

I take it that a guardian has no legal title to the property of his ward; though he has the legal power to control, and as to the personal property, to sell. But as I have before said, Thompson had neither the legal nor equitable title to this bond. It and the trust to secure it, were given for money loaned by John Thompson as executor of George Pottie the elder to Winston. Mr. Hunter was bound to know all these papers disclosed. They did not show any title in Nathaniel Thompson; but they showed that they were the property of the testator of his wards: And Hunter had no right to suppose that the bond
123 came to *Thompson as his own property. He does not say in his answer that he supposed it came to Thompson in right of his wife: And if he had said so, what right had he to suppose it. I submit that when he saw that this bond and deed

of trust had been a part of the estate of George Pottie the elder, and knew that others beside himself were interested in that estate, it was gross laches in him not to enquire how Nathaniel Thompson acquired it. Mr. Hunter excuses himself for this neglect by saying that Thompson was about to collect the money. But if he had collected it, he had no more right to pay the money than he had to transfer the bond: And he had no right to collect the bond because it was then put out as it ought to have been. It was the money of George Pottie received by Mr. Hunter without any authority to receive it, and an action for money had and received might have been maintained for it.

The court is referred to American Leading Cases, p. 300, for a collection of the authorities as to agents, showing that the transfer by one partner improperly does not transfer the title; and to Fisher v. Bassett, 9 Leigh 119; in which the only objection was the sale of the bonds at a discount. Is that worse than to dispose of the whole subject to the trustee's own use?

Robinson, for the appellant, in reply:

Nathaniel Thompson was solvent in 1824, as is proved by his giving security as guardian, and by his deposition; and by the conduct of these parties in lying by for fifteen years after the transfer of the bond to Hunter: And he continued solvent until 1840. These parties, by signing the bond, give the best evidence of his solvency and trustworthiness. Hunter was married in 1825; and within a fortnight afterwards, being at the house of his wife's guardian and step father, this guardian, without any prompting, tells Hunter what
124 *he proposes to do to pay him his wife's fortune; and the arrangement for the transfer of this bond is made, as detailed in the evidence.

Then what is the attitude of these plaintiffs? They say we vouch for Thompson's trustworthiness; and they bind themselves for his acts; and now they seek to subject a man for their relief, who they admit has been guilty of no fraud, of no breach of trust; and who never vouched in any way for the acts of Thompson. But it is said the circumstances should have excited his suspicions, and have prompted him to enquire into the true ownership of the bond. We say he did only what every gentleman would have done; even the most learned in the law either of this bar or bench. And the question is whether a man who thus acted is to be deprived of this subject as having been guilty of fraud: For that is the only ground on which he can be deprived of it.

It is said that Thompson was so in possession of this subject; that he had neither the legal or equitable title to it. It is true that the executor of George Pottie the elder owned the bond at one time; but he had parted with it. A creditor of the testator could not have followed it in the purchaser's hands. Whale v. Booth, 26 Eng. C. L. R. 210. The executor had a right to transfer the bond and did transfer it in a regular and proper manner. He could not be expected to assign it so as to bind himself; and he could not bind the estate. The delivery to Sandridge passed the property in the bond to him; and the delivery by his administrator passed it to Thompson. 1 Lomax on Ex'ors 276; Ewing v. Ewing, 2 Leigh 337. If the bond had gotten out of his possession, detinue or trover might have been maintained by Thompson for its recovery. It is true a transferee could not sue upon it in his own name. And so in England now neither an assignee nor transferee could sue in his own name.
125 But *a court of law recognizes his right and will not permit that right to be defeated by the assignor. Welch v. Mandeville, 1 Wheat. R. 233; Heath v. Hall, 4 Taunt. R. 326; Kimball v. Huntington, 10 Wend. R. 675; Wilson v. Coupland, 7 Eng. C. L. R. 77.

It is argued that this bond was appropriated as the property of the ward George Pottie, and in that character went into the hands of Thompson. To the extent that the ward had a right to this bond the guardian had absolute control over it. Field v. Schieffelin, 7 John. Ch. R. 150. The doctrine of this case was recognized by this court in the case of The Bank of Va. v. Craig, 6 Leigh 399. In this last case the subject was bank stock; and if the power of control and sale exists as to bank stock, it must exist as to state stock or debt; and if so as to state debts, it must equally exist as to the debts of individuals.

In this case there is no question that whatever passed by the transfer of the bond to Sandridge passed to Thompson by the transfer to him. He might have sued upon it in the name of the executor of George Pottie the elder, and could not have been hindered by that executor from prosecuting that suit and collecting the money. And as we have seen that the guardian has the right to dispose of the ward's estate for value, the assignee for value is entitled to the protection extended to a purchaser for value without notice; and Jones v. Poules, 10 Cond. Eng. Ch. R. 310, applies.

The facts in this case abundantly show that Hunter could have no reasonable ground of suspicion that Thompson was dealing improperly with a trust subject. And as in The Bank of Va. v. Craig, there was no mala fides and no motive of gain. He had Thompson and his sureties, who were of undoubted credit, bound to him. He might lose, but could not possibly gain. If he had not taken the bond he would have proceeded at once against them. But
126 these plaintiffs *having delayed to question the transfer of the bond to him for much more than ten years, the sureties are now protected by the statute of limitations.

As these plaintiffs insist upon the enforcement of the strict rules of law, they must be bound by it. In Mead v. Ld. Orrery, 3 Atk. R. 235, the lord chancellor

said he did not know any instance where an assignment has been made by an executor for a valuable consideration, that it had been set aside unless some fraud appeared between the executor and assignee. And to this effect was Ewer v. Corbet, 2 P. Wms. 148. The plaintiffs must therefore prove the fraud. The bill is indeed sweeping in its charges. But they are all denied in the answer and disproved by the evidence.

It is said that this bond was in fact the property of George Pottie, junior. Be it so. But do they show collusion between Hunter and the guardian? That is disproved. Did he have either means of knowing or reason to suspect that it was the property of George Pottie, junior? The only fact from which this suspicion could have arisen is, that Thompson transferred this bond to pay his own debt. The argument is that Hunter must know what the bond and deed showed; and then he must know all that he might have known. This argument has been tried before; Williams v. Nixon, 17 Eng. Ch. R. 473; and was repudiated by Lord Langdale. The bond shows that it was given to the executor of George Pottie the elder. The deed shows no more. And the proofs are that Thompson received in bonds from this executor fifteen thousand dollars in right of his wife, and six thousand dollars as guardian of Mrs. Hunter. It is said Hunter does not say he supposed the bond to have been taken as a part of his wife's fortune. He says he supposed it was Thompson's; and as he must have known that Thompson had received from the executor twenty-one thousand dollars in bonds, he might
127 therefore *well believe, when he saw Thompson treating this bond as his own, that it was his own in fact.

The whole question then is, whether the transfer of the bond by Thompson in payment of a debt of his own is of itself sufficient to subject Hunter, however innocent he may be of any participation or knowledge or suspicion of Thompson's breach of trust. On this question I refer the court to Rayner v. Pearsal, 3 John. Ch. R. 378; Petrie v. Clark, 11 Serg. & Rawle 377; Nugent v. Gifford, 1 Atk. R. 463; Bedford v. Woodham, 4 Ves. R. 40, in note. These cases show that the transfer of a bond in payment of a private debt of an executor or guardian is not fraud, unless it is shown affirmatively that the transferee knew it was a trust subject. And this doctrine has been recognized by this court in the case of Dodson v. Simpson, 2 Rand. 294. And the explanation of those cases in which such an assignment has been held invalid, is that such assignment was only important when it showed a knowledge on the part of the assignee, that the character in which the assignor held it did not authorize him to use it as he did. Scott v. Tyler, referred to in McLeod v. Drummond, 14 Ves. R. 353. In the cases in this court where such an assignment was held invalid, there were circumstances which brought home knowledge to the assignee, or should have satisfied him that the trustee was dealing improperly with a trust subject: and in all of them he knew positively that the subject dealt with was a trust subject. Such were the cases of Graff v. Castleman, 5 Rand. 195; Broadus v. Rosson, 3 Leigh 12; Fisher v. Bassett, 9 Leigh 119; and Pinckard v. Woods, 8 Gratt. 140. In this last important particular these cases are broadly distinguishable from the case now before the court.

It is asked whether if Thompson, instead of transferring this bond, had transferred Pottie's slaves, or made a deed of trust upon them to secure his debt to
128 *Hunter, it would have been valid. Such a conveyance from its nature would convey the slaves of some person; if his own it would be decisive to show he could not convey the slaves of his ward; if on the face of the deed he conveyed the slaves of Pottie, this would bring home knowledge to the grantee and would not be allowed. A guardian, believing it to be for the interest of his ward, sells his slave. Under such a sale the purchaser for value takes the legal title, and will be protected. Then suppose Thompson had sold Pottie's slaves as his own to Hunter: Hunter would have taken the legal title; and if he bought them without knowledge that they were the slaves of Pottie, he would hold them against all claimants. It may be difficult to sell and buy such a subject without knowledge; and if there were circumstances which should have led the purchaser to suspect a misapplication of the ward's estate, of course the title would fail. But this is the only distinction between slaves and bonds.

Then here are two innocent parties, one of which must suffer; and the question is, which of them? We say the sureties. They undertake for the guardian and vouch for his trustworthiness. They are the security which the law has provided for the ward. The guardian having power to transfer the bond; and this having been done so as to pass the title, it then becomes a question of equity; and every man's moral sense will say that it is not unconscientious for Hunter to retain this money.

The principle of substitution cannot be extended further in such cases as this, than where there has been fraud on the part of the purchaser. Sureties may be expected to exercise some supervision over the guardian, and may be relieved by applying for further security. But the assignee is without redress. At all events, there is nothing in this case to induce the court to extend the principle of the cases
129 already decided; and *the laches of the plaintiffs should forbid relief. Portlock v. Gardner, 23 Eng. Ch. R. 594; McLeod v. Drummond, 14 Ves. R. 353, 17 Id. 153; Ray v. Ray, Coop. Ch. R. 264. It is not material in this aspect of the case whether the lapse of time or the statute is pleaded or relied on in the answer. There are different rules on this subject in different classes of cases. In some it must be

relied on; in others this is unnecessary; and these cases of implied trust belong to the latter class. It is argued that Pottie might have maintained an action for money had and received, if it had not been barred by the statute. If Pottie was barred by the statute, how can these sureties be substituted to his rights? If he is barred, they are barred. And if such an action could have been maintained, then that is conclusive against this bill.

SAMUELS, J. Nathaniel Thompson, as guardian, was in possession of Winston's bond, as part of the estate of George Pottie his ward. Whatever interest the ward had therein was subject to the guardian's control; he might have received the money due thereon if voluntarily paid; he might have sued for it in a common law court in the name of John Thompson, executor of George Pottie the obligee, but for his own use as guardian; and the nominal plaintiff would have had no power to prevent the prosecution of the suit, or to prevent the collection of the money for the use of the guardian; or he might have sold and transferred the bond. But in any exercise of his authority the guardian must, at his peril, have acted with proper discretion, in reference to the ward's interest. It is for the benefit of the ward himself that the guardian should, if possible, be regarded as having the legal title to the ward's personal estate. That title may be essential to the protection of the property itself; the guardian is responsible for its safe
130 keeping, and it *would be unjust to deny him the means which may be the only effective means of discharging his duty. In Garland v. Richeson, 4 Rand. 206, it was held that an assignee of a bond acquired no legal title to the debt; and it follows a fortiori that a mere transferee acquires no legal title. Yet we have seen that the transferee may in a common law court recover the money; and that the supposed holder of the legal title cannot interfere to prevent such collection. It is obvious that John Thompson, the holder of the legal title, and the obligee in this bond, could not recover the money due if the holder sued for his own use, or the bond itself in detinue, or its value in trover. It is difficult to understand a legal title thus shorn of the rights usually conferred thereby. It is enough, however, for the purposes of this case, to decide that Nathaniel Thompson the guardian was invested with such title as was the subject of sale; whether legal or equitable; or partly legal and partly equitable; or equitable in form, but legal in effect.

The interest of the ward requires that his guardian should have the power to sell his personal estate. Under certain circumstances, readily conceived, an immediate expenditure of money might be indispensable to protect the estate against loss; the guardian might find that the best mode, or only mode, of raising the money, was by a sale of bonds belonging to the ward's estate. Under such circumstances, a delay for collection might be injurious or even ruinous to the ward's fortune. It is no valid objection to allowing the guardian this power, to say, it may be abused: Every power, however necessary, may be abused. The objection would apply to every case in which one party is entrusted with the property of another. This power is justified by the reason and fitness of things, and is moreover well sustained by authority.

In Truss v. Old, 6 Rand. 556, Judge
131 Green, speaking *of guardians, says, "their authority is coupled with a legal interest, and is not barely in office." "It is an interest like that of a trustee for the separate use of a married woman, an executor in trust, or an administrator of an estate of which there is no surplus after the payment of debts; all of whom have a legal without any beneficial interest." Judge Green expresses the further opinion that the guardian has power to sell his ward's personal estate.

In Bank of Virginia v. Craig, 6 Leigh 399, 426, Judge Carr says, "The power and legal title of Fox (the guardian) to dispose of the stock (the ward's property), is proved by many cases." And in this opinion Judges Brockenbrough and Cabell concurred. In the same case, p. 428, Judge Tucker says, "It is conceded also, that, as a general rule, a guardian has power to dispose of the personal estate of his ward; and though personally responsible for so doing, the vendee to whom he sells is not responsible if he has dealt fairly and justly, and without notice of any fraudulent intent."

In Field v. Schieffelin, 7 John. Ch. R. 150, Chancellor Kent considers the question of a guardian's power to sell his ward's personal estate; and comes to a like conclusion with our own courts.

Holding then on the general question, that the guardian in this case had the power to sell, the question recurs, did he exercise his power within the limits and for the purposes prescribed by law? The answer is plain, that he did not; he used his power for his own individual benefit, by appropriating the ward's property to pay his (the guardian's) own debt. This was a breach of trust, a fraud upon his ward. So far as the case of the appellees depends upon the conduct of Thompson the guardian, it is fully made out.

A recovery, however, cannot be had
132 against Hunter, *without showing his liability: The mere fraud of the guardian is not sufficient of itself, under all circumstances, to invalidate his transactions with innocent parties. In this case Hunter took the bond on Winston of Thompson, who concealed the right in which he held it, and passed it off as his own property: It was taken at par, in part payment of a debt, which was amply secured. Hunter was not induced, by any hope of profit or fear of loss, to take the transfer. His only purpose was to receive a debt justly due, by a mode of payment convenient

to both parties. In the argument of the case here it was properly conceded by the appellees' counsel, that Hunter did not in fact know that Thompson's title was imperfect; but he contended that as the bond on its face was payable to John Thompson, executor of George Pottie, it showed that at one time other parties were interested, and might still be interested therein; that if Hunter had used proper caution he would have enquired further; and upon such enquiry would have ascertained the right in which Thompson held the bond: That he must be held liable as he would be if he had procured the information which he might and ought to have obtained. In reply, it may be said that the money due Hunter's wife, and which he was about to receive at the hands of her late guardian, was a legacy given by the will of George Pottie, of which John Thompson was the executor. That Nathaniel Thompson, the guardian, in right of his wife, a legatee in Pottie's will, had received fifteen thousand dollars of the executor on account of that legacy: that these two legacies had been paid wholly or in part by the transfer of paper belonging to Pottie's estate. Under these circumstances, when the guardian proposed to transfer as his own a bond payable to Pottie's executor, Hunter might well suppose he had full right to do so: any
133 man of ordinary prudence *would have been satisfied that all was right. Hunter must therefore be acquitted of any constructive fraud, as well as of actual fraud.

George Pottie the ward, and Hunter the purchaser for value without notice, are the victims of Thompson's fraud; and in settling the question of loss between them the court should proceed upon the general principles of equity. If the equities be equal, the court will not interfere; or if one party have the advantage at law, equity will not interfere to deprive him of that advantage, unless in favor of a party having superior equity. Trying the case by these tests, we must hold that Hunter's equity is equal to that of George Pottie; a purchaser for value, without notice of fraud in his vendor, stands upon as high ground in equity, as any creditor, or cestui que trust.

Again. Thompson's transfer to Hunter gave him the power at law to receive the money if paid by Winston, and to give him a valid discharge; or to sue for it in a common law court in the name of Thompson the executor, for his own use, and to recover it without the possibility of interference by the nominal plaintiff or any other party. Although Hunter may not have had the legal title to the debt, yet such were his rights and powers at law. In the exercise of his right he has received the money, and thereby acquitted Winston of all further liability therefor. To hold him responsible to George Pottie, we must deprive him of the advantage given by his legal power and right. To arrive at such a result, we must overturn all the decisions of the courts upon cases of the same or like kind.

In Broadus v. Rosson, 3 Leigh 12, the parties dealing with the guardian were fully aware of his breach of trust, and actively co-operated with him therein for their own benefit; and for that reason were held liable.

134 *In Dodson v. Simpson, 2 Rand. 294, the party dealing with an executor was apprised of his breach of trust, and aided him therein; and was therefore held accountable.

In Fisher v. Bassett, 9 Leigh 119, a party knowingly dealing with an administrator, who in breach of his trust was applying the assets of the estate to his own use, was held responsible.

In Pinckard v. Woods, 8 Gratt. 140, a party, for his own profit, knowingly dealing with an executor in such way as to enable the executor to commit a devastavit, was made liable.

In each of these cases, and in many if not all others of like kind, the party dealing with the fiduciary has been held responsible, because and only because of his co-operation in the fraud. In our case this ruling fact does not exist. I am therefore of opinion that George Pottie had no right to draw Hunter in question for his dealing with Thompson the guardian.

If George Pottie had no right to recover of Hunter, the appellees, claiming to be substituted to his rights, can have no right to recover. If, however, the case were otherwise between Pottie and Hunter, till, under the circumstances of this case, the appellees should not be permitted to subject the appellant to any liability. The intestates of the appellees respectively bound themselves by bond as securities for Thompson as guardian; and in 1825, when this bond was in full force, their principal committed the breach of its condition which is complained of in this suit. At that time the securities might have guarded themselves against all loss by using a small degree of diligence. They owed it to themselves and to the ward, to see that the guardian, who obtained possession of the ward's estate by means of their credit, faithfully performed his trust; they should at least have taken care, when the ward attained full age, that the guardian
135 *fulfilled his duty. Instead of this, however, they allowed the guardian to retain the estate for fifteen years without question. At the end of that time, and eight years after the ward had become of full age, the guardian becoming insolvent, the securities are compelled to pay the amount of the ward's estate in the guardian's hands. From 1825, when the bond was transferred to Hunter, to 1840, Thompson was perfectly solvent, and could have paid his ward if required to do so; yet the securities, confiding in Thompson's integrity and resources for indemnity, permitted him to retain the money without question. The loss resulting from the misplaced confidence of the securities should be borne by their estates; they trusted first, and they trusted last; they are asking relief against a party

who is at least as innocent as themselves, and whose conscience is in nowise touched by their claim: he should not be held liable.

I am of opinion to reverse the decree and dismiss the bill, with costs of both courts to the appellant.

DANIEL and LEE, Js., concurred in the opinion of Samuels, J.

MONCURE, J., concurred in reversing the decree and dismissing the bill upon the last grounds stated in the opinion of Samuels, J., without dissenting from the first grounds stated by him.

ALLEN, J., concurred on the last grounds stated by Samuels, J.

Decree reversed and bill dismissed.

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136 *French v. Bankhead.

April Term, 1854, Richmond.

1. **Riparian Lands—Boundary—Case at Bar.**—By statute, the general assembly of Virginia agree to cede to the United States the soil and jurisdiction to the extent of two hundred and fifty acres at Old Point Comfort, for the purpose of fortification and other objects of national defence, and authorize the governor to convey the land by deed to the United States. The land is a peninsula bounded by Chesapeake bay, Hampton roads and Mill creek. The governor directs a survey of the land to enable him to convey, and directs the surveyor to lay off the two hundred and fifty acres as the United States shall elect to take it. The surveyor returns a plat and report, in which he says that the United States elected to take by high-water mark, and he gives the courses and distances, commencing at a point at high-water mark, and running nearly coincident with high-water mark except where it runs from Mill creek to the bay, and in that course it stops on the bay at high-water mark. The deed takes the description by course and distance from the report, but does not refer to it in terms. HELD:

   1. **Same—Same—Evidence of—Case at Bar.***—That in determining the boundaries of the land ceded to the United States, the act, the report and the deed are all to be looked to in order to ascertain what boundary was intended.

   2. **Same—Same—Same—Same.**—Looking to the act, the report and the deed, the intention was to convey by the high-water mark, and that is the boundary of the conveyance.

   3. **Same—Conveyance to High-Water Mark—What Passes.**†—That under the act, 1 Rev. Code of 1891, ch. 87, p. 341, the conveyance by the high-water mark boundary passed to the United States the soil and jurisdiction to the low-water mark.

2. **Public Lands—Appropriation by Individuals.**‡—The land at Old Point Comfort had been appropriated by legislative enactments, to the public use; and it was not therefore subject to be appropriated by individuals as waste and unappropriated land, by entry and patent.

This was an action of ejectment in the Circuit court of Elizabeth City, county, brought by James S. French against General James Bankhead, the officer of the

*Riparian Lands—Boundary—Evidence of.—See principal case cited in Carter v. Railway Co., 26 W. Va. 655.

†Riparian Lands—Conveyance to High-Water Mark—What Passes.—In Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. Rep. 557, it was said: "In Virginia, by virtue of statutes beginning in 1679, the owner of land bounded by tide waters has the title to ordinary low-water mark, and the right to build wharves, provided they do not obstruct navigation. 5 Op. Attys. Gen. 412, 435-440; *French v. Bankhead, 11 Gratt. 136, 159-161;* Hardy v. McCullough, 23 Gratt. 251, 262; Norfolk City v. Cooke, 27 Gratt. 430, 434, 435; Garrison v. Hall, 75 Va. 150."

See the principal case also cited and approved in McDonald v. Whitehurst, 47 Fed. Rep. 758.

In Ravenswood v. Flemings, 22 W. Va. 67, the court, after quoting at some length from the principal case, said that the statute in question applied only to "the Atlantic Ocean, Chesapeake Bay and the rivers and creeks thereof," and that it was intended to have no application whatever to the Ohio river. The court in this case held that riparian owners of land on the banks of the Ohio river had no title as against the state of West Virginia beyond ordinary high-water mark, that the title to the bed, the shores and banks to ordinary high-water mark was in the state of West Virginia for the use of the public.

And in Barre v. Flemings, 29 W. Va. 319, 1 S. E. Rep. 735, it was said: "In *French v. Bankhead, 11 Gratt. 136*, it was held 'that under the act (1 Rev. Code 1819, ch. 87, p. 341) the conveyance by the high-water mark boundary passed to the United States the soil and jurisdiction to the low-water mark.' This case, however, being controlled by a statute relating only to the tide-water section of Virginia, cannot be treated as authority on the question now before us. This is also true as to the case of Norfolk City v. Cooke, 27 Gratt. 430." In this case it was held that the riparian proprietors of land bounded on the Ohio river, in the state of West Virginia, own the fee in the lands to low-water mark, subject to the easement of the public in that portion lying between high and low-water mark, with the right of the state to control the same, for the purposes of navigation and commerce, without compensation to the owner. See pp. 738, 739, where the court reviews the case of Ravenswood v. Flemings, and states what it considers the real decision in that case.

In Norfolk City v. Cooke, 27 Gratt. 433, the principal case was cited along with Home v. Richards, 4 Call 441-449; Mead v. Haynes, 3 Rand. 33-36, and certain sections of the Code, as authority for the proposition that the bed of a navigable river is incapable of being granted to an individual.

See the principal case also cited in Garrison v. Hall, 75 Va. 161; Groner v. Foster, 94 Va. 657, 27 S. E. Rep. 493; Waverly, etc., Co. v. White, 97 Va. 179, 33 S. E. Rep. 534. In this last case, the court said: "*French v. Bankhead* is a very strong case. It was decided in 1854 by a unanimous court, and has never been questioned to this day."

‡Lands—Liable to Location.—In Garrison v. Hall, 75 Va. 154, it was said: "As a general rule it was held in French v. Bankhead, 11 Gratt. 136-168, that 'all lands which had never before been patented are to be considered as waste and unappropriated, and are liable to location by any holder of a treasury warrant.'"

United States in common at Fortress
137 Monroe. The *facts are stated in the opinion of the court delivered by Judge Allen.

It will be seen from the statement of facts that French's patent purports to commence at the southeast corner of Mill creek bridge, the beginning corner in the deed from the governor of the state of Virginia, conveying to the United States two hundred and fifty acres of land at Old Point Comfort; and it calls for the lines of the United States land from that point along Mill creek: And the great question in the cause was, whether the United States held by a water boundary which gave them the land to low water mark, or whether their title was limited to the lines of their deed which were intended to be and were substantially conformable to high water mark? Another question was, whether the land covered by the patent of French was waste and unappropriated land subject to entry and survey?

After all the evidence had been introduced, the plaintiff asked the court to instruct the jury:

1st. That if the jury shall be of opinion that the deed executed by David Campbell, the governor of Virginia, to the United States, was actually executed by him, as the conveyance in writing which he was authorized by the act of March 1st, 1821, to make, of soil and jurisdiction to the United States, and was accepted and received by the United States as the conveyance in writing which was to be executed by the governor of Virginia to convey soil and jurisdiction under the said act of March 1st, 1821, then said deed is to be taken as the agreement of the commonwealth of Virginia and of the United States, of what should be the boundary of the territory so ceded; and in ascertaining what the boundaries are as so ceded, and in ascertaining what the boundaries are as made by the said deed, the jury are to construe the said deed by the words and terms to be
138 found in the *deed itself; and cannot vary, alter or add to the words of the deed by any extrinsic evidence, or evidence without the deed itself.

2d. If in construing the deed and applying it to the land, the subject of the grant, by the descriptive calls of the deed, any ambiguity should arise, then the jury must be governed in solving such ambiguity, by the descriptive calls used in the deed itself; but evidence derived from matters without the deed, may be used to explain the terms or words used in the deed, and apply them to identify the land granted; but cannot be used to change the terms or words of the deed, or make an agreement for a boundary not called for in the descriptive words of the deed.

3d. That in law a distinction exists between a boundary by courses and distances and a high water mark. When courses and distances alone are called for in the deed, and high water mark is not called for therein, then as a matter of legal construction the deed is an agreement to make the boundary a boundary by courses and distances, and not by high water mark.

These instructions the court refuse to give. There was a fourth instruction asked for by the plaintiff, which was given; and which it is not necessary to state.

The defendant asked for five instructions to the jury, the first of which the court refused to give: The other four were as follows:

2d. If the jury believe from the evidence that the agent of the United States at the time of the survey in 1838, elected the line of high water as the boundary of the lands of the United States on the Chesapeake bay, Hampton roads and Mill creek, and that the lines run by the surveyor were designed to correspond generally with said high water line, and did so correspond generally; and that the courses and distances mentioned in the deed from the governor of
139 *Virginia to the United States, are the courses and distances of the lines so run, then the boundary of said lands is a water boundary, notwithstanding the courses and distances called for in said deed. And the water boundary so established extends, by virtue of the act of assembly then and still in force, to the ordinary low water mark; and consequently the plaintiff acquired no title by his patent, to any lands described therein which lie above the ordinary low water mark.

3d. The lands covered by Mill creek at ordinary high tide were not patentable at the time the plaintiff obtained the patent under which he claims in this case; and the said patent therefor gave the plaintiff no title to such lands; and as to all such lands embraced by the said patent, the jury should find for the defendant.

4th. The lands between high water mark and ordinary low water mark, were not subject to entry at the time of the entry on which the plaintiff's patent is founded. And if the jury believe from the evidence that any part of the lands covered by the said patent lie between ordinary high water mark and ordinary low water mark, then as to such lands the plaintiff acquired no title by said patent; and the jury as to such lands should find for the defendant.

5th. The lands at the Old Point Comfort, extending to low water mark on the Chesapeake bay, Hampton roads and Mill creek, were not liable to entry as waste and unappropriated lands at the date of the entry on which the plaintiff's patent is founded. And if the jury believe from the evidence that the lands covered by the said patent, or any part thereof, are part of the lands known as Old Point Comfort, then the plaintiff acquired by his patent no title to such lands or any part thereof, above the ordinary low water mark; and as to all such lands embraced by said patent, the jury should find for the defendant.
140 *These instructions the court gave.

And to the opinion of the court refusing to give the three first instructions asked for by him, and giving the four last instructions asked for by the defendant, the

plaintiff excepted. There was a verdict and judgment for the defendant; whereupon French applied to this court for a supersedeas, which was allowed.

The case was most elaborately argued by Baxter and Cox, for the appellant, and Joynes and Lyons, for the appellee.

For the appellant, it was insisted:

1st. That the deed was the exponent of the agreement between the state of Virginia and the United States; and could alone be looked to, to ascertain what were the boundaries of the land thereby conveyed. As mediately or immediately bearing on this question, they referred to The People v. Godfrey, 17 John. R. 225; United States v. Bevans, 3 Wheat. R. 336; Broom's Maxims 266, 267, 50 Law Libr.; Dwarris on Statutes 22, 9 Law Libr.; 1 Philips' Evi. 538, 548; Miller v. Travers, 21 Eng. C. L. R. 288; McIver v. Walker, 9 Cranch's R. 173; S. C. 4 Wheat. R. 444; Chinoweth v. Haskell, 3 Peters' R. 92; Howard v. Ingersoll, 13 How. S. C. R. 381; Decatur v. Paulding, 14 Peters' R. 497; Foster v. Neilson, 2 Peters' R. 253.

2d. That the deed not calling for a water boundary, but a boundary by courses and distances, the United States is not entitled to claim by a water boundary, though in fact the courses and distances called for in the deed are coincident with the high water mark. On this question they referred to Rutherforth's Inst. 463-4-5; Schutz on Aquatic Rights 117, 122, 125, 24 Law Libr.; Hargrave's Law Tracts, 12, 14, 15, 25, 26, 31, 32, 35, 36; The King v. Ld. Yar-
141 borough, 3 *Barn. & Cress. 91, 10 Eng. C. L. R. 19; Livingston's Argument in the Battuer Case; Houston v. Moore, 5 Wheat. R. 49; Commonwealth v. Clary, 8 Mass. R. 72; Harris v. Elliott, 10 Peters' R. 25.

3d. That if the deed was to be construed as conveying by the high water mark line, it did not operate to convey to low water mark. That whatever may be the general law of Virginia on the question, yet that the United States could only take, and did take, under a special act of the general assembly limiting the amount to be taken to two hundred and fifty acres; and that all the proceedings by the executive showed that it was only intended to convey this quantity of land; and that it was intended to limit the conveyance by the boundaries stated in the deed.

4th. That it was not competent for the United States, which showed neither title to, nor occupancy which could ripen into title by adversary possession of the lands in controversy, to question the validity of the appellant's title. Code of 1849, p. 428; Warwick v. Norvell, 1 Rob. R. 308; Jackson v. Johnson, 1 Bibb's R. 58; Sutton v. Menser, 6 B. Monr. R. 433; Polk's lessee v. Wendell, 9 Cranch's R. 87; S. C. 5 Wheat. R. 293; Norvell v. Camm, 6 Munf. 233.

That by the law of Virginia all waste and unappropriated lands are subject to entry and grant by patent. And that such are all lands which have not been patented. Whittington v. Christian, 2 Rand. 353, 369, 371; McClung v. Hughes, 5 Rand. 453, 478-9, 488; Code of 1849, ch. 112, § 37, 38; Sess. Acts of 1850-51, p. 33, ch. 41, § 10.

And they referred to the various acts passed by the legislature from the year 1679 to the present time, in relation to the land at Old Point Comfort; and insisted that they were not excluded from the body of waste and unappropriated lands, which were subject to entry and grant.

142 *For the appellee, it was insisted:

1st. That the deed was not to be taken alone to ascertain what was to pass to the United States; but that the act which authorized it, and the report of the surveyor which was made by the directions of the executive of Virginia, and upon which the deed was founded, were all necessary steps in conferring title upon the United States; and were to be looked to, to ascertain what passed by the deed. And they referred to Handly v. Anthony, 5 Wheat. R. 374; Martin v. Waddell, 16 Peters' R. 367, 411; Howard v. Ingersoll, 13 How. S. C. R. 381, 412; Garner's Case, 3 Gratt. 655, as showing that this was a contract between independent states, and to be construed upon principles of international law. To show the principles upon which the contract should be construed, they referred to Vattell, book 2, ch. 3, § 152; Foster v. Neilson, 2 Peters' R. 253; Vattell, book 2, ch. 17, § 244; Wright v. Cartwright, 1 Burr. R. 285; Noy's Maxims 48, 50; Garner's Case, 3 Gratt. 655.

2d. That the deed was intended to convey, and did convey, by a water boundary, which by the law of Virginia carried the grant to low water mark: And they referred to the facts to show this. On this point they cited Handly v. Anthony, 5 Wheat. R. 367, 374; Howard v. Ingersoll, 13 How. S. C. R. 381, Curtis' opinion; Lesseur v. Price, 12 How. S. C. R. 59; Bruce v. Taylor, 2 J. J. Marsh. R. 160; Rix v. Johnson, 5 New Hamp. R. 520; Angel on Water Courses, § 29, 30, 53; 3 Kent's Com. 427-8-9; Starr v. Childs, 20 Wend. R. 149; Dunlap v. Stetson, 4 Mason's R. 349; Mayhew v. Norton, 17 Pick. R. 357; Reid v. Lankford, 3 J. J. Marsh. R. 420; Carroway v. Witherington, Taylor's North Car. R. 273; Newsom v. Pryor, 7 Wheat. R. 7; 1 Rev. Code of 1819, ch. 87, p. 341.

3d. That the land embraced in the patent of the appellant lying between high
143 and low water mark, *was not subject to entry and patent as waste and unappropriated land. And they examined the various acts of assembly to show that the land between high and low water mark was not patentable; and that the land at Old Point Comfort was embraced in what are spoken of in the acts of assembly as public lands, as distinguished from waste and unappropriated lands. And they insisted that though it was true that a mere trespasser or intruder would not be allowed to question the validity of his adversary's title, yet that principle did not apply to a party in possession bona fide claiming title. And they referred to Whittington v. Christian, 2

Rand. 353; Warwick v. Norvell, 1 Rob. R. 308; Tichanal v. Roe, 2 Rob. R. 288; Polk's lessee v. Wendell, 9 Cranch's R. 87; Miller v. Kerr, 7 Wheat. R. 1; Poole v. Fleeger, 11 Peters' R. 185, 210; New Orleans v. United States, 10 Peters' R. 662, 717, 731.

ALLEN, P., delivered the opinion of the court:

By the terms of the federal constitution, the United States are bound to protect each state against invasion, and no state is authorized to keep troops in time of peace without the consent of congress. The duty of providing for the common defence being thus imposed upon the United States, and the erection and maintenance of fortifications being necessary and proper to perform this duty, the constitution confers upon congress the power to exercise jurisdiction over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, &c. &c. Having thus in a great measure surrendered the power of providing for her own protection against invasion, and her cost being exposed to aggression, the state of Virginia was called upon to cede to the United States

places proper for the erection of forts,
144 so that the United States *might do
that for the people of the state which she could not do herself.

On the 1st of March 1821, Sess. Acts, p. 102, an act was passed, entitled "an act ceding to the United States the lands on Old Point Comfort, and the shoal called Rip Raps." The preamble of the act recites, "that whereas it is shown to the present general assembly, that the government of the United States is solicitous that certain lands at Old Point Comfort, and at the shoal called the Rip Raps, should be, with the right of property and entire jurisdiction thereon, vested in the said United States for the purpose of fortification, and other objects of national defence." And it is then enacted, "That it shall be lawful and proper for the governor, by conveyance, to transfer, assign and make over unto the United States the right of property and title as well as all the jurisdiction which this commonwealth possesses over the lands and shoal at Old Point Comfort and the Rip Raps: provided the cession at Old Point Comfort shall not exceed two hundred and fifty acres, and the cession of the shoal at the Rip Raps shall not exceed fifteen acres: and provided also, that the cession shall not be construed or taken so as to prevent the officers of this state from executing any process, or discharging any other legal functions within the jurisdiction or territory herein directed to be ceded, nor to prevent, abolish or restrain the right and privilege of fishery hitherto enjoyed and used by the citizens of this commonwealth within the limits aforesaid: and provided further, that nothing in the deed of conveyance required by the first section of this act shall authorize the discontinuance of the present road to the fort, or in any manner prevent the pilots from erecting such marks and beacons as may be deemed necessary:" With a further provision, "that

should the United States at any time
145 abandon the said *lands and shoal,
or appropriate them to any other purposes than those indicated in the preamble to the said act, that then and in that case the same shall revert to and revest in the commonwealth."

The evidence in the record shows that surveys of part of the lands at Old Point Comfort had been made under the direction of the officers of the United States in 1816 or 1817, and in 1818. And the law, by the proviso preventing the discontinuance of the present road to the fort, seems to recognize the then existence of a fort, which must have been in possession of the United States. After the passage of the act, the United States proceeded to erect an extensive fortification on the point, but no conveyance was made by the governor, nor so far as the record discloses, any measures taken to designate the precise boundaries of the land embraced by the cession, until the year 1838.

On the 16th of May 1838, a communication from the acting secretary of war was addressed to the governor, requesting him to make a conveyance in the manner prescribed by the provisions of said act, and for the maximum quantity of land contemplated to be ceded; and referring the governor to Captain W. A. Eliason, the bearer of the communication, as being authorized by the department of war to mark out to the surveyors or other persons acting for the commonwealth of Virginia, the boundaries which for purposes of defence should be given to said cession.

This officer, on the 22nd of May 1838, addressed a letter to the governor, in which he remarked, that the limits of the ceded territory at Old Point Comfort should include all the neck of land on which Fort Monroe is situated, from the bridge to the main land; and extend as far in the northerly direction as the plat of two hundred and fifty acres will allow; that he could not say

how far this would be, until he knew
146 *how the law requires the survey lines
to be run. That he believed the lines ought to include only the dry land at ordinary high water, and that the coterminus land from high to low water line pertained as a matter of course to the plotted land. He furthermore stated that the high tide limits could be readily defined; that it would not do to leave the land between high and low water in debate; it must attach to the land above tide; and it is to be desired that it does so without increasing the number of acres in the plot.

These papers were referred to the attorney general of the state, by the governor, for his opinion and advice. That officer, after stating that it did not appear from the papers before him, whether the commonwealth owned two hundred and fifty acres of land above high water, advised that all the commonwealth's lands should

be layed off by metes and bounds; that then the surveyor should lay off, under the direction of the United States or its officers, so much of the public land, not exceeding two hundred and fifty acres, at Old Point, as they may require. That this land should be laid off by metes and bounds, the courses as well and durably marked as they could be. That the officers of the United States should elect whether they would have the whole survey laid off above high water mark; or whether they would include in its boundaries the lands below high water mark. On the return of the survey a conveyance should be made by metes and bounds. That the grant to the United States must be limited by the metes and bounds laid off, and they could not take either property or jurisdiction over the adjacent lands below high water mark as pertinent to the plotted land.

On the 1st of June 1838, the governor, as appears from an extract from the executive journal, directed the surveyor of Elizabeth City county, under the direction of Captain Eliason, and in accordance
147 with the *opinion of the attorney general, to make surveys of the lands and shoals mentioned in the act of cession, and return a fair plat and certificate of surveys to the executive. A survey was accordingly made by the surveyor, and a report returned to the governor. In the report so returned, the surveyor informs the governor that in pursuance of his directions, he applied to Captain Eliason to elect whether he would have the land ceded to the United States surveyed to high or low water mark; that he elected the former for the boundary, but requested the surveyor to spread the low water line, the mud flats and grass marsh on Mill creek, on the plat, which he had done. He further states that he began the survey at Old Point Comfort, at the southeast foot of the Mill creek bridge; and then pursued the ordinary high water mark on the Mill creek shore, until he came to the mouth of a small gut running up into the grass marsh. From thence he pursued a line between the high land and the marsh until he came to a piece of land taken up by Shelton. He then pursued this line, by a line of marked pines to the Chesapeake bay shore, at the ordinary high water; and then pursued the high water mark along the bay shore to the beginning; including an area of two hundred and seventy-eight acres one rood and ten poles, including also two acres ceded to the United States for a light-house. He then laid off two hundred and fifty-two acres for the United States, including the two acres for the light-house: and the report then gives the metes and bounds of the two hundred and fifty-two acres. The plat returned with the report shows that the land at the place described was a peninsula bounded on one side by the Chesapeake bay, on another by Hampton roads and Mill creek, having a water boundary all around the tract laid off for the United States,
148 except upon four *of the lines called for. Of these, three run parallel with, and on the edge of the high land and grass marsh, which is principally covered at high water, leaving but one line of sixty poles in length, which divides the part so laid off from the adjacent land. The report gives the boundaries, describing the survey as commencing at the southeast foot of Mill creek bridge, the position of which is designated on the plat; thence with the meanders of the creek to the mouth of a small gut running into the marsh overflowed by high tide in the creek. From this point three lines are called for; the first terminating at a dead pine on the line between the highland and the marsh; the second calls for a pine; the third calls merely for course and distance; and the plat returned shows that these three lines run between the high land and the marsh, on the edge of the marsh. From the termination of the last line on the edge of the marsh, the survey calls for a line of sixty poles to the bay shore at high water mark; and thence by various courses and distances to the beginning.

In the report, the surveyor says he pursued the high water mark along the bay shore to the beginning; and the fact that he did so appears from the plat returned. The meanderings of Mill creek are by fourteen courses, with distances on each course, amounting to five hundred and forty-nine poles; the three lines along the edge of the marsh call for one hundred and six poles; the line across the neck of land from the marsh to the bay shore at high water mark, is sixty poles in length; the meanderings of the bay and roads are by sixteen courses, with distances on each, amounting to 864.20 poles, making the whole distance around the two hundred and fifty-two acres one thousand five hundred and seventy-nine poles, of which one thousand five hundred and nineteen poles appear
149 from *the report and plat to have been a water boundary. The artificial boundaries made or marked and called for are the bridge, the dead pine and the pine.

The natural objects named are the mouth of the small gut running into the marsh, and the bay shore at high water mark, at the termination of the line across the neck between the marsh and bay.

The deed made by the governor bears no date, but an extract from the executive journal, dated the 29th of November 1838, recites that the governor executed a deed of cession to the United States for the lands at Old Point Comfort, and the shoal called the Rip Raps, pursuant to an act of the general assembly of March 1821; and the same was transmitted to Captain Eliason of the United States corps of engineers, to be recorded in the court of Elizabeth City county. On the 12th of December 1838, the deed was admitted to record in the proper county. It recites the act of March 1st, 1821, with its various provisions, and conveys the land at Old Point and at the Rip Raps, subject to the provisions of the law. It describes the tract of two hundred

and fifty acres at Old Point Comfort, as adjacent to and in part surrounding a tract of two acres theretofore granted by the commonwealth to the United States, and blends both into one tract of two hundred and fifty-two acres, the boundaries of which are described as beginning at the south-east foot of Mill creek bridge; and then gives the courses and distances, and other objects called for, as the same are set forth in the report of the surveyor returned to the executive. The deed in that portion of it describing the two hundred and fifty acres at Old Point Comfort, does not in so many words, refer to the report of the surveyor, or plat returned by him. But in reference to the fifteen acres of shoal at the Rip Raps including the site of Fort Calhoun, the deed contains this clause,' 'The boundaries of the said tract of fifteen acres
150 to *be ascertained by reference to a plat and description made by C. Hubbard, acting surveyor of Elizabeth City county, dated the 17th July 1838, hereto annexed, marked A.''

Such is the title under which the defendant, an officer of the United States, relies to protect him and the United States in the possession of the property, to recover which this suit has been instituted.

The lessor of the plaintiff claims under a patent as for waste and unappropriated land, founded on a land office treasury warrant, and entered and surveyed under the laws of the state providing for the appropriation of the waste and unappropriated land of the state, and the grant thereof in private property to individuals; jurisdiction over the territory still remaining in the commonwealth.

The grant to the lessor of the plaintiff is dated the 28th of August 1851, and is for 264.72 acres, described as lying in Elizabeth City county, including the mud flats between low water mark on Mill creek, the Shelton patent and the tract of two hundred and fifty-two acres of land conveyed to the United States by the commonwealth of Virginia by deed, recorded in the clerk's office of Elizabeth City county on the 12th day of December 1838, beginning at the east foot of Mill creek bridge, and thence along the United States land to the mouth of a small gut running into the marsh, the boundary of the United States land, and the Shelton patent.

The patent being long posterior in date to the act of cession and deed to the United States, and calling to be bounded by the lands of the United States, it becomes necessary to enquire into the extent of the grant to the United States. To ascertain this, it is important to determine whether the literal calls of the deed should alone be regarded as defining and designating the limits, by a fixed, unvarying, mathe-
151 matical line, where nothing *else is called for, or whether it is competent to look at the law, and the plat and report of the surveyor, made out in pursuance of the instructions of the governor, to enable him to execute a conveyance, to ascertain what was the land actually intended to be ceded and conveyed. There is no ambiguity apparent on the face of the deed. If any arises, it results from a comparison of the calls of the deed with the subject granted. By that comparison it appeared that the subject of the grant was a sandy peninsula, varying by the action and operation of the tides and winds. Most of the calls in the deed were for magnetic lines and distances not terminating upon any monuments or marked boundaries. A survey made out according to the mathematical lines and calls of the deed would, with the exception of three objects, the bridge and the two pines, represent no visible objects but the land and the water. The magnetic lines and courses would be found to pursue the general outline of high water mark; the high water line not being a right line from station to station, as it would follow the slight indentations in the shore, so that a right line from station to station would at some places cross the mouths of small inlets and vary above and below the precise high water line. If by such comparison of the calls with the subject granted a doubt should arise as to whether a fixed line or a water boundary was intended, a survey made by the direction of the grantor, and which was his guide in making the conveyance, would be proper evidence to explain the ambiguity thus produced. Bowling v. Helm, 1 Bibb's R. 88; Burton on Real Prop. 142.

In this case the deed of the governor refers to a plat and description made by C. Hubbard, acting surveyor of Elizabeth City county, dated the 17th of July 1838. The report of the surveyor in evidence in this cause bears date the 30th of July 1838.

But it is obvious that the report was
152 accompanied by a plat; for he *speaks of having made the surveys directed, and of having spread the low water line, and mud flats and grass marsh on the plat. The survey necessarily preceded the report, and accordingly, the certificate on the plat from the executive department shows that the survey was made on the 17th of July 1838. But the plat gives no courses and distances; they are found in the report, from which they were copied into the deed. There is no doubt, therefore, that the report as well as the plat were before the governor when he executed the conveyance, and were intended to be referred to in the deed; and whether actually referred to or not, yet as they were made out by the officer selected by the governor to enable him to execute the grant, it would be evidence as against the grantor as to the subject intended to be granted.

But this was not a transaction between individuals, but between state and state; and is to be considered and construed with reference to the character of the parties, and the object each had in view.

The act of assembly contemplated a survey; for as the cession was not to exceed two hundred and fifty acres, a survey was essential to ascertain the quantity of land,

and to define the line of demarcation between the land ceded and the adjacent land, to show to what extent the jurisdiction ceded to the United States would reach. The title of the United States depends on the act of cession, and all that was done by the proper officers to carry it into execution. Until the quantity and locality of the land was ascertained, the title was incomplete; and as congress can only exercise exclusive jurisdiction in such places within a state, when purchased by the consent of the legislature of the state, the deed of the governor would not of itself confer title and jurisdiction. The act, the survey made necessary by it, and the deed were all necessary to consummate the title; and all
153 must be *regarded, though occurring at different times, as parts of one entire compact, resulting in the transfer of a portion of the soil and jurisdiction of the state to the United States for specified purposes, and subject to certain reservations contained in the act of cession. If we look at the deed as applied to the subject of the grant, and explained by the plat and report, we see that the descriptive part commences at the water mark, on one side of the tract, calls for fourteen magnetic courses and measured distances to the mouth of an inlet running up into the grass marsh. A reference to the plat shows that the three next lines pursued the line between the high land and the marsh, the ground of which is stated on the face of the plat to be below the water at high tide, although the grass is generally above; so that all the lines from the beginning along Mill creek and the marsh correspond in general with the high water mark. The line across the neck commences at the edge of the marsh and terminates within the sixty poles called for, on the bay shore at high water mark; and from thence the lines run round by magnetic courses and distances to the beginning. The tract of two hundred and fifty acres is described as adjacent to, and in part surrounding the tract of two acres heretofore granted by the commonwealth to the United States, and the boundaries comprehend and include the two hundred and fifty acres and the two acres in one tract of two hundred and fifty-two acres. The act of January 2d, 1798, ceded so much of the public lands at Old Point Comfort, not exceeding two acres, as should be sufficient to erect a light-house. The boundaries of these two acres do not appear; but from the position of the light-house, as indicated on the plat, it may be fairly presumed it was or was supposed to be in part a water boundary; and therefore the two hundred and fifty acres are described as adjacent to and in part
154 surrounds *said tract of two acres, evidently referring to the exterior or land boundary so surrounded by the two hundred and fifty acres, and indicating that by blending the two tracts into one by a common boundary, there would be a continuous water boundary round the whole to the beginning.

The surveyor in his report furthermore certifies to the executive that the agent of the United States elected the high water mark for his boundary; but requested him to spread the low water line and the mud flats and grass marsh on Mill creek on the plat; which he accordingly did. The plat on its face indicates, by black and dotted lines, both the high and low water line; and the surveyor certifies that he began at the southeast foot of the bridge, and then pursued the ordinary high water mark on the Mill creek shore to the mouth of the small gut running up into the grass marsh; and from thence he pursued the line between the high land and marsh to Shelton's land; from thence by a line of marked pines to Chesapeake bay shore at the ordinary high water mark; and then he pursued the high water mark along the bay shore to the beginning; including an area of two hundred and seventy-eight acres one rood and ten poles, including the two acres ceded for a light-house. He then laid off the two hundred and fifty-two acres for the United States, including the two acres: And the plat shows that this was done by running a line across the neck from the grass marsh to the bay shore, cutting off 26.16 acres from the whole area of two hundred and seventy-eight acres one rood and ten poles between the line of the United States and the land of Shelton; but no other change was made in the plat in respect to the boundaries of the two hundred and fifty-two acres.

From these facts it appears that no monuments or marks were fixed to indicate
155 the curves and indentations *of the creek or bay, and from the character of the land in question it would have been difficult if not impracticable to have fixed a boundary at high or low water mark as at the time of the cession or survey, which would point out at all future times the gradual and imperceptible encroachment of the waters at one place, and the gradual accretion of the land at another. The surveyor did not attempt to fix the boundaries by such artificial monuments. The running by the magnetic course and measured distance was essential to compute the quantity of land within the area. But the lines on Mill creek and the bay were open lines; and left open because the natural boundaries of the creek and bay, the waters of which he represented on the plat at high and low water mark, obviated the necessity of any artificial marks.

In the case of Starr v. Child, 20 Wend. R. 149, the deed called for a line to the Genesee river, and thence northwardly along the shore of said river to Buffalo street. The court held that there was no necessity for looking to extrinsic circumstances, for that the deed on its face invested the grantee with a fee simple to the bank of the river. The judge, in giving the opinion, remarks, "That the cases show, what it is difficult for the human mind to resist, that the parties never mean to leave a narrow strip between the land and the river, merely

because some stake or tree, or even all the stakes or trees of the line, stand at a slight distance from the river. The expression of an intent to run the line along the stream, reaches a distinct natural monument which overcomes the others." So in the case of McCullock's lessee v. Aten, 2 Ohio R. 425, it is said, "That the fact that the marked corner called for stands four rods from the water, does not create any ambiguity in the terms, down the creek with the several meanders thereof. They import the water's edge at low water, which
156 is a decided natural *boundary, and must control a call for corner trees on the bank."

In the case under consideration, no embarrassment arises from a conflict between artificial monuments and the line of high water mark, for no such monuments are called for. In Bruce v. Taylor, 2 J. J. Marsh. R. 160, the grant called to begin on the Ohio river, thence by courses and distances, without any marked lines or corners, to the mouth of a creek emptying into the Ohio, thence by courses and distances, without any marked lines or corners, to a stake; and thence for courses and distances round to the beginning. The court held, that as three of the calls were on the river, as there were no intermediate marked lines and corners, and as the general description was "to lie on the Ohio river,"—"these facts alone would not leave room for any other legal construction of the patent, than that the Ohio river with its sinuosities is one of the lines of its boundaries." In the same case they say that even if the lines and courses had been marked, and the patent had called for the river as a line of the boundary, this call would control the marked line: It being a universal rule that the actual boundary, whether natural or artificial, shall control repugnant course and distance. In that case, the original survey was exhibited, and showed the river as a boundary: "This, the court said, was decisive. The survey was the foundation of the patent: It is of record, and in that respect equal in dignity to the patent. It does not contradict but only renders fixed and certain some of the calls of the patent; and that it may be used to aid in supplying omissions, or in correcting mistakes in the patent."

All these remarks apply directly to the case under consideration. The lands at Old Point Comfort having been held as public lands, their position in relation to the surrounding waters was well un-
157 derstood by the *grantor. The law ceded the right of property and title as well as the jurisdiction "over the lands at Old Point Comfort." It contemplated a survey, as that was necessary to ascertain the quantity; and as a conveyance was to be made by the governor, such survey would be naturally returned to the executive department, as his guide in describing the subject to be conveyed. The deed conveys the land at Old Point Comfort; it calls to begin on the water at the southeast foot of Mill creek bridge, and then for certain magnetic courses and measured distances to the mouth of a gut running up into the marsh; in all, fourteen calls without any artificial marks or corners or monuments. And on the other side it commences on the bay shore at high water mark, and thence calls for courses and distances sixteen lines, to the beginning; without a mark or corner on any of the lines. And in addition to this, the report of the surveyor sets forth that the officer of the United States elected the high water as his boundary; that he pursued the ordinary high water mark on the Mill creek shore; that he commenced at the ordinary high water mark on the Chesapeake bay shore, and pursued the high water mark along the bay shore to the beginning; and the plat returned exhibits the line of high water as the boundary of the land surveyed. All the circumstances which led the court to hold in the case of Bruce v. Taylor, that the legal construction of the patent, that the Ohio river with its sinuosities was one of the lines of the boundary, stand out with prominence in this case. To the same effect is the case of Rix v. Johnson, 5 N. Hamp. R. 520; and Angel on Water Courses, § 29, 30, where the authorities are reviewed. See also, Mayhew v. Norton, 17 Pick. R. 357.

I think, that having regard to the law, the report and survey and deed of the governor, the legal construction of the whole transaction was to make the
158 *boundary of the land ceded to and conveyed to the United States a boundary by the line of ordinary high water mark, except on the line extending from the margin of the grass marsh across the neck to the bay shore at high water mark.

The attorney general, when consulted by the executive, advised that the officers of the United States should elect whether they would have the whole survey laid off above high water, or whether they would include within its boundaries the lands below high water mark, and on the return of the survey the conveyance should be made by metes and bounds; being of opinion that the grant to the United States must be limited to the metes and bounds laid off, and that they could not take jurisdiction over the adjacent lands below high water mark, as pertinent to the plotted land. And the governor directed surveys to be made in accordance with this opinion. From whence it is inferred that by his deed the governor intended to convey, by a certain fixed, invariable line, which, though it coincided generally with the high water at the time it was surveyed, must at all times be run according to the magnetic courses and measured distances, without reference to its actual correspondence with the line of ordinary high water mark, or the gradual and imperceptible changes caused by the encroachments of the bay or the accretions to the soil. The attorney general was correct in saying that the grant to the United States must be limited by the metes and

bounds laid off, if by laid off is meant the bounds called for. But he cannot be supposed to have meant that such bounds must be artificial, made by the hand of man. Artificial monuments are liable to destruction; and surveyors seldom agree as to a precise mathematical line. The variation of the magnetic needle, uneven surfaces, and other causes, render it difficult, if not impracticable, to arrive at perfect accuracy; and hence natural or artificial
159 *boundaries always control the mere magnetic calls. We are not, therefore, to suppose that a great natural boundary, as a river, or the shore of the bay, could not be adopted in a grant by a state to the United States. Convenience would seem to point out the latter as the most proper boundaries between two governments, where jurisdiction as well as property is regulated by the limits between them. "In a case of doubt," say the Supreme court in Handly's lessee v. Anthony, 5 Wheat. R. 374, quoting Vattel, "every country lying upon a river is presumed to have no other limits but the river; because nothing is more natural than to take a river for a boundary, when a state is established on its borders; and where there is a doubt, that is always to be presumed which is most natural and proper." When, therefore, the officers of the United States elected the ordinary high water mark as the boundary, and the surveyor adopted it, and the deed conveyed to it, the land passes to the boundary so called for and adopted.

The attorney general and the agent of the United States differed as to the effect of such conveyance: The latter supposing it would give title and jurisdiction down to low water; the former, that title and jurisdiction would be fixed by the magnetic calls for courses and measured distances, no matter how the water line varied. And the question now is, what was the legal effect of the act done? And that is a matter for judicial decision. If it were a mere grant of property, the jurisdiction remaining in the state, the right of the grantee would extend to ordinary low water mark, under the express provisions of the act of assembly, 1 Rev. Code of 1819, ch. 87, p. 341; which declares that hereafter the limits or bounds of the several tracts of land lying on the Atlantic ocean, the Chesapeake bay and the rivers and creeks thereof, within this commonwealth, shall extend to ordinary low water mark; and the
160 owners of said lands shall *have, possess and enjoy exclusive rights and privileges to and along the shores thereof, down to ordinary low water mark. By the common law, the title of the proprietor extends to the ordinary high water mark.

The shore, or that space alternately covered and left dry by the rise and fall of the tide, being the space between high and low water marks, was in the king for the use of the public. The law of Virginia, so far at least as relates to the soil, has, as appears by the act referred to, been altered; and the limits or boundaries of the land extend over and include the shore, by operation of law. This was the law in force when the cession of the land at Old Point Comfort was made, and the law being general, and speaking at every instant of time, it operated upon the grant to the United States, and extended the bounds down to ordinary low water mark; thereby annexing the right to the soil between ordinary high and low water mark as incident or appurtenant to the adjacent land.

The provisions of the act of 1819 have been incorporated in the Code, ch. 62, § 1, 2; and constituted the law when the patent of the plaintiff's lessor was issued. But it is insisted that as the act ceded jurisdiction as well as property and title, that sovereignty cannot be yielded or granted by implication; and therefore, whatever might be the rule in the case of a private individual, there could have been no intention on the part of the state to apply such a rule to a grant of this description.

The state, in granting, where nothing appears to the contrary, must be presumed to have granted with reference to the general law. If she had granted to an individual, the right of property would have extended to the low water mark. If the United States, with the consent of the legislature, had purchased from the individual, the whole proprietary right would have passed; and if jurisdiction had been yielded, it must have been coincident
161 with the right of property. *The whole right of property was transferred by the act of cession and the conveyance under it; and the jurisdiction followed. If an island had been the subject of the cession, the grant of soil and property would as here, extend to low water mark, and jurisdiction would follow. This cession might be assimilated to a grant of an island; it was known to be a peninsula nearly surrounded with water. A line across the narrow neck and the surrounding waters, furnishing the best and most convenient boundary for property as well as jurisdiction; and there being nothing in the terms of the grant to limit the bounds as to property, all the incidents of such a property attach to it, including the right to the gradual accretions, which being imperceptible in their progress, may in the course of years increase the area beyond the quantity originally conveyed.

The legal effect of the deed, therefore, was to transfer to the United States the land to low water mark, with all the incidents of property so situated, and jurisdiction coincident with it, unless it should appear that in executing the transfer the governor has transcended the power conferred upon him by the law under which he was acting.

In giving an interpretation to such an act, the character of the parties to it, the purposes of the cession, and the situation and nature of the thing granted must all be looked to, and such construction given as will, if possible, carry out, and not defeat, the intention which led to the grant.

The parties were two governments, both equally interested in the accomplishment of the object in view, the erection and maintenance of the proposed fortifications. The purpose of the parties in making and receiving the cession is set forth in the preamble of the act. It recites that it was shown to the general assembly that the government of the United States was solicitous that certain land at Old
162 *Point Comfort and the shoal called the Rip Raps, should, with the right of property and entire jurisdiction thereon, be vested in the United States for the purpose of fortification and other objects of national defence. In proceeding to execute a grant having these objects in view, the grant must be interpreted as intending to pass with the subject all the means necessary to carry into effect the design of the parties to it, and to preserve and maintain the fortifications in a state of efficiency thereafter. The legislature must have contemplated such a cession as would give the government of the United States free access to and the command of either shore. To erect the fortifications, docks and wharves would be necessary; to render them efficient, a free communication between the two fortifications and unimpeded command of the shore and channel between the forts, was essential. To maintain discipline in a large garrison, and a proper police for the preservation of health and the safety of the public property, jurisdiction thereon in the words of the preamble, was required. All these objects would be defeated if the state had retained the right to the soil between high and low water mark, and to the alluvion that might be formed. She could not have intended to retain it for any purpose of her own. It was for her interest that the fortifications should be so erected as to accomplish the object intended, the protection of her own citizens from foreign invasion. Nor could she have contemplated a sale of it as private property, upon which houses might be erected masking the guns of the fort, and a conflict of jurisdiction brought about subversive of the police and discipline of the fort and garrison. Such a construction would defeat the declared purpose of the law. The nature of the property was well known to the state. It had been dedicated to the purposes of defence in the early history of the
163 colony, and had continued *as public property up to the time of the cession; a sandy peninsula projecting into the bay and connected with the main land by a narrow isthmus, the water furnishing a proper boundary and the most palpable and convenient line of demarcation between the two jurisdictions. These considerations necessarily imply that it was the intention of Virginia to cede and of the United States to receive so much of the land at Old Point Comfort, including all the land on the point from shore to shore, as would be comprised in an area containing the prescribed quantity of two hundred and fifty acres. This implication is supported by the language of the act: The governor is authorized to make over, by proper conveyance to the United States, the right of property and title, as well as all the jurisdiction the commonwealth possesses over the lands and shoal at Old Point Comfort and the Rip Raps; provided the cession at Old Point Comfort shall not exceed two hundred and fifty acres: Thus implying that the lands at Old Point Comfort meant all the lands from the point upwards, so far as the government of the United States should require, so as not to include more than the prescribed quantity in the area cut off from the adjacent lands. The provisos that the cession should not prevent, abolish or restrain the right and privilege of fishery hitherto enjoyed and used by the citizens of this commonwealth within the limits aforesaid, or in any manner to prevent the pilots from erecting such marks and beacons as may be deemed necessary, show that it was not supposed any right in the soil in the part of the land at Old Point Comfort cut off from the adjacent land would be retained by the commonwealth. But contemplating a grant of property and jurisdiction to the water boundary, the rights and privileges theretofore enjoyed and used were to be preserved unimpaired.

In giving a construction to the
164 legal effect of the *conveyance, so as to carry both property and jurisdiction to ordinary low water mark, the intention of each party, the state in making and the United States in accepting the cession, is promoted; whilst any other construction would defeat the object of the parties and render the grant illusory. The legal construction of the effect of the conveyance extending the bounds of the grant from the line of ordinary high to ordinary low water mark, conforms to the general law and carries into effect the intention of the parties to the cession. By these transactions the state has parted with property and jurisdiction subject to the reservations and provisos contained in the act of cession, within the limits of the grant to the United States, on the Chesapeake bay, Hampton roads and Mill creek down to ordinary low water mark. As an incident to such grant, the alluvion formed by the imperceptible increase of the land belongs to the United States; and therefore, there remained nothing within the limits aforesaid which could be made the subject of grant by the commonwealth to another.

If, as it has been argued, the land was to be laid off all around its area by metes and bounds, by which was to be understood fixed, unvarying lines, ascertained by permanent monuments or mathematical calls, it would have been the same, whether the ordinary low water or the ordinary high water mark had been elected as the boundary by the agents of the United States. The lines corresponding with either at the time of election, would have been fixed and unvarying. It would have been difficult if not impracticable to have designated such

a line by artificial monuments, if low water had been selected, as every tide would have submerged them; and mathematical lines, the most uncertain of boundaries, must have been relied on. The low water mark on a sandy peninsula like this, will necessarily vary through the operation
165 *of the winds and tides. As accretions, imperceptible in their progress, were formed, state jurisdiction would attach, varying as the alluvion increased, disappearing as it diminished. Even if there was more doubt as to the legal construction of the deed, the inconvenience of the construction contended for would be a strong objection to adopting it. In the language of the Supreme court in Handly's lessee v. Anthony, 5 Wheat. R. 374, "In questions which concern boundaries of states, (and here jurisdiction is involved,) when great natural boundaries are established in general terms, with a view to public convenience and the avoidance of controversy, the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals."

Questions were raised at the trial, and have been argued here, as to the validity of the patent to the lessor of the plaintiff. It is insisted by the defendant that the lands at Old Point Comfort could not be entered, surveyed and patented as waste and unappropriated lands of the commonwealth; that the acts of the government had separated these lands from the mass of waste and unappropriated lands, and reserved them for the public use as a site for fortifications and defence; and that this is a matter which any defendant sued by another claiming under a patent under the general law, may set up to defeat this action.

It seems that as early as 1629-30, 6 Charles 1st, an act was passed by the assembly for the "raysing of a ffort at Poynt Comfort;" and certain persons named "by full consent of the whole assembly, were chosen to view the place,"—"and agree for the building, raysing and finishing of the same." A fort seems to have been erected, and various regulations in regard to the fort are found in the 1st vol. of Hening's Statutes, p. 166, 175, 215, 218.
166 In 1639, an act was passed *levying taxes to pay the captain of the fort and ten guards, and to build a new fort at Point Comfort. In 1671, Governor Sir William Berkeley, in reply to enquiries submitted by the lords commissioners of foreign plantations, reported that there were five forts in the colony, two in James river, but that they had neither skill nor ability to make or maintain them, &c. 2 Hen. Stat. 512.

It does not appear from anything in the Statutes at Large whether a fort was continued at the point during the residue of our colonial history or not. By the revolution the commonwealth succeeded to the rights and dominion of the crown. In May 1779 the act passed for establishing a land office and ascertaining the terms and manner of granting waste and unappropriated lands; subjecting such lands to entry under land office treasury warrants, providing for the making and return of surveys, and for the issuing of patents. But in addition to the waste and unappropriated lands thus made the subject of entry, survey and grant in the mode prescribed, there were certain lands in the eastern part of the state which, by the acts of the agents of the crown or commonwealth, the proprietor of all the waste lands in the commonwealth, had been set apart and appropriated to public purposes. It does not appear that any specific grant or special act passed for such appropriation. They seem to have been dedicated to the public use, by being so used and enjoyed. When referred to in the laws, they are designated as public lands, and a specific mode of disposition was prescribed. Thus the act of May 1784, 2 Rev. Code of 1819, p. 414, directed that all public lands and other public property in or near the city of Richmond, except so much thereof as should be set apart by the executive for the use of the government, should be sold by certain commissioners named in the act. By another act, passed May
167 1784, 2 Rev. Code *415, all the public lands in this commonwealth, except those thereafter mentioned, were directed to be sold by commissioners named in the act. By the 3d section, certain of those lands in and near Williamsburg and in James City were transferred to and vested in the president and professors of William and Mary university forever. By the 4th section, the commissioners were empowered to sell the lands commonly called Gosport, except such part as in their opinion may be necessary for the use of the public. In October 1784, 2 Rev. Code 419, another act passed in relation to the disposition of the public lands called and known by the name of Gosport, and authorizing the commissioners to convey to purchasers thereof an estate in fee simple. In October 1785, 2 Rev. Code 423, an act entitled "an act for the sale of certain public lands," was passed, by which it was enacted "that the public lands in the counties of York and Elizabeth City, except a point of land in the last mentioned county, called Point Comfort, should be vested in certain commissioners by name, who were empowered to sell and convey the same to purchasers."

All these acts were passed after the general land law of May 1779, throwing open the waste and unappropriated lands within the territory of this commonwealth to entry, survey and patent by all adventurers. Yet it is manifest that the legislature did not suppose that lands set apart for public purposes, or the public lands were embraced under the designation of waste and unappropriated lands. Special acts were passed for the sale of these public lands by commissioners, and the title of the state passed not by patent but by a conveyance of the commissioners specially authorized to execute deeds. The act last mentioned shows

that the point of land in Elizabeth City county, called Point Comfort, was so held, not as waste and unappropriated land, liable to entry under a land warrant, but as public land, the title to which had
168 vested in the *commonwealth for special purposes. By the act of January 2d, 1798, 1 Rev. Code 1819, p. 48, the governor was authorized by deed to convey to the United States all interest in and right and title to, as well as all the jurisdiction which the commonwealth possessed over, so much of the public lands not exceeding two acres, situate in Elizabeth City, at a place commonly called Point Comfort, as should be sufficient to erect a light-house. Here again the land is treated as public land belonging to the commonwealth, the title to which was to be transferred by deed. A proviso in this law continued to the citizens of the commonwealth the privilege they then enjoyed of hauling their seines on the shores of said land. And by the act of cession the commonwealth authorized the governor to transfer by deed her right and title as well as the jurisdiction she possessed over the lands and shoal at Old Point Comfort and the Rip Raps. As a general rule, all lands which had never before been patented are to be considered as waste and unappropriated, and are liable to location by any holder of a treasury warrant. But as the crown first and the commonwealth afterwards owned all the public domain, it was competent for either to set apart a portion thereof for specific purposes. The early proceedings of the colonial legislature show that this point of land was so set apart; and from the fact that no attempt appears to have been made to take it up as waste land until recently, it would seem that the public right was universally acknowledged. The laws passed since the act of May 1779, recognize the existence of such public lands, provide for a specific mode of disposition, treat this as a portion of such public lands, and reserve it from sale, and the acts of 1798 and 1821 treat it as the public property of the state, when about to cede portions of it to the United States.

These various acts amount to a complete appropriation to the public use of the
169 lands at Old Point Comfort, *held by the commonwealth, and excepted from the sale of other public lands by the act of 1785, and withdrew them from the mass of waste and unappropriated lands. They were not liable to entry, survey and patent as such; and the patent therefore passed no title whatever. The act of March 31st, 1851, Sess. Acts, p. 33, protecting the magazine at Westham and any stone quarry now worked by the state from grant, cannot be so construed as to subject all other lands owned by the state, and held for specific purposes, to location as waste and unappropriated: It may confer the immunity of public lands upon the property therein mentioned if it was waste and unappropriated before that act. On this ground the plaintiff showed no title; and it was competent for any person to rely upon this defence. It is not like the case of a contest between claimants to a portion of the waste and unappropriated land under conflicting claims. In such controversies, private rights alone come under review; and we give no opinion as to the right of a defendant in ejectment to object to the validity of the plaintiff's patent in such a case. But where the right is vested in the commonwealth for the benefit of the public, as in the case of the public square in the city of Richmond, the navigable waters and the soil under them held by the commonwealth for the common use, and expressly exempted from grant by the Code, ch. 62, § 1, it would be unreasonable and oppressive if the individual could not protect himself from an action of trespass brought by the patentee, until the patent had been repealed or shown to be invalid in some proceeding having that object directly in view.

These observations upon the rights of the parties dispose of all the questions raised by the instructions moved for on either side, and given or refused at the trial.

The first instruction asked for and
170 refused, asserts *the proposition that the deed alone can be regarded to ascertain the rights of the United States. It has been already shown that the title of the United States depends upon the law, the proceedings had in execution of it, and the deed. They were all necessary to complete the cession, and must be looked to in order to find out what was intended to be granted and was in fact granted to the United States: The instruction was therefore properly refused.

The second instruction is rather an abstraction than an instruction bearing on the case, and for this reason properly refused as calculated to mislead the jury. The terms are obscure, but the first clause would seem to imply that where a latent ambiguity arises from a comparison of the calls of the deed with the subject of the grant, no evidence aliunde could be received to explain it. It is in such cases that evidence aliunde must be resorted to; and as has been already remarked, the law, the survey, report and deed must all be regarded in arriving at the intention of the parties, and to ascertain the extent of the cession. That instruction was properly refused.

The third instruction is based upon a state of facts not existing. Courses and distances are not alone called for in the deed. The southeast foot of Mill creek bridge, the mouth of the small gut running into the marsh, the dead pine, the line between the high land and the marsh, the pine, the bay shore at high water mark, are all called for; for this reason the instruction was properly refused, as calculated to mislead, and also because it asks for a legal construction of the effect of the deed, which the law did not warrant.

Nor did the court err in any of the instructions given to the jury at the instance of the defendant. From what has been already said, it appears that the deed,

construed with reference to the law
171 and acts *done in execution of it, gave to the United States a boundary, by operation of law, to the ordinary low water mark; and consequently the lessor of the plaintiff could acquire no title by his patent to any lands described in the deed, which lie above ordinary low water mark.

The third instruction, in regard to the lands covered by the waters of Mill creek at ordinary high tide, is to be taken secundum subjectam materiam. So far as it comes in collision with the defendant's grant, the patent could give no title, and as the grant to the defendant, by extending to ordinary low water on Mill creek embraced all that could be the subject of grant, the patent to the plaintiff's lessor could give no title to such lands.

The fourth instruction is similar, in the principle involved, to the third.

The fifth is equally free from objection, taking it secundum subjectam materiam, which was the lands in controversy as claimed by the defendant. These lands had been granted, and property and jurisdiction parted with. They were, therefore, no longer waste and unappropriated at the date of the entry on which the patent issued to plaintiff's lessor; and upon the further ground, which was probably the meaning of the court, that the lands at Old Point Comfort, extending to low water mark on the Chesapeake bay, Hampton roads and Mill creek, were public lands, and not liable to appropriation by entry, survey and grant, as part of the waste and unappropriated lands of the commonwealth.

We think there is no error in the judgment, and that it should be affirmed.

Judgment affirmed.

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172 *Tapscott v. Cobbs & als.*

April Term, 1854, Richmond.

1. **Ejectment—When Mere Possession Will Support Action—Case at Bar.†**—A party in peaceable possession of land is entered upon and ousted by one not having title to, or authority to enter upon, the land. The party ousted may recover the premises in ejectment upon his possession merely; and his right to recover cannot be resisted by showing that there is or may be an outstanding title in another, but only by showing that the defendant himself either has title or authority to enter under the title.

2. **Same—Death of Ancestor—Presumption as to Possession of Heir.**—Where an ancestor dies in possession of land, the presumption of law is that the heir is in possession after the death of the ancestor; and in the absence of all evidence on the point, the heir may maintain ejectment upon the strength of his possession, against one who has entered upon the land without title, or authority to enter under the title outstanding in another.

This was an action of ejectment in the Circuit court of Buckingham county, brought in February 1846, by the lessee of Elizabeth A. Cobbs and others against William H. Tapscott. Upon the trial the defendant demurred to the evidence. It appears that Thomas Anderson died in 1800, having made a will, by which he appointed several persons his executor, of whom John Harris, Robert Rives and Nathaniel Anderson qualified as such. By his will his executors were authorized to sell his real estate.

At the time of Thomas Anderson's death the land in controversy had been surveyed for him, and in 1802 a patent was issued therefor to Harris, Rives and N. Anderson as executors. Some time between the years 1820 and 1825, the executors sold the land at public auction, when it was knocked off to Robert Rives; though it appears from a contract between Rives and Sarah Lewis, dated in September 1825, that the land had, prior to that date, been sold by the
173 executors to *Mrs. Lewis for three hundred and sixty-seven dollars and fifty cents. This contract was for the sale by Mrs. Lewis to Rives of her dower interest in another tract of land, for which Rives was to pay to the executors of Thomas Anderson the sum of two hundred and seventeen dollars and fifty cents in part of her purchase. In a short time after her purchase she moved upon the land, built upon and improved it, and continued in possession until 1835, when she died. In 1825 the executor Harris was dead, and Nathaniel Anderson died in 1831, leaving Rives surviving him. And it appears that in an account settled by a commissioner in a suit by the devisees and legatees of Thomas Anderson against the executors of Robert Rives, there was an item under date of the 28th of August 1826, charging Rives with the whole amount of the purchase money, in which it is said, "The whole not yet collected, but Robert Rives assumes the liability."

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*For monographic note on Ejectment, see end of case.

†**Ejectment—When Mere Possession Will Support Action.**—By way of exception to the general rule, that in ejectment the plaintiff must recover on the strength of his own title and not upon the weakness of his adversary's, the principal case holds that, a party in peaceable possession of land, ousted by one not having title thereto, or authority to enter upon the land, such party ousted, may recover the premises in ejectment upon his possession merely; and his right to recover cannot be resisted by showing that there is or may be an outstanding title in another, but only by showing that the defendant himself either has title or authority to enter under such title. For the above proposition, the principal case is approved in Olinger v. Shepherd, 12 Gratt. 478; Atkins v. Lewis, 14 Gratt. 40, and *note*; Nelson v. Triplett, 81 Va. 237; Ushers v. Pride, 15 Gratt. 201, and *note*; Carter v. Ramey, 15 Gratt. 347, and *note*; Witten v. St. Clair, 27 W. Va. 771; Miller v. Williams, 15 Gratt. 218, and *note*; Barton v. Gilchrist, 19 W. Va. 228; Postlewaite v. Wise, 17 W. Va. 16; Elliott v. Sutor, 3 W. Va. 42; Low v. Settle, 22 W. Va. 400, 401; Gorman v. Steed, 1 W. Va. 12. See, in accord, Suttle v. R. F. & P. R. R. Co., 76 Va. 234; Barton's Law Practice (2d Ed.) 354; monographic *note* on "Ejectment," at end of case.

There is no evidence that the heirs of Mrs. Lewis were in possession of the land after her death, except as it may be inferred from the fact that she had been living upon the land from the time of her purchase until her death, and that she died upon it.

The proof was that Cobbs took possession of the land about the year 1842, without, so far as appears, any pretense of title. He made an entry with the surveyor of the county in December 1844, with a view to obtain a patent for it.

The court gave a judgment upon the demurrer for the plaintiffs, and Tapscott thereupon applied to this court for a supersedeas, which was allowed.

G. N. Johnson, for the appellant.
Irving, for the appellees.

DANIEL, J. It is no doubt true, as a general rule, that the right of a plain-
174 tiff in ejectment to recover, *rests on the strength of his own title, and is not established by the exhibition of defects in the title of the defendant, and that the defendant may maintain his defense by simply showing that the title is not in the plaintiff, but in some one else. And the rule is usually thus broadly stated by the authorities, without qualification. There are, however, exceptions to the rule as thus announced, as well established as the rule itself. As when the defendant has entered under the title of the plaintiff he cannot set up a title in a third person in contradiction to that under which he entered. Other instances might be cited in which it is equally as well settled that the defendant would be estopped from showing defects in the title of the plaintiff. In such cases, the plaintiff may, and often does recover, not by the exhibition of a title good in itself, but by showing that the relations between himself and the defendant are such that the latter cannot question it. The relation between the parties stands in the place of title; and though the title of the plaintiff is tainted with vices or defects that would prove fatal to his recovery in a controversy with any other defendant in peaceable possession, it is yet all sufficient in a litigation with one who entered into the possession under it, or otherwise stands so related to it that the law will not allow him to plead its defects in his defense.

Whether the case of an intrusion by a stranger without title, on a peaceable possession, is not one to meet the exigencies of which the courts will recognize a still further qualification or explanation of the rule requiring the plaintiff to recover only on the strength of his own title, is a question which, I believe, has not as yet been decided by this court. And it is somewhat remarkable that there are but few cases to be found in the English reporters in which the precise question has been decided or considered by the courts.

The cases of Read & Morpeth v. Er-
175 ington, Croke *Eliz. 321; Bateman v. Allen, Ibid. 437; and Allen v. Rivington, 2 Saund. R. 111, were each decided on special verdicts, in which the facts with respect to the title were stated. In each case it was shown that the plaintiff was in possession, and that the defendant entered without title or authority; and the court held that it was not necessary to decide upon the title of the plaintiff, and gave judgment for him. In the report of Bateman v. Allen, it is said that Williams Sergeant moved, "that for as much as in all the verdict it is not found that the defendant had the primer possession, nor that he entered in the right or by the command of any who had title, but that he entered on the possession of the plaintiff without title, his entry is not lawful;" and so the court held.

And in Read & Morpeth v. Erington, it was insisted that for a portion of the premises the judgment ought to be for the defendant, in as much as it appeared from the verdict that the title to such portion was outstanding in a third party; but the court said it did not matter, as it was shown that the plaintiff had entered, and the defendant had entered on him.

I have seen no case overruling these decisions. It is true that in Haldane v. Harvey, 4 Burr. R. 2484, the general doctrine is announced that the plaintiff must recover on the strength of his own title; and that the "possession gives the defendant a right against every man who cannot show a good title." But in that case the circumstances under which the defendant entered, and the nature of the claim by which he held, do not appear; and the case, therefore, cannot properly be regarded as declaring more than the general rule.

The same remark will apply to other cases that might be cited, in which the general rule is propounded in terms equally broad and comprehensive.

In 2 T. R. 749, we have nothing more
176 than the syllabus of the case of Crisp v. Barber, in which it is said *that a lease of a rectory-house, &c., by a rector, becomes void by 13th Eliz. ch. 20, by his nonresidence for eighty days, and that a stranger may take advantage of it. And that the lessee cannot maintain ejectment against a stranger who enters without any title whatever.

And in Graham v. Peat, 1 East's R. 244, in which, upon a like state of facts, arising under the same statute, the plaintiff brought trespass instead of ejectment, it was held that his possession was sufficient to maintain trespass against a wrong-doer, the chief justice, Lord Kenyon, remarking, that "if ejectment could not have been maintained, it was because that is a fictitious remedy founded upon title."

These two cases as reported may, perhaps, when taken in connection, be fairly regarded as holding that mere possession by the plaintiff will justify the action of trespass against an intruder, but is not sufficient to maintain ejectment. If so, they are in conflict with the earlier decisions before cited. It is to be observed, however, of the first of these cases, that we

have no statement of the grounds on which it was decided; and of the last, that it does not directly present the question whether ejectment could or could not have been maintained. And I do not think it would be just to allow them to outweigh decisions in which the precise question was fairly presented, met and adjudicated: The more especially, as the doctrine of the earlier cases is reasserted by Lord Tenterden in the case of Hughes v. Dyball, 14 Eng. C. L. R. 481. In that case, proof that the plaintiff let the locus in quo to a tenant who held peaceable possession for about a year, was held sufficient evidence of title to maintain ejectment against a party who came in the night and forcibly turned the tenant out of possession. In Archibold's Nisi Prius, vol. 2, p. 395, the case is cited with approbation, and the law stated in accordance with it. In this country
177 *the cases are numerous, and to some extent conflicting, yet I think that the larger number will be found to be in accordance with the earlier English decisions. I have found no case in which the question seems to have been more fully examined or maturely considered than in Sowden, &c. v. McMillan's heirs, 4 Dana's R. 456. The views of the learned judge (Marshall) who delivered the opinion in which the whole court concurred, are rested on the authority of several cases in Kentucky, previously decided, on a series of decisions made by the Supreme court of New York, and on the three British cases of Bateman v. Allen, Allen v. Rivington, and Read & Morpeth v. Erington, before mentioned. "These three cases (he says) establish unquestionably the right of the plaintiff to recover when it appears that he was in possession, and that the defendant entered upon and ousted his possession, without title or authority to enter; and prove that when the possession of the plaintiff and an entry upon it by the defendant are shown, the right of recovery cannot be resisted by showing that there is or may be an outstanding title in another; but only by showing that the defendant himself either has title or authority to enter under the title."

"It is a natural principle of justice, that he who is in possession has the right to maintain it, and if wrongfully expelled, to regain it by entry on the wrong-doer. When titles are acknowledged as separate and distinct from the possession, this right of maintaining and regaining the possession is, of course, subject to the exception that it cannot be exercised against the real owner, in competition with whose title it wholly fails. But surely it is not accordant with the principles of justice, that he who ousts a previous possession, should be permitted to defend his wrongful possession against the claim of restitution merely
178 by *showing that a stranger, and not the previous possessor whom he has ousted, was entitled to the possession. The law protects a peaceable possession against all except him who has the actual right to the possession, and no other can rightfully disturb or intrude upon it. While the peaceable possession continues, it is protected against a claimant in the action of ejectment, by permitting the defendant to show that a third person and not the claimant has the right. But if the claimant, instead of resorting to his action, attempt to gain the possession by entering upon and ousting the existing peaceable possession, he does not thereby acquire a rightful or a peaceable possession. The law does not protect him against the prior possessor. Neither does it indulge any presumption in his favor, nor permit him to gain any advantage by his own wrongful act."

In Adams v. Tiernan, 5 Dana's R. 394, the same doctrine is held; it being there again announced that a peaceable possession wrongfully divested, ought to be restored, and is sufficient to maintain the action; and that no mere outstanding superior right of entry in a stranger, can be used availably as a shield by the trespasser in such action. It has also been repeatedly reaffirmed in later decisions of the Supreme court of New York; and may therefore be regarded as the well settled law of that state and of Kentucky.

To the same effect are the decisions in New Jersey, Connecticut, Vermont and Ohio. Penton's lessee v. Sinnickson, 4 Halst. R. 149; Law v. Wilson, 2 Root's R. 102; Ellithorp v. Dewing, 1 Chipm. R. 141; Warner v. Page, 4 Verm. R. 294; Ludlow's heirs v. McBride, 3 Ohio R. 240; Newnam's lessee v. The City of Cincinnati, 18 Ohio R. 327. In the case of Ellithorp v. Dewing, 1 Chipm. R. 141, the rule is thus stated:

"Actual seizin is sufficient to recover
179 as well as to defend against a *stranger to the title. He who is first seized may recover or defend against any one except him who has a paramount title. If disseized by a stranger, he may maintain an action of ejectment against the disseizor, and in like manner the disseizor may maintain an action against all persons except his disseizee, or some one having a paramount title."

In Delaware, North Carolina, South Carolina, Indiana, and perhaps in other states of the Union, the opposite doctrine has been held.

In this state of the law, untrammeled as we are by any decisions of our own courts, I feel free to adopt that rule which seems to me best calculated to attain the ends of justice. The explanation of the law (as usually announced) given by Judge Marshall in the portions of his opinion which I have cited, seems to me to be founded on just and correct reasoning; and I am disposed to follow those decisions which uphold a peaceable possession for the protection as well of a plaintiff as of a defendant in ejectment, rather than those which invite disorderly scrambles for the possession, and clothe a mere trespasser with the means of maintaining his wrong, by showing defects, however slight, in the title of him

on whose peaceable possession he has intruded without shadow of authority or title.

The authorities in support of the maintenance of ejectment upon the force of a mere prior possession, however, hold it essential that the prior possession must have been removed by the entry or intrusion of the defendant; and that the entry under which the defendant holds the possession must have been a trespass upon the prior possession. Sowden v. McMillan's heirs, 4 Dana's R. 456. And it is also said that constructive possession is not sufficient to maintain trespass to real property; that actual possession is required,
180 *and hence that where the injury is done to an heir or devisee by an abator, before he has entered, he cannot maintain trespass until his re-entry. 2 Tucker's Comm. 191. An apparent difficulty, therefore, in the way of a recovery by the plaintiffs, arises from the absence of positive proof of their possession at the time of the defendant's entry. It is to be observed, however, that there is no proof to the contrary. Mrs. Lewis died in possession of the premises, and there is no proof that they were vacant at the time of the defendant's entry. And in Gilbert's Tenures 37, (in note,) it is stated, as the law, that as the heir has the right to the hereditaments descending, the law presumes that he has the possession also. The presumption may indeed, like all other presumptions, be rebutted: but if the possession be not shown to be in another, the law concludes it to be in the heir.

The presumption is but a fair and reasonable one; and does, I think, arise here; and as the only evidence tending to show that the defendant sets up any pretense of right to the land, is the certificate of the surveyor of Buckingham, of an entry by the defendant, for the same, in his office, in December 1844; and his possession of the land must, according to the evidence, have commenced at least as early as some time in the year 1842; it seems to me that he must be regarded as standing in the attitude of a mere intruder on the possession of the plaintiffs.

Whether we might not in this case presume the whole of the purchase money to be paid, and regard the plaintiffs as having a perfect equitable title to the premises, and in that view as entitled to recover by force of such title; or whether we might not resort to the still further presumption in their favor, of a conveyance of the legal title, are questions which I have not thought it necessary to consider; the
181 view, which *I have already taken of the case, being sufficient, in my opinion, to justify us in affirming the judgment.

ALLEN, MONCURE and SAMUELS, Js., concurred in the opinion of Daniel, J.

LEE, J., dissented.

Judgment affirmed.

EJECTMENT.

I. Nature of the Remedy.
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  B. Adverse Possession.
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IX. Verdict and Judgment.
  A. Requisites and Construction of Verdicts
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  C. The Judgment.
X. Mesne Profits and Improvements.

Cross References:

Adversary Possession, appended to Nowlin v. Reynolds, 25 Gratt. 137.

Unlawful Detainer, appended to Dobson v. Culpepper, 23 Gratt. 352.

I. NATURE OF THE REMEDY.

The action of ejectment is designed to try both the title and right of possession to the land in controversy. The plaintiff cannot recover without showing that he is entitled to the possession; and the defendant without having any right to the possession himself, may generally prevent a recovery by the plaintiff, by showing an outstanding right of possession in another. 4 Min. Inst. (3d Ed.) 444 *et seq.*; Davis v. Mayo, 82 Va. 97; Olinger v. Shepherd, 12 Gratt. 471.

II. FOR WHAT THE ACTION LIES.

Land Subject to Dower.—A plaintiff in an action of ejectment may recover land which is subject to the dower of a widow, if such dower has not been assigned; for, until the dower is assigned she has no right to the possession of any of the land. The plaintiff's recovery in such case, however, is subject to the title of the widow. Chapman v. Armistead, 4 Munf. 382; Moore v. Gilliam, 5 Munf. 346.

Where Right of Easement Is in Defendant.—A recovery of a judgment in ejectment is subject to any easement in the public to use the land as a street or highway; and the right of the public to the easement is not drawn in question or in any way affected by the controversy between the plaintiff and the defendant as to the ownership of the fee. Warwick v. Mayo, 15 Gratt. 528.

Breach of Condition Subsequent in a Deed.—Where land is granted upon a condition subsequent, and there is a breach of the condition, the grantee's estate is determined by this breach, and an action of ejectment can be maintained by the grantor against the grantee for the recovery of the land. Martin v. Ohio R. R. Co., 37 W. Va. 349, 16 S. E. Rep. 589.

But where a stipulation in a deed does not amount to a condition subsequent, the grantor cannot maintain ejectment upon nonperformance of the stipulation. Brown v. Caldwell, 23 W. Va. 187. In Carper v. Cook, 39 W. Va. 346, 19 S. E. Rep. 379, land was sold to the board of education for school purposes, and afterwards the board of education ceased to use the land for such purposes, and sold it to a third person. It was held that ejectment would not lie by the grantor, for the recovery of the land.

Incorporeal Hereditaments.—Under the Virginia statute which provides, that "a party having an interest in or claim to land held adversely by another may sell and convey the same, and his grantee may maintain ejectment for it," an action of ejectment may be maintained for the recovery of an incorporeal hereditament. Code of 1887, § 2418; Carrington v. Goddin, 13 Gratt. 587; Reynolds v. Cook, 83 Va. 817, 3 S. E. Rep. 710.

A grant of a right to quarry and remove limestone for certain specific purposes, has been held to be not a mere license, but an interest in or a right arising out of land, and as such, to constitute under the Va. Code, the foundation for an action of ejectment. Reynolds v. Cook, 83 Va. 817, 3 S. E. Rep. 710.

Land Dedicated to Public or Charitable Uses.—Where land is reserved by a grantor in a deed, and dedicated to a public or charitable use, no title passes by subsequent conveyances of the tract out of which the reservation was made, though these conveyances be without reservation; and if a subsequent grantee takes possession of the land so dedicated by reservation, the dedicator may maintain an action of ejectment for it. Benn v. Hatcher, 81 Va. 25.

Action to Recover the Use of Certain Lands.—According to the terms of a covenant annexed to a deed, the grantor of a tract of land had a right to its use, when it was not required or needed for the purposes of the grantee. In an action of ejectment brought by the grantor to recover the use of the lands which were unemployed by the grantee, it was held, that under the Virginia Code, §§ 2730, 2738, ejectment would not lie to recover the mere use of unemployed or unoccupied lands for an uncertain and indefinite period. King v. Norfolk, etc., Ry. Co., (Va. 1901), 7 Va. Law Reg. 403.

Where the Land Claimed Is Uncertain—Election.—Where there is an intention on the part of the grantor to except from the operation of a deed certain lands which would otherwise be covered by such deed, the land intended to be excepted must be described with certainty in order to withdraw it from the operation of the deed. Unless the land is described with certainty the grantor cannot maintain an action of ejectment for it. Butcher v. Creel, 9 Gratt. 201.

But uncertainty in the reservation of a deed may be cured by the election of the grantor made within a reasonable time; and after such election, the grantor may maintain an action of ejectment for the land which he elects to take. Benn v. Hatcher, 81 Va. 25.

Land Granted with Reservations to Prior Holders.—The commonwealth, by patent granted a tract of land containing 70,202 acres, within specified metes and bounds, by a survey containing a surplus of 42,000 acres, held by titles having legal preference to the warrants and rights, upon which the grant was founded. A reservation was therefore made in favor of those titles in general terms. It was decided that under the terms of this patent, the grantee was entitled to recover in ejectment all the land within the metes and bounds thereof, except such as the defendants might show themselves entitled to, under the said reservation. Hopkins v. Ward, 6 Munf. 38. See also, Nichols v. Covey, 4 Rand. 365; Bryan v. Willard, 21 W. Va. 65.

Land Forfeited for Nonpayment of Taxes.—The heirs of a patentee of land forfeited for nonpayment of taxes and not redeemed, cannot maintain ejectment for it against a party who has entered upon it peaceably, though the tenant has no title to the land. Ushers v. Pride, 15 Gratt. 190.

III. TITLE TO SUPPORT THE ACTION.

A. IN GENERAL.

General Rule.—The general rule in ejectment is that the plaintiff must show a legal title in himself, and a present right of possession under it at the time of the commencement of the action. He must recover on the strength of his own title and not on the weakness of his adversary's. As the party in possession is presumed to be the owner until the contrary is proved, it is necessary for the claimant in ejectment to show in himself a good and sufficient title to the land, to enable him to recover from the defendant. He will not be satisfied by the weakness of the defendant's claim. The possession of the latter gives him the right against every man who cannot establish a title, and if he can answer the case on the part of the claimant by showing the real title to the land to be in another, it will be sufficient for his defence, although he does not pretend that he holds the land with this consent or under the authority of the real owner. Suttle v. Rich., etc., R. Co., 76 Va. 284; Nelson v. Triplett, 81 Va. 236; Russell v. Allmond, 92 Va. 484, 23 S. E. Rep. 895; Holly River Coal Co. v. Howell, 36 W. Va. 489, 15 S. E. Rep. 214; Reusens v. Lawson, 91 Va. 226, 21 S. E. Rep. 347; Atkinson v. Smith (Va.), 24 S. E. Rep. 901; Bradley v. Ewart, 18 W. Va. 598; Witten v. St. Clair, 27 W. Va. 762; Slocum v. Compton, 93 Va. 374, 25 S. E. Rep. 3; Low v. Settle, 32 W. Va. 600, 9 S. E. Rep. 922; McKinney v. Daniel, 90 Va. 704, 19 S. E. Rep. 880; Voight v. Raby, 90 Va. 799, 20 S. E. Rep. 824.

Exceptions to the General Rule.—A person in peaceable possession of land which is entered upon, and who is ousted by a stranger without title, may recover in ejectment upon the strength of his mere previous possession. The reason is, that actual seisin is evidence of title against all the world, except the true owner, and the law will not permit that seisin to be wantonly invaded by one who himself has no title. Lee v. Tapscott, 2 Wash. 276; Suttle v. Richmond, etc., R. Co., 76 Va. 289; Witten v. St. Clair, 27 W. Va. 762.

A tenant let into possession under a lease is estopped to deny the title of his landlord, and this estoppel may be relied on in ejectment. Here again, the estoppel is founded on a permissive possession, and is admitted to be a departure from the strict rule of law, which requires that the plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of his adversary's. Miller v. Williams, 15 Gratt. 213; Alderson v. Miller, 15 Gratt. 279; Suttle v. Rich., etc., R. Co., 76 Va. 289; Witten v. St. Clair, 27 W. Va. 762.

Equitable Title Insufficient.—It is a well-established rule that an equitable title is not sufficient to support an action of ejectment. Ruffners v. Lewis, 7 Leigh 720; Suttle v. Rich., etc., R. Co., 76 Va. 284; Russell v. Allmond, 92 Va. 484, 23 S. E. Rep. 895; Slocum v. Compton, 93 Va. 374, 25 S. E. Rep. 3.

Title from a Common Source.—In ejectment, when both parties claim title from a common grantor, the rule is well settled that it is *prima facie* sufficient for the plaintiff to prove such common derivation of title, without proving that such person had title to the land in controversy. Bolling v. Teel, 76 Va. 487; Laidley v. Cent. Land Co., 30 W. Va. 505, 4 S. E. Rep. 705; Low v. Settle, 32 W. Va. 600, 9 S. E. Rep. 922; Carrell v. Mitchell, 37 W. Va. 130, 16 S. E. Rep. 453.

When Title Must Exist in Plaintiff.—The plaintiff must have title to the land in controversy at the commencement of the suit in order to support an action of ejectment. Suttle v. Rich., etc., R. Co., 76 Va. 284; Russell v. Allmond, 92 Va. 484, 23 S. E. Rep. 895. But it has been held that the conveyance of the land in controversy by the plaintiff pending an action of ejectment does not affect his right of recovery. Beckwith v. Thompson, 18 W. Va. 103.

What Is Sufficient Proof of Title.—A plaintiff in an action of ejectment may show his title by tracing it back to a grant from the commonwealth, or he may show such a state of facts as will warrant the jury in presuming a grant from the commonwealth. Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 S. E. Rep. 232. And he may recover under one or the other of two demises of the same land, from different persons. Hopkins v. Ward, 6 Munf. 38; See v. Greenlee, 6 Munf. 302.

B. ADVERSE POSSESSION.

Actual Possession under Color of Title.—A person having held actual possession of land for more than fifteen years under color of title, and being then ousted by another who is a mere trespasser without pretence of title, may recover in ejectment against such trespasser, though it does not appear that the land has ever been granted by the commonwealth. Middleton v. Johns, 4 Gratt. 129.

See generally, on this subject, monographic *note* on "Adverse Possession" appended to Nowlin v. Reynolds, 25 Gratt. 137.

Temporary Possession Insufficient to Give Title.—It was held in Pasley v. English, 5 Gratt. 141, that a temporary possession of land, by cutting and sawing timber upon it, was not such adversary possession as would give title, and enable a party to sue in ejectment.

In ejectment, where it appeared from the evidence that the land in controversy was vacant when the defendant came to the possession of it peaceably and quietly, without any privity between him and the lessors of the plaintiff or those under whom they claimed, it was held that the plaintiff could not recover, upon the ground of the prior possession of the lessors, without proving twenty years uninterrupted adverse possession on their part or on the part of those under whom they claimed; or showing a right to the possession by the death and seisin, in the manner prescribed by the act of assembly, of some person under whom they claimed. Moody v. McKim, 5 Munf. 374.

Adverse Possession—Interlocks.—A plaintiff in an action of ejectment claiming title by adverse possession, though he recovers other parts of the tract claimed, cannot recover possession of an interlock which has never been in his actual possession and which has been occupied for a long time by the defendant. The plaintiff must show possession of the interlock or some portion of it for the period of the statutory bar before his claim will ripen into title. Breeden v. Haney, 95 Va. 622, 29 S. E. Rep. 328; Garrett v. Ramsey, 26 W. Va. 345; Congrove v. Burdett, 28 W. Va. 220.

Defect in a Deed Cured by Possession under It.—In ejectment, the jury having found twenty years' possession in the plaintiff, an objection to one of his title deeds that it was not indented, and expressed no consideration, was not sufficient to prevent a judgment in his favor. Kinney v. Beverley, 2 H. & M. 318.

Grant Presumed from Possession.—Plaintiffs in an action of ejectment, claimed under possession taken by a party in 1792, and a continuous, open, and notorious possession by persons claiming under the party who originally took possession. The defendants had only been on the land a few years, not even under color of title, and they sought to defeat the action by showing an outstanding title in a third person. It was held, that as against these defendants, a grant would be presumed to the person under whom the plaintiffs claimed. Carter v. Robinett, 33 Gratt. 429.

IV. PARTIES.

A. WHO MAY BRING THE ACTION.

Parties Entitled to Sue in Writ of Right Prior to 1850.—By the Code of Va. of 1849, the action of ejectment was enlarged to embrace all cases which were formerly covered by the writ of right. If a party was entitled to recover in a writ of right before the Code of 1849 went into effect, he is entitled to recover in the present action of ejectment under the provisions of that Code (ch. 135, 149). Mitchell v. Baratta, 17 Gratt. 445.

Cestui Que Trust.—A *cestui que trust*, after the purposes of the deed have been satisfied, may maintain ejectment, upon a demise in his own name, although the legal estate is still in his trustee. Hopkins v. Ward, 6 Munf. 38.

Trustees.—The fact that a *cestui que trust* may maintain ejectment, after the trust is satisfied, does not deprive the trustee holding the legal title, of his right to maintain such an action. Hopkins v. Stephens, 2 Rand. 422.

Purchaser from a Trustee.—A conveyance of the trust property by a trustee, though in violation of the terms of the trust deed, passes an absolute legal title to the property, defeasible only in a court of equity; and the purchaser from the trustee may maintain an action of ejectment against the party in possession. Taylor v. King, 6 Munf. 358; Harris v. Harris, 6 Munf. 367.

Co-tenants Inter Se.—Ejectment may be maintained by one tenant in common against another; but in such case actual ouster must be shown by the plaintiff before he can maintain the action. The *pro forma* confession of ouster which a defendant was compelled to make under the old "consent rule" before being allowed to plead, was not sufficient to satisfy this rule. Taylor v. Hill, 10 Leigh 457.

Co-tenants against Third Persons.—A plaintiff in an action of ejectment cannot recover that to which he has not the legal title, therefore a co-tenant cannot recover the share of another co-tenant. If a partition has been made which is effectual, each joint tenant is still seised of his individual share of the whole, and that will be the extent of his recovery in an action of ejectment. Nye v. Lovitt, 92 Va. 710, 24 S. E. Rep. 345.

Action by a Grantor after Making a Void Grant.—A deed of bargain and sale and release of land, from a person not in possession, to another in the same predicament, the land being at the time held by a

third person with adverse title, passes nothing, and therefore does not divest the bargainor of his right to recover in ejectment. Hopkins v. Ward, 6 Munf. 38.

Assignee of a Mortgagee.—The possession of the mortgagor, continuing by the mortgagee's permission, is to be considered the possession of the mortgagee; so that, where the latter could recover in ejectment, his deed assigning the mortgage will enable the assignee to recover in like manner. A final decree of foreclosure, in favor of the assignee of a mortgage, ought to put to rest any controversy between the parties thereto, on the ground of any supposed defect in the deed of assignment. Chapman v. Armistead, 4 Munf. 382.

Party Claiming under a Decree.—A decree requiring the execution of a conveyance to a party, does not of itself vest title to the land in that party, and he cannot maintain an action of ejectment for it until there has been a deed executed to him. Aldridge v. Giles, 3 H. & M. 136; Nelson v. Triplett, 81 Va. 236.

Reversioner.—Where there was a devise to a person and the heirs of his body, but if he died without heirs of the body, then a limitation over the heirs of the grantor; this was held to be a fee simple defeasible upon the devisee dying without heirs of the body; and when the devisee died without heirs of the body, the heirs of the grantor were allowed to sue for and recover the land in an action of ejectment. Elys v. Wynne, 22 Gratt. 224. See also, Corr v. Porter, 33 Gratt. 278; Hyer v. Shobe, 2 Munf. 200; Burke v. Lee, 76 Va. 386.

Ejectment by the Heir—Presumption.—Where an ancestor dies in possession of land, the presumption of law is that the heir is in possession after the death of the ancestor; and in the absence of all evidence on the point, the heir may maintain ejectment upon the strength of his possession, against one who has entered upon the land without title, or authority to enter under the title outstanding in another. Tapscott v. Cobbs, 11 Gratt. 172.

Heirs of an Executor.—On the death of an executor who had acquired the legal title to land at a trustee's sale, his heirs were the proper parties to bring ejectment, whether the property was purchased by their ancestor in his own right, or for the benefit of his testator's estate. Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 S. E. Rep. 232.

Action by the Person in Possession of the Premises.—Virginia Code, sec. 2726, as amended by Acts 1895–6, p. 514, provides that: "The person actually occupying the premises and any person claiming title thereto or claiming any interest therein adversely to the plaintiff may also at the discretion of the plaintiff be named defendant in the declaration. If there be no person actually occupying the premises adversely to the plaintiff then the action must be against some person exercising ownership thereon, or claiming title thereto, or some interest therein at the commencement of the suit." It was suggested that under this statute the person in possession of the land might sue in ejectment a person claiming title thereto, but this view is overruled, and it is held that ejectment will not lie in such case. Steinman v. Vicars (Va. 1901), 7 Va. Law Reg. 259.

Patentee of Waste Land.—It is not necessary for a patentee of waste and unappropriated land, to make a personal entry thereon, to enable him to maintain ejectment; for the patent *ipso facto* confers seisin. Such seisin may be transferred and continued by deed of bargain and sale, or by devise; but a person, whose seisin is interrupted by the actual entry and adverse possession of another, cannot, while out of possession, convey by bargain and sale such a title as will enable the bargainee to recover in ejectment. Clay v. White, 1 Munf. 162.

Heirs of a Patentee.—The heirs of a patentee of land may recover in ejectment, against a person who had the use and occupation of the land as his own, in the lifetime of the patentee, and so continued until after his death, claiming to hold the same by adverse possession; the duration of such possession having been less than twenty years. See v. Greenlee, 6 Munf. 303; Clay v. White, 1 Munf. 162; Clay v. Ransome, 1 Munf. 454. In such case, if the heirs being out of possession of the land, have executed a deed of bargain and sale of the same to a third person, such bargainee cannot recover in ejectment; but the bargainors may. See v. Greenlee, 6 Munf. 303; Hopkins v. Ward, 6 Munf. 38; Ushers v. Pride, 15 Gratt. 190.

Junior Patentee.—A patent is the consummation of the legal title, and passes to the grantee the legal estate and seisin of the commonwealth. Accordingly, where a patent contained a reservation in favor of a prior claimant who relied only on his entry and survey, and under these circumstances, a patent including the land so claimed and without a reservation, was issued to a junior patentee, the latter acquired the legal title, and his title prevailed in an action of ejectment. Carter v. Hagan, 75 Va. 557.

In an action of ejectment, the plaintiff rested his title on a grant dated in 1796 of 20,000 acres; defendant relied on a patent dated in 1795, for an equal tract adjoining the plaintiff's tract, and a resurvey by order of court in 1835, for the purpose of more certainly establishing the lines of the original grant. The resurvey contained 26,650 acres, the difference being within plaintiff's tract. The lines of the resurvey, however, did not correspond with those of the original grant. It was held that the title to the 6,650 acres was founded on new rights acquired subsequent to the plaintiff's patent, and could not affect the plaintiff's title. Randolph v. Longdale Iron Co., 84 Va. 457, 5 S. E. Rep. 30.

Action by the Commonwealth.—An act directed the public engineer to lay off a road and sites for bridges thereon, and declared that upon the return of the plats thereof to the clerks' offices of the county courts in which the road located lay, the land should be vested in the commonwealth for the use of the road. It was held, that on compliance with the law, the title to the land on which the road was located, and the sites of the bridges were fixed, was vested in the commonwealth; and that the commonwealth or her grantee might maintain ejectment therefor against the former owner. James R. & K. Co. v. Thompson, 3 Gratt. 270.

Parties Claiming under a Statute—Virginia.—A plaintiff in ejectment who does not claim title by grant from the commonwealth, but by certain proceedings had under sec. 41, ch. 108, Code of 1873 as amended by Acts 1879–80, p. 205, must bring himself within the terms of this act. This act provides that the commonwealth's title to land which has been settled continuously for five years, and on which taxes have been paid within five years by the person in possession, shall be relinquished to the person in possession of the land claiming the same under such settlement and payment. Where the evidence showed that the plaintiff's grantor was not in possession when proceedings under such act were begun, it was held

proper for the court to sustain a demurrer to evidence, for want of title in the plaintiff. Slocum v. Compton, 93 Va. 374, 25 S. E. Rep. 3.

Parties Claiming under a Statute—West Virginia.—The act of 1841 vested title to land in those who were in actual possession under claim of title, derived from or under a grant. Parties who claim under this act, must show possession under title or claim derived from or under a grant of the commonwealth. It was held that the parties in an action of ejectment who claimed title from a patent issued on different entries and surveys of different dates, must show within which of the entries or surveys the land lay, which they claimed as actual occupants under this act. Kenna v. Quarrier, 3 W. Va. 210.

Purchaser from Insolvent Debtor.—Where a person taken in execution is discharged as an insolvent debtor, the estate in lands belonging to him at the time of such discharge is, by the statute (1 Rev. Code, 1819, ch. 134, p. 538), so completely vested in the sheriff of the county wherein such lands lie, that an action of ejectment for such lands cannot afterwards be maintained on the demise of the insolvent debtor, while the execution remains unsatisfied. Syrus v. Allison, 2 Rob. 200.

Collateral Agreement No Bar to the Action.—An agreement between a tenant in possession and the plaintiff in an action of ejectment, that if the plaintiff recovers against the tenant's lessor, a lease shall be executed by the plaintiff in the same terms as that subsisting before, does not operate to bar the action by the plaintiff, which joins the tenant as a defendant. Carrington v. Otis, 4 Gratt. 235.

Bill in Equity by a Party Who May Maintain Ejectment.—Where a party has a complete and adequate remedy at law for the recovery of land, equity has no jurisdiction. A bill in equity in such case is called an "ejectment bill" and is demurrable. Stuart v. Coalter, 4 Rand. 74; Lange v. Jones, 5 Leigh 192; Carrington v. Otis, 4 Gratt. 235; Stearns v. Harman, 80 Va. 48; Jones v. Fox, 20 W. Va. 370.

A widow claiming to be the sole heir of her deceased husband has not a right to file a bill in chancery against parties claiming to be heirs of her husband, who are in possession of the property of her deceased husband as his heirs, and obtain from the court a decision, as to who are the true heirs of the husband, and be put into possession of her husband's land, if she established herself to be his sole heir. In such case her remedy is in a common-law court by ejectment. Jones v. Fox, 20 W. Va. 370.

A court of equity has no jurisdiction to settle the title or bounds of lands between adverse claimants, unless the plaintiff has an equity against the defendants claiming adversely to him. An equity against other persons will not give such jurisdiction. The remedy in such case is by an action of ejectment. Stuart v. Coalter, 4 Rand. 74; Lange v. Jones, 5 Leigh 192; Carrington v. Otis, 4 Gratt. 235.

A court of equity has no jurisdiction to remove a cloud upon the title to land, where the party who asks for relief is out of possession. He has a complete remedy at law in an action of ejectment for the recovery of the land. Otey v. Stuart, 91 Va. 714, 22 S. E. Rep. 513; Louisville, etc., R. Co. v. Taylor, 93 Va. 231, 24 S. E. Rep. 1013; Stearns v. Harman, 80 Va. 48.

B. AGAINST WHOM THE ACTION MAY BE BROUGHT.

Party in Possession—Common-Law Rule.—At common law the rule is well established that the action of ejectment must be brought against the tenants in possession. The landlord has a right to be made a joint defendant, however, through fear that he may be injured by a combination between the plaintiff and his tenant: but he may waive this right, or having asserted it, he may relinquish it by consent to the plaintiff. Herbert v. Alexander, 2 Call 502; Stearns v. Harman, 80 Va. 48; Southgate v. Walker, 2 W. Va. 427; Hauks v. Price, 32 Gratt. 107. In an action of ejectment the facts proven at the trial, did not show that the defendant was in possession of the land described in the declaration, at the time the action was brought. It was held, that the plaintiff was not entitled to a judgment against him, although the plaintiff's title and right to recover were perfect in all other respects. Nor did the common-law consent rule, then in force, obviate the necessity of its being proved or admitted on the trial, that the defendant was in possession of the land sued for, at the time the suit was rought. Southgate v. Walker, 2 W. Va. 427.

Ejectment may be brought against several persons, in possession of any part of the tract of land claimed by the lessor of the plaintiff. Stuart v. Coalter, 4 Rand. 74.

Party Claiming Title—Statutory Rule.—The Virginia Code, ch. 131, sec. 5, provides "that the person actually occupying the premises shall be named defendant in the declaration. If they be not occupied, the action must be against some person exercising ownership thereon, or claiming title thereto, or some interest therein at the commencement of the suit." So in Stearns v. Harman, 80 Va. 48, a bill in equity asking for relief when there was no person in possession of the land, was dismissed, because ejectment might have been brought against the person *claiming* title to the land. This statute was also construed in Harvey v. Tyler, 2 Wall. (U. S.) 134. See also, Postlewaite v. Wise, 17 W. Va. 14.

V. DEMAND AND NOTICE TO QUIT.

Necessity of Notice.—Where a purchaser of land is put in possession without a conveyance having been made to him, he is a tenant at will, and his possession is lawful, until demand of possession is made by the owner, and refusal is made by the tenant. In such case, the vendor is bound to make demand for the premises, and serve the tenant with notice to quit before bringing an action of ejectment; and this is true even though the vendee may be entitled in equity to a specific execution of the contract. Twyman v. Hawley, 24 Gratt. 512; Williamson v. Paxton, 18 Gratt. 475; Pettit v. Cowherd, 83 Va. 20, 1 S. E. Rep. 392; Jones v. Temple, 87 Va. 210, 12 S. E. Rep. 404.

Tenant by Sufferance—Notice Not Essential.—Where a party is in possession of land under a contract which has already been declared null and void, he is merely a tenant by sufferance, and as such not entitled to notice to quit before ejectment can be maintained by his landlord for the premises. McClung v. Echols, 5 W. Va. 204.

VI. DEFENCES.

A. LIMITATIONS OR ADVERSE POSSESSION.

Adverse Possession a Good Defence.—Where there is adverse possession by the defendant of the premises for the period of the statutory bar, this of course is a good defence to an action of ejectment. Va. Midland R. Co. v. Barbour, 97 Va. 118, 33 S. E. Rep. 554; Taylor v. Burnsides, 1 Gratt. 190; Creek-

mur v. Creekmur, 75 Va. 430; Thomas v. Jones, 28 Gratt. 383; Va. Min. & Imp. Co. v. Hoover, 82 Va. 449; Bream v. Cooper, 5 Munf. 7; Andrews v. Roseland Iron & Coal Co., 89 Va. 393, 16 S. E. Rep. 252; Stull v. Rich Patch Iron Co., 92 Va. 253, 23 S. E. Rep. 293; Core v. Faupel, 24 W. Va. 238; Adams v. Alkire, 20 W. Va. 480; Lagorio v. Dozier, 91 Va. 492, 22 S. E. Rep. 239.

See monographic *note* on "Adverse Possession" appended to Nowlin v. Reynolds, 25 Gratt. 137.

When the Statute Commences to Run.—The statute of limitations does not commence to run in favor of an occupant of land, while the title thereto is vested in the state. But the statute does commence to run in favor of such occupant against the grantee of the state, from the date of the grant of the land so occupied. Hall v. Webb, 21 W. Va. 318; Adams v. Alkire, 20 W. Va. 480; Shanks v. Lancaster, 5 Gratt. 110; Reusens v. Lawson, 91 Va. 226, 21 S. E. Rep. 347.

Injunction to Judgment on Ground of Lapse of Time.—An injunction to a judgment in an action of ejectment, will not be dissolved, where it appears that the plaintiff in the action, was guilty of laches and has acquiesced in the claim of the defendant for the period of the statutory bar. Hatcher v. Hall, 77 Va. 573.

"War and Stay Law Period" Must Be Excepted.—A defendant in ejectment is protected by twenty years' possession before the bringing of the action, but the stay law period provided for by the legislature is not to be counted in his favor. Clay v. Ransome, 1 Munf. 454; Va. Min., etc., Co. v. Hoover, 82 Va. 449; Hall v. Webb, 21 W. Va. 318. But a statute providing for the war and stay law period, so far as it relates to actions for recovery of land, is unconstitutional and void, as to actions which had become barred before the passage of that act. Hall v. Webb, 21 W. Va. 318.

Burden of Proving Adverse Possession.—Where defendants in ejectment rely upon adverse possession as a defence, the burden of proving adverse possession is on them. They must show not only entry, but that their possession has been continuous during a period necessary to give title under the statute of limitations. A break in the possession restores the seisin of the true owner. Stonestreet v. Doyle, 75 Va. 356; Turpin v. Saunders, 32 Gratt. 27; Parkersburg, etc., Co. v. Schultz, 43 W. Va. 470, 27 S. E. Rep. 255; White v. Ward, 35 W. Va. 418, 14 S. E. Rep. 22.

Ejectment for Rent—Saving in Favor of Infants Not Applicable.—The saving in favor of infants, married women or insane persons in sec. 36, ch. 135, of the Code, in relation to actions of ejectment was held not to apply to actions of ejectment brought by the lessee to recover possession of the leased premises, which had been recovered by the landlord, under his right of re-entry for rent in arrears, as provided for by § 16, ch. 138, of the Code. In such case the lessee is always barred in twelve months. Leonard v. Henderson, 23 Gratt. 331.

Possession Not Adverse.—An open, exclusive, notorious and uninterrupted possession of land for more than twenty years, taken, held, and claimed under a parol gift from a plaintiff in ejectment, for a life not yet terminated, is no bar to his recovery in the action. Clarke v. McClure, 10 Gratt. 305; Flanagan v. Grimmet, 10 Gratt. 421.

The holder and claimant of property, under an equitable title derived from a vendor or grantor, who retains the legal title for future conveyance, does not hold adversely but in subordination to the grantor's title; and no length of possession under such title will ripen into such a title as to bar an action of ejectment brought by a second grantee, who has the legal title. Nowlin v. Reynolds, 25 Gratt. 137; Garrett v. Ramsey, 26 W. Va. 345.

B. OUTSTANDING TITLE IN A THIRD PARTY.

Outstanding Title Must Be Valid.—To defeat an action of ejectment by an outstanding title in a stranger, the defendant must show it to be a present, subsisting, operative legal title, on which the owner could recover if asserting it by action. It is not for the plaintiff to disprove its validity. Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 S. E. Rep. 255; Wilson v. Braden (W. Va.), 36 S. E. Rep. 367; Wilcher v. Robertson, 78 Va. 602; Jarrett v. Stevens, 36 W. Va. 445, 15 S. E. Rep. 177; Atkins v. Lewis, 14 Gratt. 30.

An outstanding title which will defeat an action of ejectment must be one that is subsisting and superior at the commencement of the action. Jarrett v. Stevens, 36 W. Va. 445, 15 S. E. Rep. 177.

One who is in actual possession of land, cannot defeat an action of ejectment, by showing that he had conveyed his title to another, before the commencement of the action. Wilson v. Braden (W. Va.), 36 S. E. Rep. 367.

Proof of Outstanding Title Insufficient.—In an action of ejectment it was held that a grant of land by the commonwealth, which was properly issued and authenticated, gave the grantee *prima facie* title, which could not be resisted in ejectment, by a defendant who had taken possession without color of title, and relied on the fact that the land had been conveyed by an old colonial governor, to a third person, prior to the grant by the commonwealth to the plaintiff. Holloran v. Meisel, 87 Va. 398, 13 S. E. Rep. 33.

Patent—Prima Facie Proof.—Defendants in ejectment relied upon an outstanding title in a third person and offered in evidence an abstract of the patent certified by the register, which was received without objection. It was held that this was to be regarded in the appellate court as *prima facie* evidence that such a grant was issued, though the case came up on a demurrer to evidence. Atkins v. Lewis, 14 Gratt. 30.

Contract of Purchase.—Where the defendants in an action of ejectment did not attempt to show title in any other person than the plaintiff, but claimed under him, and sought to defend their possession by virtue of a contract of purchase, it was held that they were estopped from disputing his title. McClung v. Echols, 5 W. Va. 204.

C. EQUITABLE DEFENCES.

At Common Law.—At common law no equitable defence is available in an action of ejectment against the plaintiff with the legal title. Taylor v. King, 6 Munf. 358; Harris v. Harris, 6 Munf. 367; Gibson v. Jones, 5 Leigh 370; Carrington v. Goddin, 13 Gratt. 587.

By Statute.—Equitable defences are now very generally allowed by statute to prevail against the party with the legal title in certain specific cases. The defences provided for in Virginia and West Virginia are two:

First.—When a vendor of land seeks to eject the vendee who has no deed, but is in possession under a written contract of purchase signed by the vendor, and the vendee has paid for the land, and is entitled to a deed. Va. Code 1887, sec. 2741; W. Va. Code 1899, ch. 90, sec. 20. The defence under this section is limited to cases where the whole contract,

and its precise terms, is manifested by plain written evidence. The written contract itself must be produced before the jury; and parol evidence of its contents is inadmissible, though it may have been lost or destroyed. Davis v. Teays, 3 Gratt. 283; Carrell v. Mitchell, 37 W. Va. 130, 16 S. E. Rep. 453; Jennings v. Gravely, 92 Va. 377, 23 S. E. Rep. 763; Suttle v. Richmond, etc., R. Co., 76 Va. 284.

Second.—Where the sum, a mortgage or deed of trust was given to secure, has been paid, and the owner of the land is in possession, and the mortgagee or trustee brings ejectment. Code of Va. 1887, sec. 2742; W. Va. Code 1899, ch. 90, sec. 20. Under this section the defence is limited to mortgages and deeds of trust, where the mortgage money has been fully paid, or to sales, where the vendee has paid all the purchase money and performed everything incumbent on him, so as to entitle him to the specific execution of the contract in equity, and a conveyance of the legal title, without any condition proper in equity to be imposed on him. It must be a sale, and not a partnership in the acquisition of the land; and the terms of the contract must be plain. Davis v. Teays, 3 Gratt. 283; Carrell v. Mitchell, 37 W. Va. 130, 16 S. E. Rep. 453; Suttle v. Richmond, etc., R. Co. 76 Va. 284; Jennings v. Gravely, 92 Va. 377, 23 S. E. Rep. 763.

Statute Strictly Construed.—The legislative enactment providing for equitable defences in certain specified cases was dictated not by a general, but a restricted policy, having in view on the one hand the preventing of gross injustice to the tenant in possession, and on the other guarding against the evils of a complicated and protracted litigation. The defendant who cannot bring himself within the terms of this statute, though he has a perfect equitable title, must fail in his defence against the plaintiff with the legal title and immediate right of possession. Davis v. Teays, 3 Gratt. 283; Jennings v. Gravely, 92 Va. 377, 23 S. E. Rep. 763; Suttle v. Richmond, etc., R. Co., 76 Va. 284.

Notice of Equitable Defences.—The statute allowing equitable defences requires that a notice of such defence must be given to the plaintiff at least ten days before the trial. If the defendant does not file the notice as required by this section, his defence will not avail him at the trial. Carrell v. Mitchell, 37 W. Va. 130, 16 S. E. Rep. 453.

VII. PLEADING AND PRACTICE.

A. FORUM OF THE ACTION.—Land is immovable property, and the universal law of nations is, that the forum *rei sitæ* in actions at law is the only jurisdiction in which the right or title to immovables can be determined, and the judgment of such forum is absolutely conclusive in such cases. Witten v. St. Clair, 27 W. Va. 762.

B. THE DECLARATION.

Description and Location of the Property.—The declaration in an action of ejectment must describe the premises sought to be recovered with sufficient certainty. What is sufficient certainty will depend largely upon the circumstances of the particular case. But as the purpose of the description, is to identify the land so as to enable possession to be given after judgment rendered, it may be said to be the general rule that where the description of the property in the declaration is sufficient to enable the sheriff to deliver possession of the property after judgment, it is a sufficient description. Urquhart v. Clarke, 2 Rand. 549; Hitchcox v. Rawson, 14 Gratt. 526; Postlewaite v. Wise, 17 W. Va. 1; Carter v. Chesapeake, etc., Ry. Co., 26 W. Va. 644; Kemble v. Herndon, 28 W. Va. 524; Holly River Coal Co. v. Howell, 36 W. Va. 489, 15 S. E. Rep. 214; Fleming Oil & Gas Co. v. South Penn Oil Co., 37 W. Va. 645, 17 S. E. Rep. 203; Clerc v. Greer (W. Va.), 38 S. E. Rep. 485.

In Carter v. Chesapeake, etc., R. Co., 26 W. Va. 644, the declaration described the premises as "a certain lot of land lying in the town of Ronceverte, in the county aforesaid, being the piece of land near the railroad depot in said town, upon which the defendant has erected a pumphouse and appliances for the purpose of supplying its engines with water." Applying the rule above laid down, the court held this description sufficient, and a demurrer to the declaration was overruled.

In Hitchcox v. Rawson, 14 Gratt. 526, a declaration which described the land as a part of a larger tract owned by the plaintiff, near certain creeks which had no public notoriety was held defective and bad on demurrer.

In Clerc v. Greer (W. Va.), 38 S. E. Rep. 485, a description of land showing the county, the quantity, the home farm of which it was a part, the person to whom it was assigned, the suit in which partition was made, and all the lands by which it was bounded, was held sufficient.

In an action of ejectment brought under Code of Virginia of 1860, it was held that the land was described with sufficient certainty, where the declaration stated the county in which it lay, and that it adjoined the "old Postlewaite farm," and that it contained 114 acres, and its boundaries were set out in detail by courses and distances. Postlewaite v. Wise, 17 W. Va. 1.

In Kemble v. Herndon, 28 W. Va. 524, the caption of the declaration was: "West Virginia, Preston County, to wit." The declaration described the land as situated in Preston county, in Kingwood district, and gave a description of it which was minute and accurate. The declaration was held valid, and the fact that it was not stated in the body of the declaration that Preston county was in West Virginia, did not invalidate it.

The Declaration Need Not Allege That the Premises Were "Unlawfully" Withheld.—A declaration in an action of ejectment, which alleged that the plaintiffs were ousted by the defendants, and held out of possession by them, was held sufficient. It was not necessary to allege that the defendants *unlawfully* withheld possession of the premises from the plaintiffs. Postlewaite v. Wise, 17 W. Va. 1.

Variance in Counts—Effect.—After issue joined in ejectment on the title only, and a verdict for the plaintiff, for the land in one of the counts in the declaration mentioned, it was held to be no ground for a motion in arrest of judgment, that the two counts laid demises of the land from different persons. Throckmorton v. Cooper, 3 Munf. 93; Paul v. Smiley, 4 Munf. 468.

In ejectment, where the demise and ouster were laid precedent to the plaintiff's title, it was held to be cured by the statute of jeofails. Duval v. Bibb, 3 Call 362; Whittington v. Christian, 2 Rand. 353.

Enlarging the Term Laid in the Declaration.—Upon a judgment in ejectment, if execution of the writ of *habere facias possessionem* be prevented for several years by injunction, the plaintiff is entitled to the writ on motion upon a rule to show cause, without a *scire facias*, provided not more than a year has elapsed since the affirmance, by the court of appeals, of the decree dissolving the injunction, and

dismissing the bill in chancery. In such case, if the term laid in the declaration has expired pending the proceedings on the injunction the court to which the motion is made for the writ, may cause the term to be enlarged and award the writ, upon a rule to show cause, served upon the defendant. Noland v. Seekright, 6 Munf. 185.

That the term stated in a declaration in ejectment has expired, previous to the decision on an appeal, is a circumstance of no importance. Baker v. Seekright, 1 H. & M. 177.

In ejectment, if the term laid in the declaration expire before the decision of the cause, the practice is to grant leave to amend the declaration by enlarging the term. Hunter v. Fairfax, 1 Munf. 218.

Landlord Not Joined in the Declaration—Costs.—A landlord who defended an action of ejectment against his tenant without being joined in such action, was compelled to pay the costs of the action where his defence was unsuccessful, and execution against the tenant for the costs had been returned unsatisfied. Johnston v. Mann, 21 W. Va. 15.

Where a tenant was sued in ejectment for the land so held by him it was held that his landlord was entitled under the act, Code, ch. 135, § 5, to be made a party defendant to the action. Mitchell v. Baratta, 17 Gratt. 445.

Substitution of New Plaintiffs by Amending the Declaration.—When one or more plaintiffs have been named in the declaration in ejectment, and it is afterwards discovered or supposed that other persons may have the right, the same reason that authorizes the joinder of several different persons, not claiming jointly or in common, in an original declaration, admits the introduction of new plaintiffs by an amendment. When this is done, all may proceed in the one suit; the same surveys and depositions, thereafter made and taken, and the same evidence, may be used, as far as competent and relevant; and the rights of all the parties may, at one time, be determined. Strader v. Goff, 6 W. Va. 261.

Undivided Interests—Declaration—Statute.—By section 2730, Virginia Code, it is provided that the plaintiff in ejectment shall state whether he claims in fee, or for life, or for the life of another, or for years, specifying such lives, or the duration of such term, and when he claims an undivided interest he shall state the same. A declaration was held sufficient under this section, which stated that the plaintiffs were possessed each in fee simple absolute, of an undivided share or interest in a tract of land, where the suit was for the whole land so claimed, and not for any part or parcel. Roach v. Blakey, 89 Va. 767, 17 S. E. Rep. 228.

Several Claimants May Be Joined in One Action of Ejectment.—Several tenants, claiming severally, parts of the land sued for, may be sued in one action of ejectment. Camden v. Haskill, 3 Rand. 462.

C. PLEAS.

Under Virginia Statute the Only Plea in Bar Is the General Issue.—In an action of ejectment, the only plea in bar of the action, in whole or in part, admissible under the statute (Code 1873, ch. 131, sec. 13) is the plea of "not guilty"; and where the defendant was allowed to file a paper which he called a disclaimer, but which was in effect a special plea, the appellate court held the allowance of the filing of such paper error. Reynolds v. Cook, 83 Va. 817, 3 S. E. Rep. 710.

Defendant May Plead in Abatement—Waiver.—A plea in abatement is admissible in an action of ejectment, and a defendant may waive his plea in abatement and plead in bar. James River, etc., Co. v. Robinson, 16 Gratt. 434.

A defendant in ejectment admitted that he was mistaken as to matters pleaded in abatement, and upon this admission submitted the issue upon the plea to the court, and at the same time asked leave to file the plea of "not guilty." This was in effect a waiver of the plea in abatement, and he should have been permitted to file the plea of "not guilty." James River, etc., Co. v. Robinson, 16 Gratt. 434.

Pleas—West Virginia—Statute.—The Code of West Virginia, ch. 90, sec. 13, provides, "that a defendant in ejectment shall plead the general issue only, which shall be that he is not guilty of unlawfully withholding the premises," etc. It was held proper for the court, in an action of ejectment to sustain a demurrer to a special plea, to a declaration in ejectment under this statute. Johnston v. Griswold, 8 W. Va. 240.

D. NEW TRIALS.

Rule in Regard to New Trials in Ejectment.—A court ought to hold a stricter course towards plaintiffs, moving for new trials, in ejectment, than towards defendants; yet, where a verdict in favor of a defendant, in ejectment, is founded in mistake and produces injustice, it is both the right and duty of the court to grant a new trial. Deems v. Quarrier, 3 Rand. 475.

Motion for a New Trial—After-Discovered Evidence.—In an action of ejectment, judgment being given for the plaintiffs, the defendants moved for a new trial upon the ground of after-discovered evidence. This evidence, which they claimed was after-discovered, was a conveyance which had been on record for two years. It was held that as the defendants did not allege that they had used due diligence, the motion was properly overruled; and the judgment was affirmed on appeal. Lewis v. McMullin, 5 W. Va. 582.

Motion for a New Trial—Putting the Plaintiff upon Terms.—In an action of ejectment, the verdict was for the plaintiff, for the whole amount of the land claimed. The defendants moved the court to set aside this verdict, and to grant them a new trial, upon the ground that the verdict was contrary to the law and evidence. After consideration of the motion, the court entered an order declaring that the verdict was contrary to the law and the evidence, and that it would set the same aside and grant a new trial, unless the plaintiff would abate the said verdict and take a judgment for less land than allowed in the verdict. On an appeal by the plaintiff, it was held that while it is proper for the trial court to put the plaintiff on terms in an action for the recovery of money, this rule does not apply to actions of ejectment because of § 2646, Va. Code, prescribing what the verdict for land shall be. Shiflet v. Dowell, 90 Va. 745, 19 S. E. Rep. 848.

But by a later decision in Virginia, a plaintiff in ejectment may be put upon the term, as well as a plaintiff in any other action. In Fry v. Stowers, 98 Va. 417, 36 S. E. Rep. 482, HARRISON, J., in delivering the opinion of the court, said: "We do not approve the rule announced in Shiflet v. Dowell, 90 Va. 745, 19 S. E. Rep. 848, that the principle stated does not apply in the case of an action of ejectment, because of the statute which requires that the verdict shall 'specify the land, particularly as the same is proved, and with the same certainty of description as is required in the declaration.' The practice of putting a party upon terms where the verdict is plainly

erroneous in part, is a wise and salutary one, saving delay, costs, and above all, ending strife, and we perceive no good reason why the ends of justice are not as much subserved by the application of the principle in an action of ejectment as in any other case."

E. APPELLATE PROCEEDINGS.

Effect of Death of the Appellee.—Where, in ejectment, judgment was given for the defendant and the plaintiff appealed, pending which, the appellee died, it was held that the appellant could not sue a *scire facias* against his heirs, but he must bring a new suit. Tomkies v. Walters, 6 Call 44.

Death of Plaintiff's Lessor.—An appeal from a judgment in ejectment does not abate by the death of the plaintiff's lessor; and this is true though the lessor claims for life only. Medley v. Medley, 3 Munf. 191; Kinney v. Beverley, 1 H. & M. 530; Purvis v. Hill, 2 H. & M. 614; Mooberry v. Marye, 2 Munf. 453; Carter v. Washington, 2 H. & M. 31. See also, Stockton v. Copeland, 30 W. Va. 674, 5 S. E. Rep. 143.

Dismissal of Writ of Error.—Where the plaintiff in error himself has done some act since the judgment complained of was rendered, that would in law prevent him from obtaining any fruits of a writ of error, his writ of error will be dismissed by the appellate court. But where the motion to dismiss was founded upon an alleged forfeiture of the defendant's title after judgment in an ejectment case, the motion was overruled. Bradley v. Ewart, 18 W. Va. 598.

No Issue Made Up—Judgment Reversed.—Where the record in an action of ejectment, showed that there was no issue made up between the plaintiff and the defendant, by the pleadings in the case, the judgment was reversed by the appellate court. Brown v. Cunningham, 23 W. Va. 109.

In an action of ejectment the plaintiff recovered possession of the tract of land in controversy, and a writ of possession issued, ousting the defendant and putting the plaintiff in possession. Afterwards this judgment was reversed by the appellate court. It was held that the defendant was entitled to a writ of possession of the land. Brown v. Cunningham, 23 W. Va. 109.

Irregularities at the Trial—Objection on Appeal.—Where there were a number of defendants to an action of ejectment, and a trial and verdict was had as to part of them, and the case was revived against the heirs of others, and a further trial was had as to them, no objection being made in the court below, it was held that the question of error in the separate trials, could not be raised for the first time in the appellate court. Kenna v. Quarrier, 3 W. Va. 210.

VIII. EVIDENCE.

A. ADMISSIBLE EVIDENCE.

The Evidence Must Be Relevant.—The evidence in an action of ejectment must be relevant to the issue. The statute of jeofails, curing any objection of form or substance in the declaration in ejectment, after issue joined, does not affect this rule. Butts v. Blunt, 1 Rand. 255. In this case the lessor being a fictitious person, instead of the lessee, evidence on the part of the plaintiff not going to show title in the lessor, was excluded.

The "Best Evidence Rule"—Exceptions.—The rule requiring that the best evidence which the nature of the case admits of should be produced, though generally true, is inapplicable in actions of ejectment concerning the title to land. A copy of a patent is as good evidence of title as the original would be. Lee v. Tapscott, 2 Wash. 276.

The testimony of the editor of a newspaper, that he inserted therein, the requisite number of times, an advertisement, the purport of which he states on oath, is sufficient proof of such publication, on a trial in ejectment, without producing the advertisement itself. Moore v. Gilliam, 5 Munf. 346.

Indorsement on a Deed.—An indorsement on the back of a deed, relating to the subject-matter of the deed, is a part of the deed, and is admissible in evidence to defeat an action of ejectment. Stone v. Hansbrough, 5 Leigh 422.

Recitals in a Deed.—In an action of ejectment, it was held admissible for the plaintiff to introduce in evidence a deed, for the purpose of supplying a link in his chain of title, by means of recitals contained therein, and from which a grant might be presumed as against the defendant. Va. & Tenn. Coal & Iron Co. v. Fields, 94 Va. 102, 26 S. E. Rep. 426. See also, Hall v. Hall, 12 W. Va. 1; Hassler v. King, 9 Gratt. 115.

Evidence to Show Adverse Possession.—In ejectment between co-tenants, where the defendants relied on adverse possession, and acquiescence by the plaintiffs, letters by a party under whom defendants claimed, and also a correspondence between one of the plaintiffs and the agent of the defendant, were held competent evidence to show for what purpose the tenants in possession had claimed the property, and the plaintiffs acquiesced in their claim. Stonestreet v. Doyle, 75 Va. 356.

Error in a Patent—Evidence.—In ejectment for land in Wood county, lessor of plaintiff claimed under grant of land described in the patent as lying in Monongalia; defendant showed by the statute of 1784, dividing Monongalia and establishing Harrison county, and other evidence that the land described in the patent, at the date of the patent, lay not in the then county of Monongalia, but in that of Harrison, and that no part of the present county of Wood was then part of Monongalia. It was held, competent to the plaintiff to prove, that the land in Wood was the same land granted by the patent, notwithstanding the error of the patent as to the county in which it lay. Chapman v. Bennett, 2 Leigh 329.

Proof of Outstanding Title—Landlord and Tenant. In an action of ejectment brought by the landlord against a tenant in possession, it appeared that before the institution of the action the tenant had disclaimed to hold under the landlord; it was held admissible for the tenant to introduce in evidence matters which tended to show title in a third person, and an assignment of that title by such third party, to the tenant himself. Smoot v. Marshall, 2 Leigh 134.

Commissioner's Deed.—In an action of ejectment the plaintiff offered in evidence a deed made by a commissioner in pursuance of a decree entered in a suit brought for the specific execution of a written contract for the sale of the land so conveyed, and such portions of the record, as show the authority of the commissioner to make such deed, including the said written contract. *Held*, it was not necessary in such action of ejectment to prove the execution of such contract by the vendor of the land. Waggoner v. Wolf, 28 W. Va. 820.

Tax Deed Executed by a Deputy Recorder.—In an action of ejectment, a tax deed for land, executed in 1870, by a deputy recorder, and duly acknowledged by him in his own name as such deputy, was

held admissible evidence under W. Va. Code of 1868. Davis v. Living, 32 W. Va. 174, 9 S. E. Rep. 84.

Record in Another Suit.—A record in another suit was held admissible in evidence in an action of ejectment, for the purpose of using as evidence certain exhibits contained in the record, where the exhibits tended to prove title, and the record was accompanied by proof of possession under claim or color of title. Va. & Tenn. Coal & Iron Co. v. Fields, 94 Va. 102, 26 S. E. Rep. 426.

In ejectment where the defendants claimed as a purchaser under a decree, it was held that the record in a chancery cause was legal evidence for him, as a link in his chain of title, though the plaintiff was not a party to the cause. Baylor v. Dejarnette, 13 Gratt. 152.

But in an action of ejectment, the record of another action of ejectment between other parties was held not competent evidence upon a question of boundaries, or the location of the land in controversy. Stinchcomb v. Marsh, 15 Gratt. 202.

Record of Prior Proceedings—Collateral Attack.—On the trial of an action of ejectment, plaintiff claimed under a conveyance from a commissioner of delinquent lands, and offered the record of the proceedings for the sale of the lands in evidence. The defendant objected to it for irregularities on its face. But as these irregularities did not render the proceedings void, it was held they could not be attacked in a collateral proceeding between the purchaser and a third party. Hitchcox v. Rawson, 14 Gratt. 526.

Evidence of Nonexecution of a Deed.—In an action of ejectment, evidence by the female plaintiff, that she did not sign or acknowledge the deed under which the defendant claimed, was admitted. It was held that the defendant might rebut this by showing that she received a part of the consideration for the deed. Blair v. Sayre, 29 W. Va. 604, 2 S. E. Rep. 97.

Identification of Land—Land Books—Payment of Taxes.—Upon the trial of an action of ejectment it was held admissible for the plaintiffs to introduce evidence showing that a tract of land containing the same number of acres, and lying the same distance from the courthouse, and in the same direction as the land in controversy, was charged on the land books for the purposes of taxation. They were also allowed to introduce tax tickets showing the payment of taxes on the land so listed. The question as to the identity of the land was held one for the jury upon all the evidence. Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 S. E. Rep. 232.

Entry—Identification.—An *entry* may be introduced, as presumptive evidence, before the jury, in an action of ejectment, to identify the calls of the patent; but not to furnish particulars of description, not contained in the grant, nor to invalidate or aid the legal title of which the patent is the foundation. Camden v. Haskill, 3 Rand. 462.

Evidence to Show Color of Title.—In an action of ejectment to recover a larger tract of land, of which defendants claimed title to two parcels or interlocks, it was held proper for the court to admit evidence of the possession of the plaintiff of the larger tract outside of the interlocks in controversy, where the plaintiff's claim was based upon adverse possession under color of title. Breeden v. Haney, 95 Va. 622, 29 S. E. Rep. 328.

Defendant in ejectment claiming under a junior patent, founded on an inclusive survey, may introduce in evidence the entries for the different tracts embraced in the inclusive survey, the order of court authorizing the survey, and the survey itself, in order to show possession under color of title prior to his patent. Shanks v. Lancaster, 5 Gratt. 110.

The deed or instrument relied on to give color of title, must seem to define specifically the boundaries of the claim, therefore, an instrument offered by the plaintiff in evidence in an action of ejectment, which did not point to the boundaries of the claim, was rejected. Blakey v. Morris, 89 Va. 717, 17 S. E. Rep. 126.

Party Claiming under a Void Patent.—Where the grantee in a patent for land was dead at the time the grant issued, the patent was void; and this was properly shown on a trial of ejectment in which one party claims under the patent. Blankenpickler v. Anderson, 16 Gratt. 59.

In ejectment, it was held competent to the defendant, to give in evidence that the patent, under which the plaintiff claimed, was obtained by fraud, although upon the face it appeared to have been regularly issued. Hambleton v. Wells, 4 Call 213. But evidence is inadmissible, in an action of ejectment, to show irregularities which do not amount to fraud. Witherinton v. McDonald, 1 H. & M. 306.

Competency of Witnesses—Trustee.—The trustee in a deed of trust, conveying property to be sold for payment of a debt, is equally the agent of the debtor and creditor, and is a competent witness, in an action of ejectment against the debtor in behalf of a purchaser from himself, to prove that the sale of the property was advertised, according to the terms of the deed of trust. Ross v. Norvell, 3 Munf. 170.

Competency of Witnesses—Husband and Wife.—In an action of ejectment, the heirs of a wife demanded land in possession of grantees of the husband, on the ground that it had descended upon her from her father, though the wife's brothers had conveyed it to her and her husband by a deed reciting a consideration, but which the heirs claimed was only a deed of partition. It was held, that the declarations of the husband that the land had come to the wife from her father and that he had only a life estate in it, were admissible in evidence. Dooley v. Baynes, 86 Va. 644, 10 S. E. Rep. 974.

B. INADMISSIBLE EVIDENCE.

Irrelevant Evidence.—Evidence which is irrelevant to the issue, and which has no connection with the subject of the controversy is not admissible in an action of ejectment. Blakey v. Morris, 89 Va. 717, 17 S. E. Rep. 126; Butts v. Blunt, 1 Rand. 255. The will of a patentee of land under whom the plaintiff in ejectment claimed, was held inadmissible in evidence, where it made no reference to the land in controversy. Blakey v. Morris, 89 Va. 717, 17 S. E. Rep. 126.

Unproved Deed.—In an action of ejectment, it was held error to admit a deed in evidence, where there was no legal proof of its execution, and no sufficient evidence of possession under it; and evidence of possession fifteen years after the date of said deed by a purchaser from the grantee therein, under his deed, was not sufficient to entitle the former deed to be admitted. Where the plaintiff was permitted to show by parol evidence, possession in conformity with his deed, it was held error to exclude the evidence which the defendant offered in rebuttal. Shanks v. Lancaster, 5 Gratt. 110.

Parol Declarations Cannot Extend a Deed.—In an action of ejectment where the plaintiff's deed conveyed by well defined boundaries, it was held that a

parol agreement made before the execution of the deed, that other adjoining land beyond these boundaries, should be included in it, or an agreement after its execution that it should extend to include other adjoining lands, could not have the effect to embrace these lands within the deed. Pasley v. English, 5 Gratt. 141; Pasley v. English, 10 Gratt. 236.

Attacking a Deed.—In an action of ejectment by a party claiming under the purchaser against the devisees, evidence to prove that the consideration of the deed was different from that expressed in it, was held inadmissible. Carrington v. Goddin, 13 Gratt. 587.

Parol Disclaimer.—In ejectment by the heirs of the devisee of an estate in fee, the defendant introduced evidence tending to show a parol disclaimer by the devisee, of the land devised to him, and moved the court to instruct the jury, that if they believed from the facts proved, that there was such parol disclaimer of the land devised, they must find for the defendant. The court refused to give this instruction to the jury, and instructed them that the disclaimer must be by writing. Bryan v. Hyre, 1 Rob. 94; Suttle v. Rich., etc., R. Co., 76 Va. 284.

Deed of Partition.—A decree of partition obtained by several parties against the vendor of certain lands was held inadmissible in evidence in an action of ejectment brought by them against the vendee, who was not a party to the suit for partition and was therefore not bound by the decree. Carter v. Washington, 2 H. & M. 345.

A Deed Which Is Improperly Acknowledged.—If proof, or acknowledgment, of a deed, made by a nonresident of land lying in Virginia, be not certified according to law, though it should be admitted to record it cannot be received in evidence as a recorded deed in an action of ejectment. Turner v. Stip, 1 Wash. 319.

But in Wise v. Postlewait, 3 W. Va. 452, it was held that a deed for land in that state, acknowledged in another state, by part of the grantors, in such manner that it might be admitted to record in West Virginia, but which was not recorded, might be given in evidence on the trial of an action of ejectment, as to the parties by whom it was acknowledged.

C. WEIGHT OF EVIDENCE.

A Question for the Jury.—While it is competent to the court to decide upon the legality and admissibility of evidence, it is not competent to them to decide upon the weight of such evidence. It should be admitted only as legal testimony, in relation to the subject in controversy, leaving the jury to determine what facts are proved by it. Whitacre v. McIlhaney, 4 Munf. 310.

In an action of ejectment, the plaintiff offered evidence to prove where one of the corners of a survey was located, and the defendant offered evidence to prove where another corner was located. As both of them could not be correct it was held a question for the jury, to determine the boundary upon all the evidence which was produced before them. Bowers v. Dickinson, 30 W. Va. 709, 6 S. E. Rep. 335.

Weight of Record in Ejectment.—The record of an action of ejectment is not conclusive evidence of the date of the demise, in an action for mesne profits, although it is conclusive as to the title. Whittington v. Christian, 2 Rand. 353.

IX. VERDICT AND JUDGMENT.

A. REQUISITES AND CONSTRUCTION OF VERDICTS.

In General.—The verdict of the jury in an action of ejectment must describe the premises with convenient certainty and must be responsive to the issue. The estates of the parties in the subject of the controversy must be set out specifically. The object of describing the premises is that possession may be delivered, and where a verdict points out the locality of the tract by reference to the lands of coterminous owners and the public highways passing it, it forms a description equally satisfactory and certain as the statement of metes and bounds ordinarily contained in deeds of conveyance. Hawley v. Twyman, 24 Gratt. 513; Messick v. Thomas, 84 Va. 891, 6 S. E. Rep. 482.

In Wilson v. Braden (W. Va.), 36 S. E. Rep. 367, the evidence showed that the plaintiff and the defendant, were each entitled to hold a part of the land. A verdict of the jury which did not show with any degree of certainty the part each was to hold, was held bad.

A verdict in ejectment, finding for the plaintiff, in general terms, a certain number of acres, part of the premises in the declaration mentioned, without designating the boundaries of such part, or referring to some certain standard to supply such defect, was held too uncertain to warrant a judgment upon it, and a *venire facias de novo* was awarded. Gregory v. Jackson, 6 Munf. 25; Cropper v. Carlton, 6 Munf. 277; Murra v. Northern, 1 Wash. 282.

Where the premises in an action of ejectment were described in the declaration with "convenient certainty," and the verdict was that the plaintiff was entitled in fee to the whole of the premises in the declaration described, such verdict was held not defective for uncertainty. Messick v. Thomas, 84 Va. 891, 6 S. E. Rep. 482.

Co-tenants—Certainty of Verdict.—One cannot recover as sole plaintiff in ejectment the interests of both himself and his co-tenants, and where a plaintiff shows that he is a co-tenant, he must also show the extent of his undivided interest, so that the verdict and judgment may be sufficiently certain as to his interest. Marshall v. Palmer, 91 Va. 344, 21 S. E. Rep. 672.

The Verdict Must Be Responsive to the Issue.—To a charge in a declaration of ejectment that the defendant unlawfully withholds the possession of the land, the plea was "not guilty," and the verdict of the jury was: "We the jury, find that the defendant does not withhold possession of the land in the declaration mentioned, as alleged, and therefore find for the defendant on the issue joined." This was held responsive to the issue, and the verdict in form was unexceptionable. Andrews v. Roseland Iron & Coal Co., 89 Va. 393, 16 S. E. Rep. 252.

The declaration in ejectment alleged that the plaintiff was possessed of an estate in fee, and the defendant entered upon this estate and unlawfully withheld possession thereof from plaintiff. The defendant pleaded not guilty, the verdict of the jury was: "We, the jury, find for the plaintiff that he is entitled in fee to the whole of the premises in his declaration described, and that all the defendants were in possession of a part thereof, or claimed title to some part at the commencement of this suit." It was held, that the verdict responded to the issue. Messick v. Thomas, 84 Va. 891, 6 S. E. Rep. 482; Hawley v. Twyman, 24 Gratt. 516.

Verdict Must Specify the Estate.—In an action of ejectment, the declaration stated that the plaintiff had title in a fee simple to the land, and described it by quantity, and as bounded by certain roads and coterminous owners. The issue was upon the plea of "not guilty," and the verdict of the jury was: "We, the jury find that the defendant is guilty in manner and form as stated in the declaration." It was objected that this verdict did not specify the estate to which the plaintiff was entitled; but it was held to be a finding by the jury that the plaintiff was entitled to the land in fee, and was a sufficient description of the estate. Hawley v. Twyman, 24 Gratt. 516; Messick v. Thomas, 84 Va. 891, 6 S. E. Rep. 482.

Verdict Must Specify the Estate—West Virginia.—In Elliott v. Sutor, 3 W. Va. 37, the plaintiff claimed land in fee, the verdict of the jury found for the plaintiff the land in the declaration mentioned, as described in a survey in the cause, without specifying the estate therein to which the plaintiff was entitled. It was held that the verdict was unobjectionable. But this case has since been overruled, and it is now held that a verdict which does not specify the estate to which the plaintiff is entitled is fatally defective, under W. Va. Code, ch. 90. Low v. Settle, 22 W. Va. 387; Oney v. Clendenin, 28 W. Va. 34.

Proof that a corporation, suing in ejectment, has an estate in fee in land, whether on the dissolution of the corporation the estate would revert to the grantor or not, is sufficient to support a finding by the jury that the corporation has an estate in fee. Mercer Academy v. Rusk, 8 W. Va. 373.

Verdict—Rules of Construction.—In an action of ejectment there was only one plaintiff, and on a plea of not guilty the jury found this verdict: "We, the jury, find the issue for the plaintiffs, and we find the plaintiffs have title in fee to the lands in the declaration mentioned, and we find one cent damages for the plaintiff." It was held that this verdict was valid, as the word "plaintiffs" could only refer to the one plaintiff in the case. Williams v. Ewart, 29 W. Va. 659, 2 S. E. Rep. 881.

Verdicts of juries are to be favorably construed. But in an action of ejectment where the verdict was so vague and uncertain that the substantial meaning of the jury could not be satisfactorily collected from the verdict, it was held insufficient, and a new trial was awarded. Lewis v. Childers, 13 W. Va. 1.

Variance between Verdict and Declaration—Construction.—A declaration in ejectment claimed five acres of land, and the plot of the surveyor made in the cause showed that the boundaries and lines as described in the verdict finding for the plaintiffs contained nine acres. It was held that as the only question in dispute was a common line, claimed by the plaintiff and the defendant, and the jury having found for the former, it was immaterial whether the quantity be five or nine acres, as the bounds and line claimed in the declaration corresponded with the bounds and lines found by the jury. Elliott v. Sutor, 3 W. Va. 37.

Province of the Jury—Undivided Interests.—Though in ejectment the plaintiffs in their declaration claim the whole of a tract of land, the jury may find for the plaintiffs for an undivided interest in it. Though where less land is recovered than is demanded, the boundaries of the land recovered should be designated, yet where an undivided interest in it is recovered, it is impossible to set out the boundaries; but the interest being certain, that is sufficient. Callis v. Kemp, 11 Gratt. 78.

In an action of ejectment, where a deed which forms part of the chain of title of the plaintiff, is alleged to be voluntary and fraudulent, it is proper for the jury under suitable instructions from the court, to determine whether the deed was voluntary and fraudulent, or not. Taylor v. Mallory, 96 Va. 18, 30 S. E. Rep. 472.

It was proved on a trial in ejectment, that the father of the lessor of the plaintiff, who devised the land to him, was in possession thereof many years before and until his death; and that the lessor of the plaintiff afterwards conveyed it to a person, who was in possession at the time of his death; it was held that the jury might presume that the lessor of the plaintiff was in possession from the death of his father to the date of such conveyance, if it was not proved that some other person, in the meantime, had that possession. Moore v. Gilliam, 5 Munf. 346.

Whether the plaintiff in ejectment is sole heir of a person through whom he traces title, and whether the defendant has adverse possession for the period of the statutory bar, are questions for the jury. Taylor v. Mallory, 96 Va. 18, 30 S. E. Rep. 472.

Verdict Fixing the Boundary Lines.—Where, in an action of ejectment, the evidence is conflicting as to boundary lines, the verdict of the jury fixing such lines will not be disturbed unless some other valid objection thereto be shown. Fry v. Stowers, 98 Va. 417, 36 S. E. Rep. 482.

Verdict for Part of the Land Sued for.—Where a verdict in ejectment is for a part only of the land sued for, the boundaries of the part recovered should be designated. The verdict must be certain in itself, or must refer to some certain standard by which to ascertain the land so found, otherwise it will be too uncertain to warrant a judgment upon it. Callis v. Kemp, 11 Gratt. 78, 84; Gregory v. Jacksons, 6 Munf. 25; Slocum v. Compton, 93 Va. 374, 25 S. E. Rep. 3.

Where Defendant Only Claims Part of the Land.—In an action of ejectment where the defendant at the trial proved that he was in possession of and claimed title to only a part of the premises, the verdict and judgment for the whole land claimed in the declaration was held not to be erroneous, or at least not an error whereby the defendant was injured. Messick v. Thomas, 84 Va. 891, 6 S. E. Rep. 482; Carrington v. Goddin, 13 Gratt. 587; Beckwith v. Thompson, 18 W. Va. 103.

In an action of ejectment all of the defendants pleaded a joint plea of not guilty, without disclaiming title to any of the land in the declaration. The plaintiff proved his right to the whole land, but failed to prove that certain of the defendants were in possession of any part of the land, or that they claimed title to it, or any part thereof. It was held that a general verdict for the whole land claimed in the declaration was not erroneous, because of this failure of proof by the plaintiff. Beckwith v. Thompson, 18 W. Va. 103.

A general verdict for the defendant in an action of ejectment, is proper, if warranted by the evidence; and no disclaimer is necessary to its validity, although much more land was described in the declaration than the defendant had in possession at the commencement of the suit. Jones v. C. & O. R. Co., 14 W. Va. 514.

In an action of ejectment, the tenant, without disclaiming title to any part of the land in the declaration mentioned, proves upon the trial that he is only in possession and claiming title to a part of it. A verdict and judgment in favor of the plaintiff

for all claimed in the declaration, is not erroneous; or if it is, it is not an error by which the tenant is injured, or of which he can complain in an appellate court. Carrington v. Goddin, 13 Gratt. 587.

Verdict upon One of Several Counts.—In an action of ejectment, the declaration contains three counts: The first count in the name of J. M. and J. C. M., the second count in the name of J. M., and the third count in the name of J. C. M. The plea filed, is, not guilty, on which issue is joined. The jury find for J. C. M., "under the third count in the declaration, the following land in fee simple," and described the land so found, by reference to the plat of the surveyor filed in the cause. This finding of the jury is to be taken as a finding for J. C. M., of part of the land in the declaration demanded, and that his estate therein, was an estate in fee simple, and the verdict giving metes and bounds, by reference to said plat, is sufficiently specific. Myers v. Ford, 9 W. Va. 184.

Verdict of Jurors Who Are Irregularly Sworn.—The oath usually administered to a jury is, "to well and truly try the issue joined." Where the jurors were sworn to "speak the truth of, and upon the premises" their verdict in an action of ejectment was held to be unexceptionable. Mercer Academy v. Rusk, 8 W. Va. 373.

Verdict No Bar to Another Action.—No verdict and judgment in ejectment, can be relied on as a bar to a subsequent action of ejectment, even though for the same land, and between the same defendants and lessors of the plaintiffs, if the fictitious plaintiffs are not the same. Pollard v. Baylors, 6 Munf. 433.

Verdict by Eleven Jurors.—A verdict in ejectment rendered by eleven jurors was held valid, where it appeared that the parties in open court consented to a trial by eleven jurors instead of twelve. Roach v. Blakey, 89 Va. 767, 17 S. E. Rep. 228.

Verdict Extended by the Court.—In an action of ejectment the jury found for the plaintiff one cent damages. The verdict was extended by the court so as to include *the land in the declaration mentioned*, and one cent damages. This was no error. McMurray v. Oneal, 1 Call 246.

B. SPECIAL VERDICTS.

Special Verdict Must Describe the Premises.—The plaintiff in ejectment may recover less land than the quantity stated in his declaration. But, if the jury find a special verdict, showing the plaintiff entitled to a certain number of acres, part of the tract sued for, and do not specify the boundaries of such part with so much precision as that possession thereof may with certainty be delivered, a *venire de novo* ought to be awarded. Clay v. White, 1 Munf. 162. See also, Geddy v. Butler, 3 Munf. 345.

Special Verdict—Certainty.—In ejectment the jury set out the wills of a grandfather and father; and if the son who is dead took under his father's will they find for the plaintiff. If he took under the grandfather's will, they find for the defendants. The verdict is sufficiently certain; and submits the single question upon the construction of the wills to the court. Callis v. Kemp, 11 Gratt. 78.

In an action of ejectment, the jury having returned a special verdict, which found facts in relation to two tracts of land, and concluded by saying that if the law arising upon those facts were for the plaintiff they found for the plaintiff, the lands in the declaration mentioned, but if the law was for the defendant they found for the defendant; and the court being of the opinion that the law was for the plaintiff as to one of the tracts of land, and for the defendant as to the other, held it unnecessary to award a *venire facias de novo*, but gave judgment on the special verdict for the plaintiff for one tract, and for the defendant for the other. Hutchison v. Kelly, 1 Rob. 123.

Special Verdict—Insufficiency.—A special verdict in ejectment was set aside, for not finding the time of the death of a person, under whom the lessors of the plaintiff might or might not have been entitled to the land in controversy, their title depending upon the time when he died, which, from the circumstances disclosed in the verdict, probably could have been found by the jury; also, for not finding whether the defendant or those under whom he claimed, had or had not such possession of the land as would be sufficient for his defence, in that action, whatever might be the state of the title. Cropper v. Carlton, 6 Munf. 277.

Actual Ouster Must Be Shown in Verdict against a Co-tenant.—In an action of ejectment against a tenant in common by a co-tenant, if the jury return a special verdict, actual ouster must be found therein, to entitle the plaintiff to judgment; the *pro forma* confession of ouster which the defendant is compelled to make before he is allowed to enter his plea, was held not sufficient in an action of ejectment, between co-tenants. Taylor v. Hill, 10 Leigh 457; Purcell v. Wilson, 4 Gratt. 16.

Tracing Title in a Special Verdict.—In tracing title in a special verdict in an action of ejectment, it is not necessary to find a seisin in the crown; because that is the ultimate point beyond which the party is not bound to go. Birch v. Alexander, 1 Wash. 34.

C. THE JUDGMENT.

Effect of a Judgment in Ejectment.—The whole effect of a judgment for the plaintiff in ejectment is to put the lessor of the plaintiff into possession of the land; and the only point decided is, that he has a better title to the possession than the defendant. Chapman v. Armistead, 4 Munf. 382.

After judgment for the plaintiff in ejectment, trespass does not lie against one who was no party to the suit, without proof of an actual trespass. Alexander v. Herbert, 2 Call 508.

Judgment in Ejectment—Validity.—A person, having an equitable title to a tract of land, executed a power of attorney, to obtain a conveyance, but without authorizing a sale of his right. The attorney, being induced to believe the title bond defective and finding it inconvenient to pay the balance due of the purchase money, was persuaded, notwithstanding the land had greatly increased in value, to give up the title bond (but without assigning it) to the husband of a woman in whom the legal title was, in consideration of the husband's giving up to him the unsatisfied bond for the purchase money. After the death of the wife, the husband sold the land, as his own, and the purchaser of him filed a bill in equity to enjoin a judgment in ejectment obtained against him by the heir of the wife, and to get a conveyance of the land. It was decided, that the contract between the attorney and the husband did not stand on such a footing of fairness and equity, that it ought to prevail over the legal title of the heir of the wife. McClenahans v. Hannah, 4 Munf. 499.

Amendment of a Judgment—Clerical Error.—In following an old form, a judgment in ejectment was entered for "the term yet to come." It was held no error for a court to allow an amendment of this judgment, so as to conform with the modern action of ejectment, which is adapted to try title to land.

as well as to get possession of it. Alvey v. Cahoon, 86 Va. 173, 9 S. E. Rep. 994.

Judgment by Confession in Ejectment.—A confession of judgment in an action of ejectment, by one of several co-defendants, was held valid, where the confession was not obtained by any unfair means, and was not made with intent to embarrass the other defendants. Va. & Tenn. Coal & Iron Co. v. Fields, 94 Va. 102, 26 S. E. Rep. 426.

A judgment by confession in an action of ejectment cannot be corrected by motion; but only by appeal to a higher court; judgment by confession not being included in the statute allowing correction of judgments by default by simple motion. Stringer v. Anderson, 23 W. Va. 482.

Joint Judgment in Ejectment.—In an action of ejectment, parties defended it jointly and neither of them entered a disclaimer, but on the contrary gave notice with their plea of not guilty, that they jointly claimed the premises in controversy, and would rely on a contract between the plaintiff and one of the defendants, as a defence at the trial. It was held that this was an admission that they were in possession, and in possession jointly; and that they would make a joint defence, so a joint judgment was held valid. McClung v. Echols, 5 W. Va. 204.

Where there were three defendants in ejectment, who appeared at different times: the first pleaded and, as to him, issue was joined; the second was admitted a defendant, but did not plead; the third pleaded, but no issue was joined; and in this state, the cause was tried, and verdict and judgment were given for the plaintiff; it was not error, notwithstanding there was no plea for the second defendant; nor issue as to the third; for their rights remained untouched, and may be tried when issues are made up as to them. Hambleton v. Wells, 4 Call 213.

Judgment for Costs.—A general judgment for costs against two defendants in ejectment, is proper, though one of them did not enter himself a defendant until there had been one trial of the cause, and a large portion of the costs had been incurred. Middleton v. Johns, 4 Gratt. 129.

Reversal of a Judgment—Validity.—Where there were two judgments in an action of ejectment, one in favor of some of the plaintiffs, against the defendants, and one in favor of the defendants, against the other plaintiffs, it was held that where the defendants appealed from the former judgment, that it might be reversed without disturbing the other judgment. Strader v. Goff, 6 W. Va. 257.

Office Judgment—Inquiry of Damages Necessary.—An office judgment in an action of ejectment does not become final without the intervention of the court or jury. The defendant in ejectment may, upon notice to the plaintiff, appear at the next term of the court, and move the court to set aside the judgment, and allow him to plead therein. Smithson v. Briggs, 33 Gratt. 180; James River, etc., Co., v. Lee, 16 Gratt. 424.

X. MESNE PROFITS AND IMPROVEMENTS.

Claim for Mesne Profits Entered after Filing of the Plea.—Where a plaintiff in ejectment filed a claim for mesne profits under sec. 30, ch. 90, Code of West Virginia, after the defendant had entered his plea, he was not allowed to recover in the same action, because it might have operated as a surprise or fraud upon the defendant. Witten v. St. Clair, 27 W. Va. 762; McCann v. Righter, 34 W. Va. 186, 12 S. E. Rep. 497.

Interest upon Mesne Profits.—Prior to the act, Code, ch. 177, sec. 14, p. 673, interest could not be allowed by a jury in an ejectment upon the profits; and where the jury allowed such interest it was held mere surplusage, and the judgment was given for the principal sum and interest from the date of the verdict. Hepburn v. Dundas, 13 Gratt. 219.

Assessment of Mesne Profits.—In an action of ejectment, after the plea of not guilty was filed, the plaintiff filed an account of rents and profits, and after the suit had been pending a number of years, an agreement was entered into between the parties to the suit, whereby the defendant agreed to let judgment go by default in the suit, and the plaintiff agreed to waive all claims to damages sustained by destruction of a dwelling house, timber, etc., and the defendant agreed to pay the plaintiff all legal costs and rents in said suit. The action of ejectment remained pending for several years and was dismissed under the four-year rule, without the said rents having been ascertained in the action. In an action of covenant brought on the agreement, by the plaintiff in said action of ejectment, to recover the rents and costs, it was held that as the rents had never been assessed in either of the modes provided by statute, covenant could not be maintained for them. McCann v. Righter, 34 W. Va. 186, 12 S. E. Rep. 497.

Improvements—Who Can Recover—Bona Fide Claimants.—Where land is recovered in ejectment, the evicted defendant in order to recover for his improvements must have been a *bona fide* holder as claimant of the land; and he must have reasonable grounds to believe that he had a good title at the time he made the improvements. Constructive notice, by the recordation of the deed, is sufficient to prevent him from being a *bona fide* claimant. Dawson v. Grow, 29 W. Va. 333, 1 S. E. Rep. 564; Hall v. Hall, 30 W. Va. 779, 5 S. E. Rep. 260; Burton v. Mill, 78 Va. 468.

Where land has been recovered in ejectment, and the defendant goes into chancery, to obtain compensation for improvements, he will not succeed if he had notice of the plaintiff's title at the time of making the improvements. McKim v. Moody, 1 Rand. 58; Southall v. McKeand, 1 Wash. 336; Morris v. Terrell, 2 Rand. 6.

If a person purchase land with notice of an equitable title in another, but that other neglect to assert his right for a long time, during which time valuable improvements are made on the land, the purchaser shall not in equity, lose the value of his improvements; but if the right is asserted before the improvements are made the purchaser will lose them. Southall v. McKeand, 1 Wash. 336.

Improvements—Juries.—If a defendant in ejectment claims for improvements on the land, the plaintiff may at any time before a judgment is rendered on the assessment of the value of the improvements, though after the jury which tried the issue or passed upon the defendant's claim for improvements has been discharged, require that the value of his estate in the premises, without the improvements, shall also be ascertained. And this enquiry is to be made by another jury. The value of the plaintiff's estate in the premises without the improvements, is to be ascertained as at the time when the assessment of the value of the improvements was made. Goodwyn v. Myers, 16 Gratt. 336, and *foot-note*.

In actions of ejectment, if there is a claim by the plaintiff for mesne profits and damages for waste, and by defendant for improvements under §§ 30 and 32 of ch. 135 of the Code, both claims must be passed upon by the same jury. Where the statements are filed with the declaration and plea, the jury sworn to try the issue in ejectment may make all the enquiries required at the same time that they try the issue, or the enquiries may, if the court should so order, be made by the same jury after the verdict on the title is recorded; or by a new jury to be empanelled. Goodwyn v. Myers, 16 Gratt. 336.

In an action of ejectment, the same jury which tried the case on its merits was allowed without objection from either side, to fix the value of the land, the rent and profits thereof, and the value of the improvement claimed by the defendant. It was held too late after verdict, to object to this action of the court. Corr v. Porter, 33 Gratt. 278. See *foot-note* to Goodwyn v. Myers, 16 Gratt. 336.

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182 *Lee's Ex'or v. Boak.

April Term, 1854, Richmond.

1. **Issue Out of Chancery—No Exception to Verdict—Effect in Appellate Court.***—Where an issue is directed in a chancery cause, and a verdict is found to which no exception is taken, and a decree is rendered thereon, the facts found in the verdict must be regarded in the appellate court, as the established facts of the case.
2. **Legacies—Case at Bar.**—Testator gives a legacy to a nephew, but directs that he shall account for the amount of certain bonds and receipts of the nephew which the testator had paid off for him as his security. After making his will, testator, shortly before his death and in contemplation of that event, delivers to the nephew the bonds, &c. with the view of their becoming his absolute property in the event of the testator's death, and for the purpose of discharging the nephew from all accountability for the same as one of his legatees, in his settlement with the executor. HELD:
   1. **Same—Advancement in Satisfaction of—Case at Bar.**—The intention of the testator being that the nephew shall not account for the moneys paid by the testator for him, the gift of the bonds and receipts is not an advancement in satisfaction of the legacy to the nephew.
   2. **Gifts Mortis Causa—Bonds.**†—A bond may be the subject of a *donatio mortis causa*, whether it be the bond of a stranger or the donee: and in this case the donation was valid.

Samuel Lee, by his will, recorded in 1842, directed his estate to be sold by his executors, and the fund arising therefrom, after the payment of his debts, to be distributed among a large number of nephews and nieces; giving to four of them, of whom the appellee William L. Boak was one, each two shares thereof, subject, however, as to the share of the said Boak, to a deduction therefrom of all moneys theretofore paid by the testator for him as his security. In 1845 Boak filed his bill against Throck-

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***Issue Out of Chancery—No Exception to Verdict—Effect in Appellate Court.**—The principal case and Fitzhugh v. Fitzhugh, 11 Gratt. 210, were cited in Nease v. Capehart, 15 W. Va. 305, for the proposition laid down in the first headnote.

Same—Object of Issue.—In Hickman v. Railroad Co., 30 W. Va. 301, 4 S. E. Rep. 657, it was said: "In Nease v. Capehart, 15 W. Va. 300, this court, following the law as settled in Virginia and elsewhere, decided, that 'the object in directing the issue is to satisfy the conscience of the chancellor, but that conscience must be satisfied with the verdict of the jury upon an issue properly directed, where no errors have been committed during the trial thereof, either by the court or by the jury, to the prejudice of either party.' Carter v. Campbell, Gilmer 159; *Lee v. Boak, 11 Gratt. 182;* Fitzhugh v. Fitzhugh, *Id.* 210; Henry v. Davis, 7 W. Va. 715."

See further, monographic *note* on "Issue Out of Chancery" appended to Lavell v. Gold, 25 Gratt. 473.

Case Submitted to Court—Bill of Exceptions.—In Joslyn v. State Bank, 86 Va. 289, 10 S. E. Rep. 166, the court cites the principal case and Paul v. Paul, 2 H. & M. 525, as authorizing the proposition that in the case where the whole matter of law and fact has been submitted to the court, as well as in the case where there has been a verdict, there must be a bill of exceptions pointing out the alleged error, and a certificate of evidence showing what testimony was before the court or jury. See also, *foot-note* to Wickham v. Martin, 13 Gratt. 428.

†**Gifts Mortis Causa—Choses in Action.**—In Seabright v. Seabright, 28 W. Va. 470, the court said: "But it is now perfectly well settled at least in this country, that a promissory note, a bond or any instrument in writing, which creates a liability against a third person, and which is held by the donor and is his property either legal or equitable, is the subject of a valid *donatio causa mortis*. It is a matter of no importance, whether the chose in action, the subject of the *donatio causa mortis*, be the note or bond of a third person, or whether, if a note, it be payable to bearer or be endorsed in blank, or whether it be payable to the donor only, and he does not endorse it; it not being now regarded as at all necessary, that the legal title to the chose in action should pass by the delivery of it by the donor to the donee as a gift *causa mortis*, but it being sufficient, that by the delivery of the chose in action by the donor to the donee as a gift *causa mortis* the equitable title to such chose in action passes and vests in the donee by delivery. (*Lee v. Boak, 11 Gratt. 182;* Wells v. Tucker, 3 Binn. 366; Harring v. Edwards, 11 Md. 424; Constant v. Schuyler, 1 Paige 319, 318; Westuto v. DeWitt, 36 N. Y. 340; Holly's Administrator v. Adams, 16 Vt. 306, 311; Smith v. Kittridge, *et al.*, 21 Vt. 238, 242; Grover v. Grover, 24 Pick. 216, 264, 366; Sessions v. Moseley, 4 Cush. 87; Borneman v. Sidlinger, 15 Me. 429; Parker v. Marston, 27 Me. 196, 209; Brown's Executor v. Brown, 18 Conn. 410, 413; Jones v. Dyer, 16 Ala. 221; Rhodes v. Childs, 14 P. F. Smith 18; Gourley v. Listenbigler, 1 P. F. Smith 345.)"

Gifts—Delivery.—The principal case is cited several times as authorizing the proposition that all gifts, except by will, must be attended by delivery of possession to make them valid. See Thomas v. Lewis, 89 Va. 62, 15 S. E. Rep. 389; Spooner v. Hilbish, 92 Va. 341, 23 S. E. Rep. 751; *foot-note* to Morrison v. Grubb, 23 Gratt. 342.

See, in accord, Ewing v. Ewing, 2 Leigh 337; Miller v. Jeffress, 4 Gratt. 472; Seabright v. Seabright, 28 W. Va. 471.

See also, monographic *note* on "Gifts"; article on "Gifts of Personalty," 1 Va. Law Reg. 871-894.

morton, executor, and the other legatees of Lee, for an account and distribution of the estate, claiming to be entitled to two full shares thereof, without any deduction on account of money paid by the testator for him as his security; and averring
183 *that the testator, a short time before his death, and in contemplation thereof, when in full possession of his faculties, delivered to the complainant, to be canceled and destroyed, all the bonds evidencing such payments; expressly placing this act of delivery and donation upon the ground that it would be harsh and unjust, considering the past relations between them, to charge the complainant with such payments in the distribution of the estate.

The executor filed his answer, in which he expressed the opinion, that at the time of the alleged delivery and donation, the testator was incapable of knowing the meaning and consequence of the important act of releasing the complainant from the whole of his large indebtedness; if he was to get, besides, his legacy under the will. The amount paid by the testator as security for Boak, was upwards of six thousand dollars, and was greatly more than two full shares of the estate. Sundry depositions were taken and filed on both sides, as well in regard to the delivery of the bonds, &c., as in regard to the capacity of the testator to do such an act. A cross bill and answer were also filed. The cause was then heard; and the court, regarding the case as a proper one for the decision of jury, directed two issues to be tried. The issues were accordingly tried; and the jury found, "that the testator Samuel Lee deceased, shortly before his death, and in contemplation of that event, delivered to the complainant William L. Boak the bonds, receipts and other evidences of debt for moneys paid by him as the security of the said Boak, with the view of their becoming his absolute property in the event of the testator's death, and for the purpose of discharging the complainant from all accountability for the same, as one of the legatees of the estate in his future settlement with the executor; and further, at the time of such delivery and donation,
184 the said Samuel Lee was *of sound and disposing mind and memory, and capable of understanding the full effect and consequence of such an act." No exception was taken to the verdict; and a decree was rendered for a settlement of the executorial account and distribution of the estate; recognizing the right of Boak to two shares of the estate. From that decree this appeal was taken by Throckmorton, the executor.

R. T. Daniel and Brooke, for the appellant.

Faulkner, for the appellee.

MONCURE, J., after stating the case, proceeded:

The appellant has no cause to complain, and does not complain, of the decree of the court below directing the issues. No exception having been taken to the verdict, and the court having rendered a decree thereon, the facts found therein must be regarded as the established facts of the case. Whether the testator stood in loco parentis, in relation to his nephew Boak; and whether the legacy was a portion, and the donation of the bonds, receipts and other evidences of debt was of such a nature as that, standing by itself, it would have been considered an advancement in satisfaction of the legacy; are questions which need not be answered in this case. For assuming them to be answered in favor of the appellant, that is in the affirmative, I am still of opinion that, according to the facts found by the jury, the case is in favor of the appellee. If from the mere fact of the donation of the bonds, receipts, &c., an intention on the part of the testator to satisfy the legacy to Boak would have been presumed, certainly the presumption would have been repelled by proof of a contrary intention. This is admitted by the counsel for the appellant. The question is one of intention, on all the facts of the case.

The verdict expressly finds a contrary
185 intention *in this case. It finds not only the fact of the donation of the bonds, &c., but that they were given for the purpose of discharging Boak from all accountability for the same as one of the legatees in his future settlement with the executor. The will had directed that Boak should be charged with the bonds, &c., in the settlement of his legacy. The established purpose of the donation was to discharge him from all accountability for the bonds, &c., in such settlement. The necessary consequence is that he is entitled to the legacy without any deduction on account of the bonds, &c.: just as if the debt had been paid by Boak, instead of given up to him; or as if the testator had made a codicil, releasing the debt and saying it was not to be deducted in the settlement of the legacy. The testator, by giving the legacy subject to a deduction of the debt, did not deprive himself of the power of afterwards receiving the debt; or giving it to the debtor, by a donation inter vivos, or mortis causa, or by a codicil: And if so received or given, the debt would be discharged, that part of the will directing a deduction of the debt from the legacy would be revoked, and the debtor would be entitled to the legacy without such deduction: Unless indeed the debt were given in satisfaction of the legacy; in which case the legacy itself would be revoked. I do not see how this matter can be made plainer by argument or by authority: And I do not think there can be any room for doubt as to the right of Boak to the legacy without any deduction for the debt if the donation to the debt was a valid donation. That question I will now proceed briefly to consider.

Whether the donation was valid or not, depends upon whether there was a sufficient delivery of possession to perfect the gift. All gifts, except by will, must be attended by delivery of possession to make them

valid. Until such delivery they are
186 inchoate and revocable; *indeed mere nullities. The donation in this case, as found by the jury, was a donatio mortis causa. But there is no difference in this respect between donations mortis causa and inter vivos. The same kind of delivery of possession which is necessary to make good the one, is necessary to make good the other. 1 Roper on Legacies, 19; Ewing v. Ewing, 2 Leigh, 337, 341 and 344. The cases are conflicting in regard to the donation of a debt by the delivery of a bond, note, or other evidence of the debt. I deem it unnecessary to review them, as most or all of them may be seen by reference to 1 Roper on Legacies, by White, ch. 1; 1 Story's Eq. Ju. § 433, note 3; 2 Id. § 706, 793 a, and notes. The distinction taken by Lord Hardwicke in Snellgrove v. Baily, 3 Atk. R. 214, between a gift by delivery of a bond and a note; saying that the former would be good as a donation mortis causa, but not the latter, though since followed in England, has been repudiated in several of the United States; in which it has been held that bonds, bills of exchange, promissory notes and other choses in action are all equally proper subjects of a valid donation as well causa mortis as inter vivos. 1 Roper on Legacies, p. 16, note 7; 4 Kent's Com. 447; Wright v. Wright, 1 Cow. R. 598; Constant v. Schuyler, 1 Page's R. 316; Borneman v. Sidlinger, 15 Maine R. 429; Wells v. Tucker, 3 Binn. R. 366. In some of the states, Massachusetts, and perhaps Connecticut, for example, the distinction taken by Lord Hardwicke seems to have been recognized. Parish v. Stone, 14 Pick. R. 198. In Virginia, bonds, bills, promissory notes, and all other writings obligatory, are assignable, and the assignee may sue in his own name. If they are transferred without a written assignment, the transferee may sue at his own cost, in the name of the party in whom is the legal title; and his right will be recognized and protected by the court against the release or other act of such party. His remedy
187 is *complete at law, and he has no occasion to ask the aid of a court of equity. The principle that a court of equity will not assist a volunteer to complete his title, which in England may defeat a voluntary transfer of a chose in action not negotiable, would seem to have no application in this state; but a bill, note, or other writing obligatory, is as proper a subject of a valid donation as a bond. Elam v. Keen, 4 Leigh 333, is the only adjudication in this state which seems to have a particular bearing on the subject. In that case, A having a bond in suit, told B he might have it, and gave him the attorney's receipt. The executor of A received the money, and B brought an action against him for money had and received. The action was sustained, though B had given no consideration for the bond; the delivery of the attorney's receipt being considered a sufficient delivery to complete the gift of the bond. Judge Carr recognized the distinction taken by Lord Hardwicke in Ward v. Turner, 2 Ves. sen. 431, between such a constructive or symbolical delivery as was sufficient to pass the right to a chattel sold, and put it at the risk of the vendee, and such a delivery as was necessary to consummate a gift. But he said, "there are many things of which actual manual tradition cannot be made, either from their nature or their situation at the time; it is not the intention of the law to take from the owner the power of giving these; it merely requires that he shall do what, under the circumstances, will, in reason, be considered equivalent to an actual delivery." He then refers to the case of Jones v. Selby, Prec. in Chan. 300, in which the delivery of the key of a trunk was held to be a sufficient delivery to make a valid gift of a tally of £500 contained in the trunk; and also to Noble v. Smith, 2 John. R. 52, in which Chief Justice Kent said, "the cases in which the delivery of a symbol has been held sufficient to perfect the gift, are those in which it was considered
188 *equivalent to actual delivery; as the key of a room, or of a ware-house, which was the true and effectual way of obtaining the use of the subject." Judge Carr considered the receipt as the representative of the bond, which, being in court, could not be delivered; and that, as in the case of the key, the delivery of this receipt was the true and effectual way of obtaining the use of the subject." These remarks are very appropriate to the case under consideration, and the principle of Elam v. Keen is, I think, decisive of this case.

In the case of Ewing v. Ewing, 2 Leigh 333, a gift of a bond to the obligor was held to be invalid for want of delivery: If the bond had been delivered the gift would have been sustained. This is obvious from the opinions of Judges Carr and Green. The former said, "Here it is expressly proved that the bond never was delivered nor any written transfer made." The latter said, "In the case before us neither the bond in question, nor the money due upon it, could be effectually given or forgiven, or released to the obligor, but by the obligee's canceling or destroying it with that avowed intention, or surrendering it to the obligor, or to some other for him, or by some instrument in writing to that effect." See also the case of Dunbar's ex'ors v. Woodcock's ex'or, 10 Leigh 628, decided by a Special court of appeals.

A donation of a debt to the debtor himself is entitled to at least as much favor as a donation of the debt to a third person: and a delivery of the evidence of the debt is at least as valid delivery of the debt itself in the former as in the latter case. The delivery of the evidence of the debt to a stranger donee, merely enables him to obtain possession of the subject of the gift; while such a delivery to a debtor donee, ipso facto puts him in possession of the subject; or converts to his own use the possession, which he had hitherto held for the use of his creditor. Indeed, a dona-

189 tion of *a debt to the debtor himself has been more favored by courts of equity than a donation to a stranger. It is believed there has been no case in which a court of equity has enforced an imperfect gift to a stranger; while there have been various cases in which that court has enforced an imperfect gift of a debt to the debtor. Some of these cases are cited and commented upon in 2 Story's Eq. Ju. § 705 a, 706 and 706 a; and "they proceed (says Story) upon the distinct ground that the transaction was one exclusively between the creditor and the debtor; and that taking all the circumstances together, it was clearly the intention of the creditor to treat the debt as in equity forgiven and released to the debtor himself. But cases of this sort (he further says), are clearly distinguishable from purely voluntary imperfect gifts or assignments of debts or other property to third persons."

I think there was a valid donation of the debt in this case; and it follows that I am for affirming the decree.

The other judges concurred in the opinion of Moncure, J.

Decree affirmed.

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190 *Richardson's Adm'r v. Prince George Justices.

Poindexter's Adm'r v. Same.

April Term, 1854, Richmond.

1. **Judgments—Scire Facias—Variance—Case at Bar.**—A judgment is recovered in the name of B H and three others, justices of P. G. county, for the benefit of the marshal of the Superior court of chancery for the Williamsburg district. The defendant being dead, a *scire facias* issues to revive the judgment, which, after setting out the plaintiffs, and the recovery of the judgment for the benefit of the marshal, adds, which marshal was W. HELD: This is not a variance.

2. **Same—Same—Surplusage—Case at Bar.**—In this case the marshal being dead, the *scire facias* recites that it was awarded at the instance of M his administrator. Though it might have been more regular for the *scire facias* to recite that it was awarded at the instance and on behalf of the plaintiffs on the record, yet as it would have been good if the averment at whose instance it had issued had been wholly omitted, the recital was mere surplusage, and does not vitiate the *scire facias*.

3. **Same—Same—How Regarded—Case at Bar.**—Neither the *scire facias* nor any other part of the record, showing what was the character of the obligation or other liability upon which the judgment was rendered, and the defendant's plea not averring that it was such a statutory bond as required that there should be a relator in any action brought upon it, and that the relator should be the party, having the legal right to sue, it must be regarded as a common law bond or liability subject to be sued on in the names of the payees without a relator, or for the benefit of the holder or any party entitled to the benefit of it; and whether W was marshal or M was his administrator, is a question in which defendant has no interest; and it cannot be raised by him by plea in bar to the plaintiffs' claim.

4. **Same—Same—Suspended by Injunction—Surplusage.**—The *scire facias* stated the judgment had been suspended by injunction. This was an unnecessary allegation, and may be treated as surplusage; and a plea that the judgment had not been suspended by injunction, offered no bar to the *scire facias*.

5. **Same—Same—Dissolution of Injunction—Immaterial Issue.**—The *scire facias* further stated that the injunction had been dissolved. A plea that the injunction had not been dissolved, is bad, and an issue made up upon it is immaterial. Therefore, though the court admits improper evidence upon it, offered by the plaintiff, it is not cause for reversing the judgment.

191 *6. **Same—Death of Judgment Creditor—Pending Injunction.***—The dependency of an injunction to a judgment at law, will not prevent the revival of the judgment upon the death of either the plaintiff or defendant; and the injunction operates upon the judgment on the *scire facias*, to restrain and prohibit the issue of execution thereon.

These two cases are precisely the same except in the names of the defendants below, who are the appellants. The statement of one is therefore the statement of the other.

In April 1847 a scire facias was issued from the clerk's office of the Circuit court of the county of New Kent, which recited, that whereas Benjamin Harrison, Thomas Cock, Nathaniel Colly and William Baird, justices of Prince George county, who sue for the benefit and at the cost of the marshal of the Superior court of chancery for the Williamsburg district, which marshal was Charles L. Wingfield, at a Superior court of law begun and held for New Kent county on Monday the 4th of October 1830, by the judgment of said court recovered against Holt Richardson and John L. Poindexter, on a motion for a judgment and award of execution upon a bond given for the forthcoming and delivery of property on the day and at the place of sale, taken by virtue of the plaintiff's execution sued out of said court against the goods and chattels of the defendant Richardson and one Thomas H. Terrell and John H. Christian, the sum of eight hundred and thirty-four dollars and forty-two cents, the penalty of said bond, and their costs by them in that behalf expended. But the said judgment was to be discharged by the payment of four hundred and sixteen dollars and twenty-one cents, with interest thereon, to be computed after the rate of six per cent. per annum, from the 6th day of September 1830 till paid and the costs, one dollar and eighty-six cents. Whereof, &c. And

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*Judgments—Scire Facias—Pending Injunction.—In Hutsonpiller v. Stover, 12 Gratt. 592, it is said that the pendency of an injunction to a judgment does not prevent the suing out of a *scire facias*. Citing *Richardson v. Prince George Justices*, 11 Gratt. 190.

See monographic *note* on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518.

whereas a certain Charles L. Wingfield was the said marshal, and since the
192 rendition of the judgment *aforesaid, the execution of which has been suspended by an injunction obtained by the said Holt Richardson, the said Charles L. Wingfield and the said defendants Holt Richardson and John L. Poindexter have all departed this life, the said Richardson having died intestate as it is said; and administration on the estate of the said Charles L. Wingfield has been in due form of law granted to P. P. Mayo; and administration of the said Holt Richardson has been in due form of law granted to Theophilus A. Lacy, as we have been informed. And now in behalf of the said P. P. Mayo, administrator as aforesaid of the said Charles L. Wingfield, it is said that although judgment be given as aforesaid, and the injunction granted staying the execution of said judgment has been dissolved, yet execution of the debt, interest and costs still remain to be made. Therefore, at the instance of the said P. P. Mayo, administrator of the said Charles L. Wingfield, we command you, that you make known to the said Theophilus A. Lacy, administrator of the said Holt Richardson, that he be at the clerk's office, &c., on the first Monday in August next, to show cause, if any he can, why the said P. P. Mayo, administrator of the said Charles L. Wingfield, ought not to have execution against him the said Theophilus A. Lacy, administrator of Holt Richardson, of the debt, interest and costs aforesaid, according to the judgment aforesaid.

The scire facias having been returned executed, the defendant appeared and demurred to it, and moved to quash it; and also tendered five pleas: 1st. Nul tiel record. 2d. That P. P. Mayo was not the administrator of Wingfield. 3d. That the execution of the judgment in the scire facias mentioned was not suspended by injunction. 4th. That at the time of the rendition of said judgment, Charles L. Wingfield was not the marshal of the Superior court of chancery for the Williamsburg dis-
193 trict. 5th. That the injunction *in the scire facias mentioned, by which the said judgment was enjoined, had not been dissolved.

The court overruled the demurrer, and refused to quash the scire facias, and on the motion of the plaintiffs, excluded the second, third and fourth pleas tendered by the defendant, but admitted the first and fifth. And the defendant excepted. There was a general replication to the first plea, and issue; and the plaintiffs replied to the fifth plea, that the said injunction had been dissolved; and this they were ready to verify by the record. And the defendant took issue on the replication.

On the trial of the issue joined on the first plea, the plaintiffs introduced the judgment and award of execution; and the defendant objected to the introduction of this evidence, without the production also to the court of the forthcoming bond on which the judgment and award of execution were awarded; also the execution on which the forthcoming bond was taken, and the whole record of the suit out of which these had their origin. But the court overruled the objection, and gave judgment on that issue for the plaintiffs.

Upon the trial of the issue on the replication to the fifth plea, the plaintiffs moved the court to try it without the intervention of a jury; to which the defendant objected. But the court overruled the objection, and determined to try the issue without a jury. The plaintiff then offered in evidence a part of a record of a chancery suit lately pending in the Circuit court of New Kent. This was the proceedings in cause which had been commenced in the Chancery court of Williamsburg, but was afterwards transferred to the Circuit court of New Kent. The part of the record filed commenced with an amended and supplemental bill filed by Holt Richardson in a suit which he had instituted in that court, as administrator of John Forth against William Spraggins and Polly his wife; and the
194 *object of this supplemental bill was to enjoin proceedings upon a judgment recovered against him on a forthcoming bond in the Circuit court of New Kent. But the part of the record nowhere shows who were the plaintiffs, or what was the amount of the judgment. This injunction was granted, and was afterwards dissolved. Upon this evidence the court gave a judgment for the plaintiffs on this issue. And the defendant excepted to the opinion of the court overruling his objections to the evidence upon the issues upon the first and fifth pleas, and also to the opinion of the court overruling his objection to the trial of the last issue by the court without a jury: And applied to this court for a supersedeas, which was allowed.

Lyons, for the appellant.
Steger, for the appellees.

LEE, J. It is no doubt true that if a scire facias for the purpose of reviving a judgment, be found to vary in a material matter from the judgment in the description which it undertakes to give of it, advantage may be taken of it in the proper mode, and the variance will prove fatal. But waiving the question whether a proper mode of making such an objection could be by a general demurrer or motion to quash, I am of opinion that no such variance appears in the present case. It is true the judgment was in the names of four persons described as justices of Prince George county, suing for the benefit of the marshal of the District court of chancery held at Williamsburg, without giving his name, while the scire facias avers that his name was Charles L. Wingfield. But this is no variance. It is intended to furnish an additional means of identification of the person for whose benefit the judgment had been rendered, and to show the right of the party at whose instance the present

195 proceeding *was taken. It is an averment in nowise repugnant to, but strictly consistent with, all the terms of the judgment, while the names, sums, dates and other elements of description, which the judgment affords, are found accurately given in the scire facias. The objection that the scire facias recites it was awarded at the instance of P. P. Mayo, administrator of Charles L. Wingfield, instead of Benjamin Harrison, and the other three parties who are the plaintiffs on the record, is one rather of form than of substance. It might have been more regular for the scire facias to recite that it was awarded at the instance and on behalf of the plaintiffs on the record, but as it would have been good if the averment at whose instance it had issued had been wholly omitted, I regard it as mere surplusage, and not serving to vitiate; and the rather because the requirement of the process is that the defendant shall show, if anything he can, why execution should not be awarded against him "according to the judgment aforesaid," thus contemplating conformity to the judgment in the manner of the process sought, while it recognizes the right of the party for whose benefit it was designed to be taken. I think the demurrer and motion to quash were properly overruled.

It does not appear from the scire facias, or in any other part of the record, what was the character of the obligation or other liability upon which the original judgment was rendered. It may have been a statutory bond, made payable to the plaintiffs in their official character, or though payable to them in such character, it may not have been a statutory bond, though good as a common law obligation; or it may have been a bond or other contract, payable to the plaintiffs, in their individual character, the words justices of Prince George county being added as "designatio personarum." Nor do the defendants' pleas, or any of them, allege that it was such a statutory
196 bond as required that *there should be a relator in any action brought upon it, and that the relator should be the party having the legal right to sue. In the absence of any such information as to the character of the obligation, and of any averment that it was of the nature above indicated, we must regard it as a common law bond or liability, subject to be sued on in the name of the payees, without any relator, or for the benefit of any party who may be the holder, or lawfully entitled to the benefit of it. Thus the questions whether Wingfield was marshal and whether Mayo was his administrator, are questions between the latter and the plaintiffs on the record, with which the defendant has no concern, because the demand being treated as a common law and not a statutory liability, and the proceeding being to revive a judgment on such a liability in the name of the payees, a judgment upon this scire facias for whose use soever, will be a complete bar in favor of the defendant to any future action. At most, if the defendant desired to call in question the right of Mayo to use the names of the original parties, and to prosecute the scire facias for his own benefit, the proper mode was to apply to the court for its summary interference by rule. Howard v. Rawson, 2 Leigh, 733, and authorities cited in the opinion of Judge Summers. He could not make such matter the subject of a plea in bar to the plaintiff's action. I think the pleas that Wingfield was not marshal, and that Mayo was not his administrator, tendered immaterial issues, and were properly rejected by the court.

The plea that the judgment had not been suspended by an injunction, offered no bar to the scire facias. It but served to point to another matter which might be made the subject of a plea in bar, and which, if not successfully answered, would defeat the action. It is true the scire facias does allege that execution of the judgment had been suspended by an injunction; but
197 *this allegation was unnecessary, and may be treated as surplusage; and a naked traverse of such a matter offers no sufficient defence to the action. If the defendant desired to set up the statute of limitations in his defence, it was his duty to plead it distinctly and directly: He could not be entitled to the benefit of it upon a collateral issue. If the plea were strictly true and there never had been an injunction, it does not follow that the judgment could not be revived. And if the defendant had pleaded the statute of limitations, the plaintiffs might have replied some matter (other than the pendency of the injunction) which might serve to take the case out of its operation, but of the benefit of which, upon the issue tendered, they might be deprived. I think, therefore, this plea also was properly rejected by the court.

The fifth plea tendered by the defendant (that the injunction had not been dissolved) was received by the court, and an issue made up upon it. And if this could be regarded as a good plea, or the issue joined upon it as material, it might admit of question whether the court did not err in admitting the imperfect and incomplete record offered by the plaintiff in evidence, in support of the issue upon his part. For although, as has been decided by this court in the cases of White v. Clay's ex'ors, 7 Leigh 68, and Wynn v. Harman, 5 Gratt. 157, a decree or other extract from the record may be given in evidence without the production of the whole record, yet from the case of Masters v. Varner's ex'ors, 5 Gratt. 168, we learn that this is to be so understood where the decree or extract so offered itself satisfactorily establishes the fact it is offered to prove. And in this case the portion of the record offered by the plaintiff was scarcely sufficient to identify the judgment the injunction to which was thereby dissolved, as that upon which the scire facias in question had been sued
198 out. But I do not regard *the plea as a good bar, nor the issue joined upon it as material. I can perceive no good

reason why a party plaintiff, whose judgment has been enjoined, may not be permitted, upon the death of the defendant pending the injunction, to revive it against his personal representative. Such a proceeding can be no breach of the injunction, the object of which is to restrain the party from enforcing the judgment by execution, and reaping its fruits, until the matters of equity alleged can be heard and considered. All that the court of chancery intends to restrain is execution. The plaintiff may proceed so far as to be able to take out execution the instant the injunction is dissolved. 1 Eden on Injunct. 97. Now, where the defendant dies after the injunction, unless the plaintiff can go on and revive against his representative, he will not be in a situation, upon the dissolution of the injunction, to issue his execution, but must then be delayed till he can sue out his scire facias and obtain the order of revival; and thus, by the supervening death of the defendant, he is placed in a worse condition than when the injunction was allowed; while, if he is allowed to go on and revive his judgment, notwithstanding the injunction, he is merely reinstating himself to the right which he then had of issuing his execution as soon as the injunction is dissolved. In fact, the right to sue out execution upon its dissolution, is the very condition of an injunction to a judgment; and if the judgment creditor die pending the injunction, the court of chancery will in a summary way impose it as a condition on the complainant to consent to revive at law, under the penalty of having his injunction dissolved if he refuse. Medley v. Pannill, 1 Rob. R. 63. And there can be no conceivable difference in this respect whether the necessity for the revival is occasioned by the death of the judgment creditor or the judgment debtor. The
199 inconvenience to be remedied *is precisely the same in both cases: and what the court of chancery would itself enforce in a summary way by a rule, it surely would not regard as a breach of the injunction when sought to be accomplished by the ordinary process of law. The judgment creditor must take care to stop with the order reviving his judgment. Thus far may he go but no farther; and the judgment of the court upon the scire facias is to be regarded as in strict subordination to the injunction to the original judgment of which it is the mere continuation.

I regard this as the reasonable and sound doctrine upon this subject; and I have seen no case which should be considered as disaffirming it. It is true Judge Baldwin, in delivering his opinion in the case of Smith's adm'r v. Charlton's adm'r, 7 Gratt. 425, 466, intimates that pending a writ of error or injunction or cessat, an action of debt or scire facias cannot be brought upon the judgment. He cites no authority for the proposition, and so far as it respects the injunction, it is an intimation thrown out arguendo and by way of illustration. He probably did not advert to the distinction between the nature and effect of an injunction and that of a writ of error or cessat. At all events it was a point not at all material to the decision in that case, and the remark of the judge as it respects the injunction, must be regarded as obiter merely. On the other hand, there are several cases to be found in the English chancery, from which the right to revive a judgment by scire facias upon the death of the judgment debtor pending an injunction may be fairly deduced. Thus, where there is an interlocutory judgment, as by default or upon demurrer, and an injunction is allowed, the plaintiff may, notwithstanding, go on and ascertain his damages. Morrice v. Hankey, 3 P. Wms. 146. So where the defendant at law had put in a frivolous plea, to
200 which the plaintiff demurred, *and there was an injunction allowed; and pending the injunction, the plaintiff went on and obtained judgment, it was held by Lord Macclesfield that this was no breach of the injunction. Sidney v. Hetherington, 3 P. Wms. 147 n. So where there had been an award made under a reference which had been made a rule of court, and an injunction was allowed, it was held by Lord Roslyn that the party might go on at law, take his rule to show cause why an attachment should not go for performance of the award, and proceed to make his rule absolute without being guilty of any breach of the injunction, provided he did not execute the attachment. Franco v. Franco, 2 Cox R. 420. And in a case where there was judgment against a defendant as executor quando acciderint, an injunction was allowed, the plaintiff at law pending the injunction, took out a scire facias to enquire after assets: this was held by Lord King to be no breach of the injunction, being only a continuation of the old action on the same record. Morrice v. Hankey, 3 P. Wms. 146. In all these cases the object of the party was simply to place himself in a condition to sue out execution as soon as the injunction should be dissolved: and such is the purpose for which a party may well be permitted to revive his judgment where the defendant has died pending the injunction.

It is objected that the judgment on the scire facias, awarding execution, is in favor of Mayo, administrator of Wingfield, when it should have been in favor of Harrison and the other plaintiffs on the record. It might have been more regular that it should have been in terms in favor of the latter, for the use and benefit of Mayo, administrator, &c.; but as the judgment is to be understood with reference to the scire facias on which it is founded; and as that goes for award of execution according to the original judgment, it may be regarded as in effect an award of
201 *execution to be sued out in their names for the use of Mayo administrator of Wingfield, according to the suggestions contained in the scire facias. The objection goes rather to form than to substance, and does not call for a more grave consideration.

I am of opinion to affirm the judgment.

The case of Poindexter's ex'or v. Wingfield's adm'r is in all respects similar to the foregoing, being a proceeding to revive the judgment against the representative of the other defendant Poindexter, who had also died after the injunction. The same defence was made and the questions arising in this case are precsely the same as those in the former.

I am of opinion that this judgment also should be affirmed.

ALLEN, MONCURE and SAMUELS, Js., concurred in the opinion of Lee, J.

DANIEL, J., dissented. He thought the fifth plea of the pendency of the injunction a good plea; and that the proof admitted by the Circuit court of its dissolution was not sufficient.

Judgment affirmed.

202 *Boyles' Adm'r v. Overby.

April Term, 1854, Richmond.

1. **Fraud of Decedent—Action against Personal Representative.***—An action on the case for fraud in selling to the plaintiff an unsound slave, which he was induced to purchase by means of a false and fraudulent warranty of soundness; or by means of a fraudulent concealment of the unsoundness of the slave, cannot be maintained against the personal representative of the vendor.
2. **Same—Same—Judgment for Plaintiff—Jeofails.**—In such an action against the personal representative of the vendor though there is a judgment in favor of the plaintiff, the error will not be cured by the statute of jeofails. 1 Rev. Code of 1819, ch. 128, § 103, p. 511.
3. **Same—Same—Verdict for Plaintiff—Judgment.**†—In such a case, though there is a verdict for the plaintiff, judgment should be rendered for the defendant, notwithstanding the verdict.
4. **Statute of Jeofails—When Action Misconceived in Sense of Statute.**—An action is misconceived in the sense of the statute, only in a case wherein upon the trial the proofs show a cause of action fit to be asserted in a form different from that adopted. The defendant is held liable upon proof showing a liability; and if no objection is made to the form of the action until after verdict, the defect is cured thereby.
5. **Same—Interpretation of.**—To hold a defendant liable upon a cause of action not asserted, is going to the utmost verge of the law, even where such cause of action is proved. But to hold him liable for such cause when not proved, or proved by evidence not admissible if the suit had been brought for that cause, is going beyond the letter and spirit of the law.
6. **Practice at Common Law—No Cause of Action Set Forth—Effect of Statute of Jeofails.**‡—The statute, though it will aid defects whether of form or substance in pleading, where a portion of the matter pleaded is appropriate, does not apply to cases in which the matter pleaded is, in all its parts, merely nugatory, setting forth no cause of action or no ground of defence.

This was an action on the case in the Circuit court of Patrick county, brought by Allen S. Overby against the administrator of William Boyle deceased. The declaration contained two counts. The first set out that the plaintiff bargained with Boyles in his life time, to buy of Boyles a negro girl slave, and that Boyles, by falsely warranting and representing the said
203 negro *to be sound, falsely and fraudulently induced the plaintiff to buy, and that he did buy of the said Boyles the said negro for, &c.; whereas the said ne-

*Torts—Survival of Action.—In Lee v. Hill, 87 Va. 501, 12 S. E. Rep. 1052, the principal case was disapproved. In that case, the true rule as to the survival of tort action was said to be as follows: Where the cause of action is a tort unconnected with contract, and affects the person only, and not the estate, such, for instance, as assault, libel, slander and the like, the action dies with the person; but, where the action is founded on contract, it is virtually *ex contractu*, although nominally in tort, and, in such case, the action survives.

†Judgment Non Obstante Veredicto.—In Duval v. Malone, 14 Gratt. 27, it was said: "The court of its own motion, even after verdict, may disregard the finding of immaterial facts; and in a proper case judgment may be rendered *non obstante veredicto;* or, if the case be not in a condition to warrant a judgment, a repleader may be awarded. 1 Rob. Prac. (Old Ed.) 222; Beale's Adm'r v. Botetourt Justices, 10 Gratt. 278; *Boyles' Adm'r v. Overby, 11 Gratt. 202*, and the cases there cited."

See also, the principal case cited on this point in Davis v. Com., 13 Gratt. 151; Mason v. Bridge Co., 28 W. Va. 653, both cases also citing Ross v. Milne, 12 Leigh 204.

‡No Cause of Action—Effect of Statute of Jeofails.—In Robrecht v. Marling, 29 W. Va. 774, 2 S. E. Rep. 831, it is said: "If there had been no legal cause of action in the declaration alleged, and no demurrer to the declaration, and evidence taken to support such declaration and verdict and judgment rendered, upon writ of error to such a judgment it has often been held that, notwithstanding our strong statute of jeofails, the judgment and verdict would be set aside, and judgment entered in the appellate court for the defendant *non obstante veredicto.* Mason v. Farmers' Bank, 12 Leigh 84; Davis v. Com., 13 Gratt. 139; Ross v. Milne, 12 Leigh 204; *Boyles v. Overby, 11 Gratt. 202;* Holliday's Ex'rs v. Myers, 11 W. Va. 276."

See principal case also cited for this proposition in Roanoke, etc., Co. v. Karn, 80 Va. 595; Long v. Campbell, 37 W. Va. 671, 17 S. E. Rep. 198. In this last case, it was said: "Where a declaration states a case imperfectly, the statute (of jeofails), after judgment without objection to the defect, intends to cure it; but not where the declaration states no case at all. The opinions of JUDGE LEE in Kennaird v. Jones, 9 Gratt., at page 189, and in Hitchcox v. Rawson, 14 Gratt., at page 538, and of JUDGE MONCURE in *Boyles v. Overby, 11 Gratt. 202*, in their construction of the statute, are to same effect. See Land Co. v. Karn, 80 Va. 589, 595." For other cases where the statute of jeofails was held inapplicable because no cause of action was stated, see Ross v. Milne, 12 Leigh, 204, 37 Am. Dec. 646; Mason v. Bank, 12 Leigh 84.

See the principal case distinguished in Spengler v. Davy, 15 Gratt. 397, 398; Holliday v. Myers, 11 W. Va. 287, 289, 290, 291.

gro, at the time of said warranty and sale, was not sound, &c. The second count set out that the plaintiff was induced by Boyles to buy the said slave, by falsely, deceitfully and fraudulently suppressing and concealing from the plaintiff the fact that the slave at the time of the sale labored under an incurable disease called consumption, which said unsoundness was well known to said Boyles.

Whilst the case was pending the administrator of Boyles was removed from his office, and administration de bonis non was granted to Clark Penn; and on his motion, he was admitted a party defendant.

On the trial of the cause there was a verdict for the plaintiff for two hundred and eighty-six dollars and fifty cents, upon which the court rendered a personal judgment against Penn: And he thereupon applied to this court for a supersedeas, which was awarded.

Grattan, for the appellant.
There was no counsel for the appellee.

SAMUELS, J. The plaintiff's cause of action is set forth in a declaration of two counts.

In the first count he alleges a deceit by Boyles the intestate, in the sale of a diseased slave; and alleges that the plaintiff was induced to purchase by means of a false and fraudulent warranty of soundness.

In the second count he alleges a deceit in the sale of an unsound slave by Boyles the intestate, by means of a fraudulent concealment of the unsoundness of the slave. There is nothing in the record to show upon what proof the verdict was rendered.

These causes of action, and each of them, died with the vendor Boyles; if suit
204 thereon had been brought *in his life time, it must have abated by his death. The suit brought against his administrator, and revived against the administrator de bonis non, was for causes of action no longer in existence. This appears from the plaintiff's own showing; and judgment should have been rendered for the defendant, notwithstanding the verdict, unless the statute of jeofails, 1 Rev. Code, ch. 128, § 103, p. 511, may require a different judgment.

It is obvious to remark that notwithstanding the comprehensive terms of the statute, it was not thereby intended to cure all cases occurring before verdict: If such had been the purpose of the legislature, a simple and direct enactment to that end would have been the mode adopted. Instead of this, an enumeration is given of particular errors, which, after verdict, shall not be relied on to stay or reverse the judgment; amongst them are these: "Any mistake or misconception of the form of action;" or "any other defect whatsoever in the declaration or pleading, whether of form or substance, which might have been taken advantage of by demurrer, and which shall not have been so taken advantage of."

In the enquiry whether either of these clauses of the statute includes the case before us, we may discard the second count of the declaration; that is clearly beyond the reach of help from the statute. The first count, in alleging the fraud, sets forth that it was perpetrated by means of a false warranty; and it has been suggested that this action on the case in form ex delicto, for the tort, the fraud in the deceit, was misconceived for an action on the warranty, and therefore is cured by the verdict. This I conceive cannot be so. The legislature cannot have intended to sustain a judgment because in a different form of action, and upon proof of other facts, a judgment might have been had for damages assessed by a different rule;
205 and *thus, almost necessarily, different in amount. The verdict in this case was rendered upon proof of fraud; for without such proof it could not have been rendered at all. See Trice v. Cockran, 8 Gratt. 442. Yet in an action on the warranty, fraud cannot be proven, being wholly immaterial to the cause of action. The ex'ors of Evertson v. Miles, 6 John. R. 138. In an action on a warranty of soundness, the measure of damages is the difference between the real value and the price paid. Tuck. Com. book 2, ch. 25, p. 353 of new edition; Thornton v. Thompson, 4 Gratt. 121. In case for deceit there is, perhaps, no fixed rule for the assessment of damages; they are not limited, however, as in an action on the warranty; if so, they may go beyond those recoverable in an action on the warranty. Rice v. White, 4 Leigh 474; Brown v. Shields, 6 Leigh 440. An action is misconceived only in a case wherein, upon trial, the proof shows a cause of action fit to be asserted in a form different from that adopted; the defendant is held liable upon proof showing a liability; if no objection be made to the form of action until after verdict, the defect is cured thereby. To hold the defendant liable upon a cause of action not asserted, is going to the utmost verge of the statute even where such cause of action is proven; but to hold him liable for such cause when not proven, or proven by evidence not admissible, if the suit had been brought for that cause, is going beyond the letter and spirit of the law.

The other clause of the statute of jeofails, above referred to, will not sustain the judgment. This clause was intended to aid defects of form or substance in pleading: If, however, a declaration sets forth no cause of action whatever, or a plea sets forth no defence whatever, the statute can give no aid. It extends to cases in which a portion of the matter pleaded is
206 *appropriate, but not to cases in which the matter pleaded, in all its parts, is merely nugatory.

The plaintiff having shown no cause of action whatever, I am of opinion to reverse the judgment; and on the authority of Brown v. Shields, 6 Leigh 440; Mason v. Farmers Bank at Petersburg, 12 Leigh 84; Ross v. Milne & wife, 12 Leigh 204; Tomkins v. The Branch Bank, 11 Leigh 372, to

enter judgment for the defendant, notwithstanding the verdict.

MONCURE, J. Case and assumpsit are concurrent remedies for a breach of a warranty contained in a simple contract of sale. Formerly case was the remedy, generally, if not always pursued. Recently, it has been found more convenient to declare in assumpsit, for the sake of adding the money counts. In Williamson v. Allison, 2 East's R. 450, Lord Ellenborough, C. J., said: "The more modern practice had not prevailed generally above forty years. No other proof was required to sustain the former mode of declaring than the warranty itself and the breach of it." The scienter was not necessary to be averred; nor, if averred, to be proved. The action, though in form ex delicto, was in substance ex contractu. It could probably have been maintained at common law against an executor on the warranty of his testator, although the general issue is "not guilty," and the general rule, as laid down by Lord Mansfield in Hambly v. Trott, Cowp. 371, was, that an action in which "not guilty" was the general issue was a personal action which died with the person. Being formerly the general, if not the only, form of action in such cases, it was probably used as well against executors as others. In Powel v. Layton, 5 Bos. & Pul. 370, Mansfield, C. J., seemed to be of opinion that case would lie against the executor of a carrier, the foundation of the action being essentially contract. The same prin-
207 ciple would apply, *at least as strongly, to an action on the case for a breach of warranty.

But however this may be, I think the action might have been maintained under the equity of the statute, 1 Rev. Code of 1819, p. 390, § 64, which declared that "actions of trespass may be maintained by or against executors or administrators for any goods taken or carried away in the life time of the testator or intestate." This section is an extension of the statute, 4 Edw. 3, ch. 7, de bonis asportatis, so as to embrace actions brought against, as well as by executors and administrators. Vaughan's adm'r v. Winckler's ex'or, 4 Munf. 136; Lee v. Cooke's ex'or, Gilm. 331. The statute of Edw. 3 altered the rule, actio personalis moritur cum persona, only in its relation to personal property, and in favor of the personal representative of the party injured. But to that extent it has always received a very liberal construction. "It has been observed that the taking of goods and chattels was put in the statute merely as an instance, and not as a restriction to such injuries only; and that the term trespass must, with reference to the language of the times when the statute was passed, signify any wrong; and accordingly the statute has been construed to extend to every description of injury to personal property by which it has been rendered less beneficial to the executor; whatever the form of action may be; so that an executor may support trespass or trover, case for a false return to final process, and case or debt for an escape, &c. on final process;"—"or debt against an executor suggesting a devastavit in the life time of the plaintiff's testator; or case against the sheriff for removing goods taken in execution, without paying the testator a year's rent." 1 Chit. Pl. 69. Our statute being, as before stated, but an extension of the stat. of Edw. 3, should be construed in the same manner; extending to defendants the same rule
208 of construction which, under *the limited terms of that statute, had been applied only to plaintiffs. That such has been the case, is shown by the decisions already cited and others to be found in our reports.

But even if I be wrong in all this; and if, instead of an action on the case, the plaintiff should have brought an action of assumpsit against the administrator of Boyles in this case; yet, the defendant not having demurred to the declaration, but having pleaded the general issue, and verdict and judgment having been rendered thereon; I think the defect was cured by the statute of jeofails, 1 Rev. Code, p. 512, § 103; being, at most, but a mistake or misconception of the form of action, which is expressly embraced in that statute. The only difficulty I have had on the subject has arisen from the fact that the declaration contained two counts, one for a false warranty and the other for a deceit. The latter of course cannot be supported against an administrator; and if it had been the only count in the declaration, the defect would not have been cured by the verdict. But as the plaintiff, by proving the breach of a warranty by simple contract of the defendant's intestate, would have shown a good cause of action under the first count, though not in that form; and as the defendant could by motion have had the plaintiff's evidence confined to that count, or an instruction to the jury to disregard the other count; and as every reasonable presumption should be made in favor of the verdict, I think the verdict must be regarded as having been rendered on the first count, and the defect is therefore cured.

If the form of the action were the only objection to the judgment, I would therefore be for affirming it. But it was erroneously rendered against the appellant de bonis propriis; and it would be necessary on that ground to reverse it, and render a judgment of the goods of the intestate.

209 *I have not considered the objection taken to the judgment on account of the exclusion of portions of the depositions, deeming it unnecessary to do so, as the case is decided by a majority of this court on other grounds.

LEE, J., also dissented from the opinion of Samuels, J., though he was of opinion that the personal judgment against the administrator was erroneous; and on that ground it should be reversed.

DANIEL, J., concurred in the opinion of Samuels, J., except as to the measure of damages on a warranty of soundness.

ALLEN, J., concurred with Samuels, J.

Judgment reversed, and entered for the appellant.

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210 *Fitzhugh's Ex'ors v. Fitzhugh.

April Term, 1854, Richmond.

1. **Deed of Trust, upon Slaves—When Equity Will Refuse to Enforce—Case at Bar.**—Money lent by a bachelor uncle to his nephew, to secure which a deed of trust upon slaves was executed, was held under the circumstances to have been forgiven and released by the uncle to the nephew, so that a court of equity would refuse to enforce the trust at the suit of the executors of the uncle.
2. **Appellate Practice—Issue Out of Chancery—No Exception to Verdict—Effect.***—Upon an issue directed out of chancery, the verdict of the jury is conclusive, where there is no exception spreading the facts proved upon the record.

This was a suit in the Circuit court of Fauquier county, instituted in 1844 by the executors of Thomas Fitzhugh against Dudley Fitzhugh, to enforce a deed of trust executed by the latter in September 1823, to secure two debts amounting to eleven hundred and fifty dollars due to Thomas Fitzhugh. The bill sets out the deed and alleges that no part of the debt had been paid. It alleges that one of the executors of Thomas Fitzhugh is the trustee in the deed and interested in his estate, and therefore cannot sell under the deed; and that the plaintiffs do not know what number of slaves embraced in it are still in the possession of the defendant. They therefore ask for a discovery of the slaves in the possession of the defendant; that they may be sold and the proceeds applied to the payment of the debt; that there may be a personal decree against the defendant for any residue of the debt, and for general relief.

Dudley Fitzhugh answered the bill. He admits the execution of the deed of trust, but denies that the whole or any part of the sums of money mentioned therein, was due to Thomas Fitzhugh at his death.

211 *He states that when the said sums of money were obtained by him, Thomas Fitzhugh had no intention of exacting their payment. That the sum of seven hundred and fifty dollars was obtained on the 10th of March 1819, the sum of four hundred dollars on the 20th of August 1823, and no note or memorandum in writing was executed or required to be executed, as a testimonial of the debts; and it was not until the 22d of September 1823, that the defendant, finding his pecuniary condition embarrassed, volunteered, without the knowledge of Thomas Fitzhugh, to execute and put upon record the said deed. He avers that Thomas Fitzhugh never in fact accepted the deed, nor regarded the same as a valid security for the repayment of the sums of money aforesaid. That the deed embraced all the slaves owned by the defendant; and some time after its execution, the pressure of the defendant's pecuniary difficulties compelled him to raise large sums of money, which he effected by sales of certain of these slaves: and he names eight slaves that he had sold, and the prices amounting to three thousand two hundred and ten dollars. All of which sales were made, as he alleges, with the privity and knowledge of Thomas Fitzhugh. That the purchaser required that Thomas Fitzhugh should be applied to and advised of the intended sales; and on every occasion he disclaimed any right or interest in the deed of trust or the property therein mentioned. That in this way repeated sales of the said property were made, until there only remained an old man, an old woman and a small girl, whose aggregate value does not exceed four hundred and fifty dollars. That defendant verily believes that when the said sums of money were advanced, Thomas Fitzhugh had no intention of exacting their repayment, but intended the same as gifts. But however this may be, that after the said sums of money were advanced and the deed of

212 trust executed, *the defendant rendered to said Thomas Fitzhugh, through a series of years, valuable services, which were regarded and accepted by him as full satisfaction for said sums of money, or furnished a motive for the donation thereof, so that in any view at his death no debt existed against the defendant on account thereof. That Thomas Fitzhugh was possessed of a very large estate, was unmarried and without children, was one of a very numerous family, lived to an advanced age, and many of his heirs and distributees were scattered in distant states, and personally unknown to him. That his property consisted chiefly of lands and slaves, divided into four distinct establishments, upon neither of which did he employ an overseer. The defendant was his nephew, lived within a short distance of his residence; enjoyed his confidence and affection; and for many years before his death, when he had become incapable of active exertion, was in the daily practice of rendering assistance in the management of his affairs. Had an account been kept of these services, at a moderate value, they would have greatly exceeded the demand now sought to be established against the defendant; and if it shall become necessary for his protection, he prays that an account of his said services may be taken, and the

*Appellate Practice—Issue Out of Chancery—No Exception to Verdict—Effect.—For the proposition laid down in the second headnote of the principal case, see *foot-note* to Lee v. Boak, 11 Gratt. 182.

See also, Lamberts v. Cooper, 29 Gratt. 65, and *note*; Ayres v. Robins, 30 Gratt. 119, both citing the principal case. Upon the subject of Issue Out of Chancery, see monographic *note* on "Issue Out of Chancery" appended to Lavell v. Gold, 25 Gratt. 473; Barton's Chancery Practice, vol. 2 (2d Ed.), p. 887 *et seq.*; Enc. of Pleading and Practice, vol. 11, p. 599.

value thereof set off against the demand of the plaintiffs.

The deed of trust referred to in the bill and answer bears date the 22d day of September 1823, and recites that the grantor, Dudley Fitzhugh, is indebted to Thomas Fitzhugh in the sum of one thousand one hundred dollars, with interest on seven hundred and fifty dollars, a part thereof, from the 10th day of August 1819, and with interest on four hundred dollars, the residue thereof, from the 20th of August 1823. It provided for the execution of the trust at any time after the 1st of January
213 1824, if the money *was not paid by that time: and it was executed by the grantor, the cestui que trust and the trustee, and was recorded upon their acknowledgment in the clerk's office of the County court of Fauquier.

The defendant examined two witnesses, both of them nephews of the testator of the plaintiffs. One of them, Thomas H. Fitzhugh, stated, that he had a conversation with the testator some four or five years before his death, in relation to the deed of trust. The witness had gone over to Thomas Fitzhugh's, at the instance of the defendant, to obtain his permission to sell three of these slaves. When he named the object of his visit, Thomas Fitzhugh, contrary to witness's expectations, readily acquiesced, merely remarking that he was sorry defendant's necessities were such as to require the course; that in so doing he was depriving himself and wife of all means of support when it was in his power so well to avoid it, and keep his negroes. It was true he said Dudley had executed this deed, but that he (Thomas Fitzhugh) never claimed or expected any benefit therefrom. In fact in all his conversation he throughout clearly expressed himself as having no claim to the property specified in the deed of trust. And he remarked that he had permitted Dudley to sell all that were worth anything. In answer to a question whether in his conversations with the testator he seemed to regard the defendant as his debtor for the amounts advanced to him, or did he treat the money as a gift: He answered, that he always understood it as a gift. The other witness stated that in a conversation with Thomas Fitzhugh he mentioned that the money was given to Dudley Fitzhugh, and he never expected anything but his services as compensation. The last conversation passed a short time before his death at his own house.

It was proved that Thomas Fitzhugh died at an advanced age, probably over
214 eighty years. He was an *old bachelor, lived entirely alone, about three miles from the residence of the defendant. That he was very wealthy, having four large estates; and had not kept an overseer for twenty-five years. That the defendant was often called upon by him for his assistance in the adjustment of his accounts, and frequently in regard to other matters concerning his business; and that he was a favorite nephew.

When the cause came on to be heard the court directed an issue to be made up between the parties, and tried by a jury to be impaneled before the court, on the law side thereof, to ascertain: 1st. Whether the defendant rendered any services to the testator of the plaintiffs, at any time between the 22d day of September 1823 and his death. 2d. How much the defendant deserved to have for such services, if any were rendered.

Upon the trial of the issues, the jury found that the defendant had rendered services to the testator of the plaintiff within the time specified: And that he deserved to have for such services one hundred and fifty dollars per annum from the 22d of September 1823 until the death of the testator in November 1843, with interest thereon from the end of each year respectively. And the court being satisfied with the verdict, directed it to be certified to the chancery side of the court. The plaintiffs filed various exceptions to the issue directed, and the proceedings under it; but none of them have reference to the correctness of the verdict upon the evidence.

After the verdict was certified to the chancery court, another witness was examined by the defendant, by whom it was proved that Thomas Fitzhugh recognized his obligations to the defendant for services he had rendered and was rendering to him, equal and more than equal to the money advanced to him.

The cause came on to be finally
215 heard in October *1847, when the court below, being of opinion that it was the understanding of the defendant and the testator of the plaintiffs, that the services rendered by the former to the latter should be a satisfaction of the sums advanced from time to time, and mentioned in the deed of trust; that those services were continued up to the time of the death of the testator; and the jury having found that they were more than adequate to the satisfaction of the demand set up by plaintiffs, decreed that the bill be dismissed with costs. And the plaintiffs thereupon applied to this court for an appeal, which was allowed.

Patton, for the appellants.
Morson, for the appellee.

ALLEN, P. This case is one of the first impression in this court, and I have had some difficulty in arriving at any conclusion satisfactory to my own mind. The difficulty has been somewhat increased by the conflicting pretensions relied on by the appellee to defeat the claim. The allegations of the answer that the testator had no intention of exacting payment when the money was advanced, and that the appellee without his knowledge executed the deed of trust and spread it upon record, are refuted by an exhibition of the deed itself. From that, as it appears in the record, it seems that the deed was actually executed by all the parties, including the testator, and recorded upon their acknowledgment. The

debt must therefore have been considered as an actual debt at that time, and the deed accepted as a security for it. And as to the claim that the debt was actually paid by the services rendered to his uncle by the nephew: No account for them seems ever to have been kept or charge made for them; and although they may with other considerations have operated on the creditor
216 in *inducing him to forgive the debt, I do not think the evidence shows that either party treated those services in the light of business transactions entering into the accounts of the parties.

I think, however, in view of all the circumstances of this case, and the relation in which the parties stood towards each other, enough appears to show that if the debt has not been actually released, yet that the creditor in favor of his debtor, has himself treated it as released, or in the language of the books, dead in point of effect. That whether the uncle contemplated a gift or not when the deed was executed, or united in the transaction not with the intention of exacting payment of the money really advanced, but to protect the property of the nephew from other claims, it is, I think, manifest that long before his death he treated this debt as released and forgiven. In the case of Wekett & ux. v. Raby, 2 Bro. Par. Ca. 386, the circumstances were not as strong. There the deceased on his death bed desired his executrix and residuary legatee not to trouble his debtor for a bond debt, saying that he did not deliver up the bond, for he might want it more than the debtor, but when he died the debtor should have it; he should not be asked or troubled for it. The debtor had been counsel for the creditor, but a dispute had occurred between them when the bond was executed, and they had not been friendly thereafter. Lord Macclesfield decreed that the bond should be surrendered to be canceled and satisfaction acknowledged; and his decree, upon appeal to the house of lords, was affirmed.

In the recent case of Flower v. Martin, 2 Milne & Craig 459, 14 Cond. Eng. Ch. R. 459, the case of Wekett & ux. v. Raby was approved and followed. In the last case a father had taken a bond from the son for advances under circumstances which induced the court to believe he did not
217 intend to exact payment, *or to hold it as a security to be put in force against his son for the benefit of his estate, but rather as a check upon his future conduct. In these and other cases referred to in 2 Story's Eq. Jur. § 705 a, 706, 706 a, the debt was secured by bond or note, and its existence as a valid claim was undisputed. In the leading case of Wekett v. Raby it was regarded and treated by the creditor as a subsisting debt, which he, at the time of making the declarations on his death bed, had still a right to enforce; but not intending that it should be regarded as a debt due from his debtor to his estate, and to be put in force accordingly, the court gave relief. In the case before us, the uncle was a bachelor of advanced age, and owning a large estate, the nephew resided near him, was a favorite nephew, and apparently poor and embarrassed with debt. When the money was advanced, no note or bond seems to have been required or given, and the deed of trust contains no covenant to pay the debt. More than twenty years elapsed between the execution of the trust deed and the uncle's death. During all this time no demand was made for payment. The only evidence we have that the deed was regarded as a subsisting security by anybody, arises out of the fact, that the debtor being desirous of selling some of the slaves for his own benefit, applied to the uncle for his permission to do so. It was readily given until the security was nearly exhausted, it being shown by the proof that sales were made from time to time, and the answer averring that nearly all the slaves were so disposed of, and but three, not exceeding four hundred and fifty dollars in value, remained unsold. When applied to for his permission, the uncle declared that he never claimed or expected any benefit from the deed, and that he had permitted his nephew to sell all the slaves of any value. The fact that he did assent to such sales until the security was nearly exhausted,
218 *proves the truth of his declaration that he did not claim any benefit from the deed, the only security or evidence of debt he held. In addition to this the uncle, on another occasion, is proved to have observed to another nephew, who was desirous of borrowing money from him, that the services of the appellee were equal and more than equal in value to him, to the money advanced.

The fact, that services through a long course of years were rendered, is placed beyond doubt by the verdict of the jury upon the issues directed in the cause. There being no exception spreading the facts upon the record, we must take it that they justified the finding of the jury. They find that the appellee rendered such services from the date of the deed in September 1823 to the death of the uncle in November 1843; and estimate their value at one hundred and fifty dollars per annum through the whole period. Without regarding these services in the light of payments or legal offsets, the fact that they were rendered, that they were regarded by the creditor as valuable, equal according to his declarations to the money advanced, is a circumstance tending strongly to confirm the conviction produced by all the other circumstances, that the uncle regarded the debt released and forgiven to his debtor. Such services furnished an additional inducement for the uncle so to regard the debt. It is a circumstance not appearing in the cases referred to, and makes this a much stronger case for relief than any of them. Taking into consideration the relationship between the parties; the fact that the appellee was a favorite nephew; the omission of the creditor to assert any claim under the deed during his life time, though he lived twenty

years after it execution; the sales from time to time, with his knowledge and consent, for the debtor's benefit, of nearly all the slaves conveyed; his declaration that he
219 *claimed no benefit from the deed; his admissions that the services of his nephew to him were equal in value to the money advanced; the fact established by the verdict of the jury, that valuable services were rendered, extending over the whole period intervening between the deed and the death of the creditor; I feel satisfied, that looking at this transaction as one exclusively between a creditor and his debtor, it was the intention of the former to treat the debt as forgiven and released to the debtor. I think, therefore, it is a case in which a court of equity might properly stay its hand, and refuse its assistance to the executors of the creditor seeking its aid to enforce this deed for the benefit of their testator's estate.

I am for affirming the decree.

The other judges concurred in the opinion of Allen, J.

Decree affirmed.

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220 *Parramore v. Taylor.

April Term, 1854, Richmond.

1. **Code—Rule of Construction.***—In construing the Code, the rule of construction is that the old law was not intended to be altered, unless such intention plainly appears.
2. **Testators—Incapacity.**†—What does not constitute incapacity in a testator.
3. **Wills—Improper Influence.**‡—What is not an improper influence which will invalidate a will.
4. **Same—Attestation—In Whose Presence.**§—The Code of 1849, ch. 122, § 4, p. 516, in relation to the attestation of wills, does not require that the witnesses shall subscribe their names in the presence of each other.‖
5. **Same—Same—Case at Bar.**—T subscribes his name to his will in the presence of C, and requests C to attest it, who does so. B is then called into the

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***Code—Rule of Construction.**—In Durrett v. Davis, 24 Gratt. 314, it was said: "The settled rule, however, in construing the Code, is, that the old law was not intended to be altered, unless such intention plainly appears. *Parramore v. Taylor, 11 Gratt. 220;* Owners of Steamboat Wenonah v. Bragdon, 21 Gratt. 685." The principal case was also cited as authority for this proposition in Davis v. Com., 17 Gratt. 620; Vaughan v. Jones, 23 Gratt. 453; Thomas v. Lewis, 89 Va. 66, 15 S. E. Rep. 389; Harrison v. Wissler, 98 Va. 600, 36 S. E. Rep. 982; McDaniel v. Ballard, 4 W. Va. 200 (dissenting opinion of BROWN, P.); Brown v. Randolph Co. Court, 45 W. Va. 835, 32 S. E. Rep. 168; *foot-note* to Owners of Steamboat Wenonah v. Bragdon, 21 Gratt. 686.

†**Testamentary Capacity—Testimony of Physicians.**—As to the value of the physician's testimony in regard to a testator's capacity, see *foot-note* to Simmerman v. Songer, 29 Gratt. 10, where there is a quotation from Shacklett v. Roller, 97 Va. 648, 34 S. E. Rep. 492, in which the principal case is cited. See also, *foot-note* to Cheatham v. Hatcher, 30 Gratt. 56.

‡**Undue Influence—Definition.**—In Simmerman v. Songer, 29 Gratt. 24, it is said: "It is important in the first place to consider what is meant by the phrase 'undue influence.' 'The influence to vitiate an act must amount to force and coercion destroying free agency. It must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of another; for that would be a very strong ground in support of a testamentary act. Further, there must be proof that the act was obtained by this coercion, by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear.' This is the definition given by an eminent author, Jarmyn on Wills, page 29, supported by numerous authorities, and approved by this court in *Parramore v. Taylor, 11 Gratt. 220;* Redf. Amer. Cases upon the Law of Wills, 280, 725, 735-6-7, 741; Greer v. Greers, 9 Gratt. 330." Several other cases, citing the principal case, also approved this definition. See Carter v. Carter, 82 Va. 641; Orr v. Pennington, 93 Va. 273, 24 S. E. Rep. 928; Forney v. Ferrell, 4 W. Va. 743.

In Nicholas v. Kershner, 20 W. Va. 257, JOHNSON, P., in delivering the opinion of the court, said: "The court further instructed the jury for proponents, that 'although the jury may believe, that the testator was fickle and inconstant, and that at one time he favored one or more of his children, and at other times disliked those and favored others; still if they believe he acted freely and had the capacity to understand, what property he had, and to whom he was giving it, the will is not invalid on that account; and if they believe his will was caused by the extreme kindness and attention of the devisees, that will not constitute undue influence, which will invalidate the will.' This instruction is correct. It amounts to saying, that a free and competent testator may give his property to whom he pleases, and the kindness and attention of those, who are the recipients of his bounty, however extreme that kindness and attention may have been, cannot be regarded as 'undue influence' exerted upon the testator. It would show a greater reason for making such a will. It is natural, that a father, should prefer a kind and attentive child to one who was unkind, thankless and ungrateful. Forney v. Ferrell, 4 W. Va. 742; *Parramore v. Taylor, 11 Gratt. 239;* Simmerman v. Songer, 29 Gratt. 24; Remsen v. Brinckerhoff, 26 Wend. 340." See also, "Instructions in the Daingerfield Will Case," 5 Va. Law Reg. 149-157.

§**Wills—Attestation—In Whose Presence.**—It seems well settled in Virginia that the statute prescribing the mode of executing a will does not require that the witnesses shall subscribe their names in the presence of each other. As further authority for this proposition, see the principal case cited and followed in Beane v. Yerby, 12 Gratt. 239; Green v. Crain, 12 Gratt. 252. But the West Virginia Code declares that the subscribing witnesses "shall subscribe the will in the presence of the testator, and of each other." Code of West Virginia, ch. 77, sec. 3.

The statute both in Virginia and West Virginia requires that each witness shall subscribe the will in the presence of the testator (Va. Code 1887, sec. 2514; W. Va. Code 1899, ch. 77, sec. 3). As to what is in the presence of the testator, see a somewhat extended *foot-note* to Sturdivant v. Birchett, 10 Gratt. 67.

‖See the opinion of JUDGE MONCURE for the statute.

room, and T again acknowledges the paper as his will and requests B to attest it, who does so, C being present when T acknowledges the paper to B, but not subscribing it or recognizing his subscription at that time: The whole, however, being done within a few minutes. The will was duly attested.

At the October term 1851 of the Circuit court of Accomack county, a paper purporting to be the will and codicil thereto of Thomas T. Taylor deceased, was propounded for probat by Edward W. Taylor, one of the nominated executors therein; and its admission to probat was opposed by Thomas H. Parramore and Sarah A. his wife; and Thomas H. Parramore dying during the controversy in the Circuit court, the opposition to the probat was continued by Sarah A. Parramore, who and the propounder of the will were the only children of Thomas T. Taylor. The will bears date the 24th of June 1851. It was written by James S. Corbin, and is attested by him and by Edward C. Bloxom and Littleton Walker. The codicil bears date the 7th of September 1851, and was also written by Corbin, and was attested by him and Robert J. and
221 *William T. Silverthorn. The proceedings in the cause, and the facts on which the opinion of the court is founded, are stated by Judge Moncure in his opinion. The court below admitted the will and a part of the codicil to probat; and from that sentence Mrs. Parramore obtained an appeal to this court.

R. T. Daniel, for the appellant.
Patton, for the appellee.

MONCURE, J. This is an appeal from a sentence of the Circuit court of Accomack, admitting to probat two testamentary writings purporting to be the will and codicil of Thomas T. Taylor. They were propounded by his son Edward W. Taylor the appellee, who is the principal devisee and legatee, and named executor; and were contested by his daughter Sarah A. Parramore the appellant, and her husband Thomas H. Parramore, who is since dead; the said son and daughter being the testator's only children and heirs at law. They were contested on the grounds of, first, incapacity; secondly, undue influence; and thirdly, defective execution.

The case was first tried by a jury; but it was unable to agree, and was discharged. Afterwards it was agreed to submit the whole case, upon the law and the evidence, to the court, from whose sentence either party might appeal; and that in the event of an appeal, it should be specially certified to the Court of appeals, that the judge sitting on the trial of the issue heard, and was present at the examination of, all the evidence in the cause. The court decided to admit the will and codicil to probat, with the exception of a part of the codicil considered by the court to have been improperly inserted therein. The examinations of the witnesses and the documentary evidence were certified as the facts proved on the
222 trial, and were *ordered to be made a part of the record in the cause. The whole case is now before this court for revision of the sentence of the Circuit court thereon.

I will consider the grounds of opposition to the probat in the order above stated. But it seems to be proper in the first place, to enquire, whether the testimony of James S. Corbin is to be regarded as credible. He is by far the most important witness in this cause; and if his testimony is to be believed, it conclusively settles at least two of the three questions arising in the case. He was the scrivener who wrote both the will and the codicil, as well as a prior will; was present at the execution and acknowledgment of all of them, and was a subscribing witness to all. It was of vital consequence to the contestant, therefore, to overthrow, if possible, the testimony of this witness; and an attempt was accordingly made to do so; or to weaken the force of the testimony as much as possible. The means mainly used for that purpose was a very long and close cross examination. No witness was introduced, no question asked, to impeach his general character for veracity or otherwise. The only evidence offered tending in any way to discredit him was that of Mrs. Young, a cousin of Mrs. Parramore, and it would seem, a sister of her husband Thomas H. Parramore. She testified that when the witness Corbin was formerly in attendance at court to prove the will and codicil, he dined with her husband Dr. Young; and in a conversation between them on the subject, Corbin, in answer to a question of the doctor, whether the testator had to reflect in disposing of his property, said "No, he recited or read it off as a school boy would a lesson; he (Corbin) said his brain was such that any impression might be made upon it." It is remarkable that her husband, who was also examined as a witness, and in answer to whose question the alleged statement of Corbin
223 was *made, did not remember it. The recollection of Mrs. Young as to the other circumstances of the visit and conversation was very indistinct. She said she did not know why the words of Corbin before stated made so strong an impression on her mind, unless it was confirming her in what she thought before, that her uncle was child-like. She admitted that Mrs. Parramore was a favorite cousin, and that she wished the will overthrown, because she thought, if left to himself, her uncle would never have made such a will. I have no idea that Mrs. Young, in giving her evidence, said anything that she did not believe to be true. But I think she was insensibly influenced by feelings of partiality, and misunderstood, or misconstrued, or did not rightly remember, the words of Corbin. The words, as stated by her, would have been in direct conflict with his sworn testimony given in court on the same day, and which seems to be substantially the same with his subsequent testimony in the case. Though subjected to the test of

a close cross examination, his testimony is consistent in itself, and materially variant from none of the other testimony in the case. His intelligence appears from his evidence, and his general character for veracity is strongly sustained by several witnesses who have long known him, and whose testimony appears to be entitled to much weight. He ought, therefore, to be regarded as a truthful witness in the decision of this cause. I will now proceed to consider the grounds of opposition to the probat. And

First, as to the alleged incapacity of the testator.

The testator appears to have been a man of good common sense, and to have been prudent and careful in the management of his affairs. He was about seventy-five years of age when he died, and for some time previous to his death had been in the habit of drinking freely, and perhaps many times to excess. It is not pretended, however, that he was incapacitated by the
224 ordinary *effects of old age, or drunkenness; or that he was under the influence of ardent spirit, or any other kind of stimulant, at the time of the execution of the will or the codicil. The only ground of the alleged incapacity relied on is, that for a few months before his death, and until his death, he was supposed to be affected by a disease of the brain, which produced occasional convulsions and partial paralysis, and that two of these convulsions or fits actually occurred while he was engaged in dictating the will to the scrivener. The commencement of the disease appears to have been early in June 1851. The will was executed and acknowledged on the 24th of that month, the codicil on the 7th of September thereafter, and the testator died on the 29th of the latter month. Dr. Joynes, a witness apparently of great intelligence, skill and scientific information, attended him during his last illness, and gives a minute account of the disease, and of the condition of the patient during his several visits; which were on the 17th and 19th of June, on the 29th and 31st of August, and on the 4th of September 1851. The disease with which he believed the patient was affected was "softening of some part of the left side of the brain." And the account which he gives of its nature and effects is as follows: "That disease is a softening, that is to say, a diminution of consistence of one or more parts of the brain, generally limited in extent, varying generally from the size of a pea to that of an orange: in a few cases affecting an entire half of the brain, rarely if ever the whole of it. It makes its attack in a variety of forms; sometimes the symptoms are very much those of ordinary apoplexy; the patient falling senseless and motionless, and dying in a few hours; in some instances, after the disease has commenced in this way, the patient, after a time, recovers his senses, but remains palsied in one or more limbs,
225 with frequently *more or less impairment of mind. In another class of cases, the disease begins with symptoms of inflammation of the brain, there being headache, fever, delirium, sometimes partial, convulsive movements, frequently with rigid contraction of one or more limbs, which is generally followed by palsy of the same limbs. In numerous cases, the approach of the disease is more gradual, the patient, perhaps, after suffering for a time with headache and giddiness, experiences some unusual sensation in one or both limbs of one side of the body, such as pain, tingling, &c. After a time the power of movement and the faculty of sensation in those limbs become impaired; this impairment increases until a total paralysis of those parts is the effect: partial convulsions may or may not precede or alternate with this palsy; sometimes in the beginning of such cases there is a gradual impairment of the mental faculties—though in many instances they remain unaffected until the last moments or hours of life. It must be understood that the foregoing is a very general account of some of the leading forms of the disease, and that the symptoms themselves and their order of succession vary a good deal in different cases. Its usual termination is in death; though the interval between the first attack and death may vary from a few hours to several years."—"If the disease be limited to a small portion of the brain, I believe that it may continue for a considerable time without destroying the testamentary capacity of the individual." Being asked by the contestant in the cross examination, "Do you refer the disease of the testator to that class attended with inflammation and delirium, or to that in which there is no inflammation attending the softening of the brain?" the doctor answered, "I refer his case to that in which there is no inflammation." And in answer to another question of the contestant, he said,
"I believe that softening of the brain
226 *may, without producing disorder of the intellect, produce a weakening of the will; an impairment of steady purpose; and a liability to be influenced by others. I also believe it possible that such disease might produce a perversion of the ordinary affections and dispositions."

In regard to the condition of the testator at the several visits, the doctor says that at his first visit, which was on the 17th of June, "The principal circumstance which attracted my attention was the occurrence of convulsions affecting the right half of his body at intervals. These convulsions continued for a minute or less at each return, and were followed by partial palsy of the right limbs and of the tongue; and this palsy gradually passed off in the intervals of the convulsions; so that before the return of the convulsion he had perfect use of all the limbs and of the tongue. A minute or two after the cessation of the fit, he would utter the word 'basket' two or three times, somewhat indistinctly, and then begin to talk, at first rather thickly, and afterwards with sufficient distinctness. In fact, after some time, his speech was

entirely distinct and unaffected. The left side of his body seemed to be entirely unaffected either by the convulsions or by the temporary palsy which followed them. He complained of some feeling of fullness about the head, but I do not recollect that he complained of pain."—"I cannot speak with precision as to the intervals between the fits; but I would say, in general terms, that it was about an hour, more or less, while I saw him. As to the regularity of their return and duration, I am unable to speak, because he had only two, or at most, three fits during my first visit. The duration of each fit in which I saw him seemed to be about the same."—"As to the state of his mind during these convulsions, I know nothing; after a convulsion had passed off, and the faculty of speech returned, his mind seemed clear."

227 *In the perfect intervals of the fits he communicated with the doctor as a sane and intelligent patient. The doctor was with him, on this visit, about three hours and a half, and does not think there was more than a quarter of an hour of the time in which his mind was not apparently clear. The next visit was on the night of the 19th of June, just five days before the execution of the will. "At that time (says the doctor), the convulsions had ceased; the palsy had disappeared, and the other symptoms, which I have previously mentioned, were less marked; he seemed much better in all respects."—"I next saw him on the night of the 29th of August about 10 or 11 o'clock; he was then laboring under a palsy, complete or nearly so, of the parts which had been affected at my first visit, except the tongue, which was only partially paralyzed, leaving his articulation, although somewhat thick and difficult, yet easily understood."—"The palsy, during the visit of which I speak, was permanent; it was neither absent nor diminished at any time during my visit, as far as I recollect. His mind was clear. I detected no delirium, incoherence, or other manifest disorder of the intellect. There was no convulsion during this visit, which lasted until shortly after sunrise next morning. I was in the room with Mr. Taylor some two or three hours of this time." The next visit was on the 31st of August; "his physical symptoms were much the same as at the visit of the 29th of August; nor do I think the state of his mind was materially different."—"He had no convulsions at this time."—"My next and last visit was on the 4th of September, about 11 or 12 o'clock in the morning; it continued probably two hours. At this time the tongue was much more affected by the palsy than at my two preceding visits. I experienced much difficulty in conversing with him. I was sometimes obliged to repeat a question two or three times before a clear answer could be

228 obtained; and sometimes it *required the assistance of persons standing around the bed to enable me fully to understand what he said. In other respects, I recollect nothing particular to be noted in reference to his physical condition as differing from what it was at my previous visit. As it respects the state of his mind, I am not able to speak with as much confidence as at previous visits, because, owing to the great difficulty of speech, I conversed with him but little, and obtained most of the information, which I desired in regard to his condition, since my last visit, from members of the family. So far as I conversed with him, his answers were rational. Another reason why I held but little conversation with him was, that he seemed but little disposed to talk. He appeared low spirited and somewhat fretful and irritable, and disposed to find fault with persons in the room if every attention was not promptly bestowed; he was also quite restless, requiring to be frequently lifted up and down." This visit was three days before the execution of the codicil.

Dr. West was the family physician of the testator at the time of his death; attended him during his last illness; thinks his mental condition was good about the period of the date of the will; thought he conversed as rationally as ever; saw no reason to doubt his capacity to transact ordinary business, and of disposing of his property in any way; thought he was capable of transacting his own business, such as paying and receiving debts, settling accounts, and giving and taking receipts up to the last time he visited him, which was about a week before his death; and of course about a fortnight after the date of the codicil.

I have stated thus fully the evidence of the attending physicians, because it is entitled to great and peculiar weight in determining the question now under consideration. On this subject see the opinion of Carr, J., in Burton v. Scott, 3 Rand. 399, 403.

James S. Corbin, the draftsman of

229 the will and codicil, *had always known the testator; was well acquainted with him for the last thirty years of his life; lived within three or four miles of him for the last twenty years; and was intimate with him the larger portion of the time; thinks that at the time of making his will and codicil he was as capable or competent mentally to make a will as at any previous time. The facts stated by this witness fully sustain his opinion of the capacity of the testator. He says, "I wrote two wills for the testator; this in court is the second. At the time I wrote the first will, he had before him his bonds and notes and a copy of his wife's will. After reading over the copy of his wife's will attentively, he remarked to me that he had promised his wife to make up his daughter's portion of land equal to his son's; but he believed she had already as many acres as he (Edward) had. I replied, 'yes; but her land, a large portion, was not worth more than four or five dollars an acre, and Edward's, a portion of it, worth from twenty to thirty dollars an acre.' Here he used a slight exclamation, what I do not

recollect. He then proceeded to add up the amount of his bonds and notes; after doing this, he said, with a long sigh, or breath, or something of the kind, 'I will make a will to please them, but, I expect there will be a squabble over it.' This was the time of making the first will. Some ten or twelve days after this I was again sent for to go down to his house, and he told me he wished to make some alterations in his will. I asked him if it would not be better to destroy the first will and make a new one. He answered that he thought it would. He then directed me to destroy the old will, which I did, and he took his seat at the table and dictated the will now in court, which I wrote for him. During the time I was writing the will, and just before, he had an attack of paralysis or palsy, or whatever you may call it; he
230 said he was *like some old man, whose name he mentioned, who made a will and gave all his property to himself, and said he thought too much of his property to give it to any person while living. He had, I think, while writing the last will, two short attacks of paralysis, but appeared to me perfectly rational as soon as he could speak, and would commence dictating as soon as he could speak, with as much composure as he did before he was struck."

The witness was engaged two hours or more in preparing the will, and after finishing it, read it carefully and slowly to the testator, who said, "Well, that will do," or words to that amount. It was then signed by the testator, and attested by two witnesses; after which, the testator handed it to his son Edward, and told him to put it away. At sometime between the writing of the will and the codicil, Edward W. Taylor told the witness he had shown the will to Mr. Fisher, a lawyer, who thought it was not explicit enough in regard to the bonds and notes, and said that his father wished to make a codicil to explain the nature of those gifts. Witness replied, that he would write it, if the testator requested it. Afterwards, the witness having been sent for by Edward W. Taylor, went to the house of the testator for the purpose of writing the codicil. After he had been there some short time, Edward W. Taylor said, "Father, Captain Corbin is here, and if you wish to make a codicil to your will, he will write it for you." The testator replied, "let it alone till morning."—"Some time after this (says the witness), when all or nearly all the other persons who were present had retired to bed, I suppose, and when there were no persons present except the testator and myself, and perhaps Mr. Robert J. Silverthorn (one of the witnesses to the codicil), the testator said to me, 'Edward wants me to make him executor alone, and to explain about the prop-
231 erty given to him.' I replied, *'well;' and he went on to say, 'I intended to give him all the balance of my property which I had not given away before.' I said to him, 'Did you intend to give him all the negroes or not?' And he said 'yes, everything except what I had given away before.' I may have mentioned to him the bonds and notes, but do not recollect every particular word or words that were passed between us that evening."

The witness Corbin and Robert J. Silverthorn staid there that night. Next morning Edward W. Taylor came into the bed room of the witness, and said that his father then wished him to go down and write the codicil to his will. The testator was lying in bed, and witness wrote the codicil at a window not more than eight or ten feet from the bed. Testator did not redictate to witness what he said the over night, except in one general expression, which was, "Write what I told you last night." Witness wrote the codicil according to what he understood from testator the night before, except the following clause: "He also states that the loan of a plantation to his daughter Mrs. Sarah A. Parramore was intended as a consideration for her thirds in a plantation called Poplar Grove, now owned and occupied by David Taylor, which interest the said Sarah A. Parramore and Thomas H. Parramore are to convey to David Taylor, and in case of failure, to forfeit an interest in this will to that amount." In regard to this, the witness says the testator "did not dictate it to me. I think I received it from Mr. Edward W. Taylor, who was standing at his bed-side, and to whom I supposed at that time the testator had communicated it; but when I read the codicil to the testator, he objected to that clause, and said it ought not to have been put there; that he Major Taylor would send for Mr. and Mrs. Parramore, and have that matter settled. I offered readily to strike out the clause from the codicil,
232 and left the bed-side where he *was, where I had been standing reading, and walked towards the window with the intention of striking it out, but remarked that if they did convey, that clause would be of no force. He Major Taylor replied, let it alone until they come. Consequently, I did not strike it out." When witness was writing the codicil he and testator could distinctly hear each other in a common tone of voice. Does not know where Edward was during the larger portion of the time; thinks he had been out of the room a part of the time. When he spoke to witness about the clause in relation to Mrs. Parramore, he was much nearer the testator than witness was, and much nearer to testator than to witness. His position then, as witness thinks, was casual or accidental. Witness did not hear testator dictate the clause in question to Edward, and does not suppose that he dictated it at that time, at all events. Edward said to witness, "Father wants you to put in a clause to compel sister to convey her thirds in Poplar Grove." The peculiar phraseology of the codicil in this respect was that of the witness. Has no doubt that Edward was distinctly heard by the testator, who made no objection at the moment, or before the clause was written. The codicil was read over to the testator

after it was written, witness thinks twice; once before the objection was made, and once afterwards. And it was then executed by the testator, and attested by two of the witnesses. Mr. and Mrs. Parramore were then sent for. They came over very soon after, and witness says, "I think three deeds were shown or handed to them by Mr. Edward Taylor. One of the deeds, I think, was written by Mr. Fisher, (I mean the counsel). I think this deed was intended to be given from Thomas T. Taylor to David C. Taylor. The other two were for the conveyance of Mrs. Parramore's thirds in the plantation called Poplar Grove. The one, I think, was written by
233 Mr. Edward *W. Taylor, and the other, I think, looked very much like the handwriting of Thomas H. Parramore. They (Mr. Parramore and wife) did not convey, telling Thomas T. Taylor that he was too sick to attend to business. He replied with warmth, looking at Mr. Parramore rather sternly, 'What do you mean?' Mr. Parramore replied that he only meant to say that he, Major Taylor, was too sick to attend to business. And I was not called on afterwards to strike out the clause." The deeds were handed to Mr. and Mrs. Parramore in testator's presence, and witness thinks, at his request; and testator said to them, "I wish you to fix this business." The testator had no convulsion when the codicil was written. One side of him, witness says, was completely paralyzed, and it was with much difficulty he could articulate his words. There were many words that he would attempt to articulate, and the persons present were compelled to pronounce them for him. He could articulate many words almost distinctly, and most of the words sufficiently to be understood by any person of common understanding.

The foregoing seem to be substantially the testimony of this important witness, so far at least as it affects the question of capacity. His examination was very much protracted, and he was made to repeat the same thing several times. I have endeavored to give his statement of the material facts, in their proper sequence. I think they fully sustain his opinion of the capacity of the testator, both at the time of making his will and his codicil. That opinion is also sustained by the evidence of the other attesting witnesses, and a great deal of other evidence in the case, which it is unnecessary to detail. No witness, I believe, expresses the opinion that the testator's mind was at any time unsound, except on the day of his death. No fact is proved from which unsoundness of mind at any prior time can be fairly inferred. The disease of
234 which he *died, while it paralyzed one-half of his body and impaired his speech, seems to have had little or no effect upon his mind. I am of opinion, therefore, that he had sufficient capacity to make the will and codicil.

Secondly. As to the alleged undue influence exercised upon him by his son Edward W. Taylor.

The only material evidence on this subject, I believe, is to be found in the testimony of the witness Corbin, before stated; and in the fact that at the time of the testator's death, and for several years before, Edward W. Taylor and his wife and child or children lived with him, and seem to have constituted his family. Mr. Corbin was a connection and near neighbor of the testator, and very intimate with him; and doubtless had as good an opportunity as any other person of knowing whether such undue influence existed or not. He says, "I know of nothing of the kind, of my own personal knowledge. I have never seen anything of the kind, and have no reason to believe there was, from any circumstance or occurrence coming under my own immediate knowledge or observation." Being asked, "Was there not a very long, strong and uninterrupted relation of affection between the testator and his only son Edward W. Taylor?" he answered, "I verily believe there was." And being further asked, "Did not that son fear and reverence that father, and did he not always obey him to the day of his death?" he answered, "I believe he did." Mrs. Young, a sister, it appears, of Mr. Parramore, and niece of the testator, had also no doubt a good opportunity of knowing whether such influence existed or not. When asked, in cross examination, "Do you know of any fact of undue or improper influence, either by fraud or force, which caused Thomas T. Taylor to make this will," she answered, "No, sir, I do not." In regard to the will, there is nothing in the record from which it can be inferred that he had any
235 *agency in causing the testator to make it or to adopt any of its provisions. The testator seemed to be anxious to make his will, and twice requested that Mr. Corbin should be sent for. It does not appear that Edward W. Taylor knew what would be the contents of the will until after it was written, but rather the contrary, as he expressed something like surprise at some of its provisions. By the will the testator lends the land to his son for life, and gives it to his heirs at his death. He remarked to the draftsman of the will that Edward was not to be trusted with a large estate; that he would lend it to him, and then give it to his children. Edward was not present when the will was written, he and the witness Bloxom having been sent out of the room by the testator. It does not appear that there was a great deal of difference between the two wills which Corbin prepared; nor which, upon the whole, was more favorable to Edward, though it seems probable the first was.

In regard to the course of Edward in showing the will to counsel, Corbin, when first requested by the testator to write his will had said, "You have a large estate; why do you not send for a lawyer, and have your will written in proper form?" To which the testator replied, "You can write one now, and if I get better, I can do so." There can be no doubt of the intention of

the testator to include his negroes and the balance of his bonds and notes, after paying his debts and legacies, in the residue of his property given by his will to Edward. Corbin says, that after he had written all but the last clause of the will, the testator remarked, "Give all the residue to Edward." Corbin enquired, "Do you intend to give your son Edward all your negroes?" He replied, "Yes, they are worth nothing; give them to Edward." Corbin then wrote the last clause; and read the will slowly to the testator, who expressed his satis-
236 faction with, and executed *it. The words of the clause would no doubt be construed according to the intention of the testator. The residue is described as "consisting of negroes, household furniture, and stock of horses, cattle, sheep, &c." The balance of the bonds and notes was probably not particularly mentioned, because it was supposed the amount would be small, after paying debts and legacies. The will was placed by the testator in the custody of Edward; and it is not improbable that it was shown by the latter to a lawyer at the former's request, in pursuance of the suggestion of Corbin and the purpose indicated to him by the testator, as before stated. But even if shown to a lawyer by Edward of his own accord, I see nothing in the fact from which fraud can be inferred, or which can be of much if any importance as a link in the chain of circumstances relied on to prove the fraud. The contents of the will were not intended by the testator to be concealed from Edward. It was handed to him open or unsealed. He knew his father's intention, but did not know that it was so clearly expressed in the will as to be free from doubt. He may, therefore, of his own accord, have shown it to a lawyer; and when advised that the residuary clause was not sufficiently explicit, he naturally desired that it should be explained by a codicil, so that there might be no room for future controversy. The codicil, then, gave him nothing that was not given, or intended to be given, him by the will. Its main object was to remove all room for doubt in regard to the meaning of the will. It nominates Edward sole executor, the will having made him coexecutor with W. Parramore. That matter was first mentioned to Corbin by the testator, who said, "Edward wants me to make him executor alone, and to explain about the property given to him." Having given Edward the largest portion of his estate, made him residuary legatee, and directed him to pay his
237 *debts, it seemed to be fit that Edward should be sole executor, and he naturally desired to be so. The circumstance in the case which most materially affects the propriety of the conduct of Edward W. Taylor in regard to the will and codicil, is his connection with the insertion in the codicil of the clause in relation to Poplar Grove. It seems there had been an agreement between the testator and Parramore and wife, that the latter would release to the former Mrs. Parramore's dower interest in Poplar Grove, containing three hundred acres, in consideration that the former would convey to the latter another tract of three hundred acres. Accordingly, the testator had conveyed the former tract to David C. Taylor, and the latter to Parramore and wife, whom he desired to release her interest in the former to him; and a deed was prepared to be executed by them, which, with the other two conveyances, were the deeds before mentioned as having been handed to them on the day of the execution of the codicil. The testator and his son were both interested and anxious to have the deed executed by Parramore and wife; who, for some cause not disclosed by the record, were unwilling, or had failed, to execute the deed. It is probable they had had some conversation on the subject of putting something in the codicil to compel Parramore and wife to make the deed. The testator must have heard his son, standing by his bed-side, say to Corbin who was drawing the codicil, "Father wants you to put in a clause to compel sister to convey her thirds in Poplar Grove," and by his silence he assented to what was said. It is true that when the codicil was read to him he objected to that clause, and said it ought not to have been put there, and that he would send for Mr. and Mrs. Parramore, and have that matter settled. The ground of his objection does not appear. It may have been the phraseology of the
238 clause, which was that of the *draftsman. He determined, however, after the effect of it had been explained by Corbin, to let it remain as part of his codicil.

The tract of land loaned to Mrs. Parramore for life by the will, seems to be the same land conveyed to her and her husband for life in consideration of her interest in Poplar Grove. In both the will and deed the land is described as occupied by Thomas Only. When the testator made his will he told Corbin that he loaned this land to Mrs. Parramore, in consideration of her thirds in Poplar Grove. When Corbin wrote the clause in the codicil, he wrote nothing more than what the testator had previously informed him was his actual intention, and what he had, under all the circumstances, every reason to believe the testator then wished to be embodied in his codicil. The testator would have preferred having the matter in regard to the release settled in his life time; but failing in that, seems to have been willing to settle it by his will. I cannot, therefore, see in this circumstance, taken by itself, or in connection with all the other circumstances, sufficient ground for condemning the will and codicil, or either, as having been obtained by fraud or undue influence. The testator certainly made by his will a very unequal distribution of his property between his two children, and the record does not disclose any better reason for his having done so than that it was his will; which is an all-sufficient reason with courts of justice, however they may admire the rule of equality. The violation of that rule, without

apparent good cause, may put them on the alert, and cause them to scrutinize the testamentary act with greater care. But being satisfied that it is the act of a competent testator, free from the undue influence of another, they are bound to give it full effect. Judge Carr has made some appropriate observations on this subject in Boyd v. Cook's ex'or, &c., 3 Leigh, 32, 50, 51,
239 *which I will not repeat. It is not uncommon for fathers to prefer their sons to their daughters; especially when they come to make their wills. The testator manifested such a preference otherwise than in making his will. He seems to have supposed too, that in giving property to his daughter he was giving it to her husband. Another circumstance which may have operated upon him was that he had been the guardian of her husband, who had sued him for a settlement of his guardianship account; though this circumstance does not appear to have produced any ill feeling between them; or if it did, the wound appears to have been healed before his death. But it is needless further to enquire about his motive for the preference. The nature of the disease under which the testator labored at the time of the testamentary act is another circumstance which requires of the court of probat the greatest possible care in determining whether or not the act was the offspring of a sound mind, free from undue influence of others. I have endeavored to give due weight to all these circumstances in coming to my conclusions on the subject; and I am of opinion, not only that the testator's mind was sound when the act was done, as I have already said, but that it does not appear that any undue influence was exercised upon him by his son to induce him to execute the act, or any part of it. "The influence to vitiate an act (says a writer of high reputation), must amount to force and coercion destroying free agency; it must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of another; for that would be a very strong ground in support of a testamentary act; further there must be proof that the act was obtained by this coercion; by importunity which could not be resisted; that it was done merely for the sake of peace; so that the motive was tantamount to force and fear." 1 Williams on Ex'ors, p. 39; 1 Jarm. on Wills, p. 29, note 1.

240 *The opinion I have expressed on the two questions I have been considering is greatly strengthened by the fact that it accords with that of the Circuit court; except so far as relates to a portion of the codicil to which I will again advert. The weight to which the opinion of the court which saw and heard the witnesses is entitled in such cases, is shown by the cases of Dudleys v. Dudleys, 3 Leigh 436; Jesse v. Parker, 6 Gratt. 57; Nock v. Nock's ex'ors, 10 Gratt. 106, 111.

Thirdly. As to the ground of defective execution.

And 1st, as to the will. Corbin was sent for in the night, and requested by the testator to write his will. It was probably written between eleven or twelve, and one or two o'clock that night; the draftsman being engaged about two hours in writing it. The table and writing materials were brought by the direction of the testator, who then requested his son and Bloxom (one of the attesting witnesses) to step out of the room a little while. They accordingly went out, and the door was shut. The will was then written by Corbin, read to and approved by the testator, who signed it in Corbin's presence, and requested him to witness it; which he accordingly did, by subscribing it in the presence of the testator. Corbin says, "After witnessing the will myself, he (the testator) said, 'call in Mr. Bloxom and get him to witness it too,' or words to this amount. I left the will on the table, and opened the door of the room with the intention of going after Mr. Bloxom myself; but I think I saw some of the family in the passage, and requested them to call Mr. Bloxom in. Immediately afterwards Mr. Bloxom came into the room, and the testator said to Mr. Bloxom, as I now think, either 'here, or there is my will,' I want you to witness it; and he, Mr. Bloxom, did witness it in my presence. Mr. Bloxom soon after this, either ordered, or requested Mr. Taylor to order his horse and carriage, and he and his wife left for home. Major Taylor then handed the
241 will to his son Edward W. *Taylor, and directed him to put it away. I had before this folded up the will and handed it to the testator. Mr. Edward Taylor took the will, and as I now think, put it in the drawer of the bureau or chest of drawers in the room in which the testator was then lying. Next day morning Mr. Littleton Walker came over to Thomas T. Taylor's house, and I think that he and Edward Taylor and myself went from the porch to the room of the testator together. Mr. Edward Taylor got out the will; Major Taylor acknowledged it, and requested Mr. Walker to witness it. Mr. Walker turned to me and said he could not write his name, and requested me to write it for him. This I did, and he made his mark. This occurred about 7 o'clock in the morning. The testimony of Bloxom and Walker substantially agrees with that of Corbin in regard to their respective attestations. The will was subscribed by each of them in the presence of the testator. Corbin was present when the will was acknowledged to, and subscribed by Bloxom and Walker respectively, but neither of them was present when it was subscribed by Corbin, who did not subscribe it after either of the subsequent acknowledgments. Thus the will was twice acknowledged before two witnesses present at the same time, and these witnesses subscribed it in the presence of the testator. But one of the two witnesses subscribed prior in time to either of the two acknowledgments, and did not actually subscribe it in the presence of the other. On these two grounds it is contended that

the execution is defective, and that under the new statute of wills, Code, p. 516, § 4, which governs this case, the will must be subscribed by at least two competent witnesses after it has been signed or subscribed in their joint presence; and must be subscribed by them not only in the presence of the testator but in the presence of each other.

The words of the section are, "No
242 will shall be *valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the same is intended as a signature; and moreover, unless it be wholly written by the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

It is contended by the counsel for the appellant that this part of the statute is almost a literal transcript of the statute, 1 Vict. ch. 1, § 9, which, before the enactment of our new Code, had been construed by the English courts according to the view maintained by him on each of the two grounds above mentioned; and that our statute ought to receive the same construction.

It is certainly true, as a general rule, that when an English statute, especially one of long standing, is adopted in this state, the settled judicial construction which it had received in that country at the time of its adoption in this, is also adopted along with it.

But that rule hardly applies to the revision of 1849, in which our whole code of laws, civil and criminal, was revised and re-enacted. The rule which would seem to be more applicable to that revision is that the old law was not intended to be altered, unless such intention plainly appears in the new Code. The legislative mind was fixed on the then existing law as the text, to be altered only as occasion might seem to require. Great alteration was made in words and phraseology, while comparatively little was made in substance. The codes and statutes of other states were consulted and made contributory to some extent; but not with any intention of losing sight of our own, and adopting altogether the system of another state or
243 *country on any branch of the law.

Spencer, J., in delivering the opinion of the Court of errors of New York in Taylor v. Delancey, 2 Caine's Cases 143, thus speaks of the rule which is applicable to such a case as this: "Where the law antecedently to the revision was settled, either by clear expressions in the statutes, or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the legislature to work a change. A contrary construction might be productive of the most dangerous consequences." The same principle has been recognized in other cases. Yates' Case, 4 John. R. 317, 359; Matter of Brown, 21 Wend. R. 316; Theriat v. Hart, 2 Hill's N. Y. R. 380.

The 4th section of our present law of wills seems to differ, in substance, only in one or two respects from our former law, according to its settled construction. The first and perhaps most important difference is that the present law requires all wills to be in writing, with an exception made by the 6th section. The next, and perhaps only other, difference arises from the introduction of the words "present at the same time" after the word "witnesses" in the new law. It had been well settled under the old law, that a will might be acknowledged before the witnesses at different times. In Dudleys v. Dudleys, 3 Leigh 436, the will was attested by one witness in 1818, and by the other in 1825. The evil arising from this construction was, that the testator might be capable of making a will at the time of one of the attestations, and incapable at the time of the other, and only one attesting witness could prove the important fact of mental capacity at either time. Wills are frequently, if not generally, executed by persons in extremis, whose powers of mind as well as of body are gradually sinking. They are often capable one day,
244 and incapable *the next, of making a will. The words in question were introduced to remedy this obvious evil. There seems to have been considerable opposition in the legislature even to this change. The words "present at the same time," in the report of the revisors, were stricken out by a committee of the whole house of delegates; but were restored by the house itself. The provision in the new law that the will should be signed "in such manner as to make it manifest that the name is intended for a signature," was no change of the old law; but merely an express adoption of the judicial construction it had received in Waller v. Waller, 1 Gratt. 454. The words in the new law authorizing the will to be acknowledged by the testator in the presence of the witnesses, were not in the old law, but they only embodied the long settled construction of that law. The words "but no form of attestation shall be necessary," in the new law, effected no change; no form of attestation being necessary under the old law. Pollock & wife v. Glassell, 2 Gratt. 439.

On the other hand, there are some material differences between the 4th section of our new law and the 9th section of 1 Vict. ch. 26. 1st. The latter requires the will to be "signed at the foot or end thereof;" the former requires it to be signed "in such manner as to make it manifest that the name is intended as a signature." 2dly. The latter requires that "such signature shall be made or acknowledged by the testator," in the presence of the witnesses; the former requires that "the signature shall be made or the will acknowledged by him," in the presence of the witnesses. 3dly. The latter does not even require the witnesses to be "credible," as the statute

of Charles did, but on the contrary, the 14th section enacts "that if any person, who shall attest the execution of a will, shall, at the time of the execution thereof, or at any time afterwards, be incompetent
245 to be admitted a witness to *prove the execution thereof, such will shall not on that account be invalid." The former requires the witnesses to be "competent;" thus working no change in the old law, but merely substituting in the new law a more appropriate word, "competent," for the word "credible," in the old law, which had been judicially construed to mean "competent." 4thly. The words "shall attest" in the latter (which were perhaps merely superfluous) are not in the former. 5thly. The former does not require a will, "wholly written by the testator," to be authenticated by attesting and subscribing witnesses; the latter makes no such exception.

Thus it will be seen that there is a closer correspondence, in substance at least, between our old and new law, than between the latter and the statute of Victoria. And I can see no good reason for giving to the decisions of the English courts upon their statute any greater weight in the construction of ours, than they are intrinsically entitled to. If they appear to be founded on good reasons, and are not in conflict with our own decisions, they ought to be followed by us; otherwise not.

I will now proceed to consider the two grounds on which it is contended that the execution of the will and codicil in this case was defective: And

1. That the subscription of each of the two attesting witnesses must be made after the signature or acknowledgment by the testator in the simultaneous presence of both; whereas in this case the subscription of one of them was made before.

In support of this ground the counsel for the appellant relied on three decisions of Sir Herbert Jenner Fust, viz: Allen's Case, 7 Eng. Ecc. R. 131; Simmond's Case, Id. 374; and Moore v. King, Id. 429. The first two were ex parte motions. In each of the three cases the will was subscribed by the two witnesses on different days; but
246 the first witness was present *at the acknowledgment before, and subscription by, the second; though he did not then resubscribe the will. In the last case there was this additional feature, that the first witness pointed out her signature to the second when the latter was about to subscribe the will. In each of the cases the decision was against the will. Whether that would have been the decision if, as in this case, the transaction had occurred at one and the same time, but one of the witnesses had signed an instant before the acknowledgment by the testator in the simultaneous presence of both, is perhaps not certain: though I think it may fairly be inferred that it would, from what was said by the judge in those cases, and in Olding's Case, Id. 341, and Cooper v. Bocket, Id. 537; in which two latter cases he decided that a will must be signed by a testator before it is subscribed by witnesses, whether the two acts occur at the same or different times. The opinion of this learned judge seems therefore to be in favor of the appellant on the question under consideration.

I must say, however, that I do not consider that opinion reasonable, and if it were unopposed by any countervailing decision, I would not be willing to follow it. But there are three decisions of this court which I think are in conflict with that opinion, and against the appellant on this question. It is true they were decisions under our old law; but I do not think there is any material difference between the old and new law in this respect. These decisions are Pollock & wife v. Glassell, 2 Gratt. 439; Rosser v. Franklin, 6 Id. 1; and Sturdivant v. Birchett, 10 Id. 67.

In Pollock & wife v. Glassell, the name of the first witness was signed diverso intuitu, and whether in the presence of the testatrix or not, does not appear; though it was certainly not signed at her request, and was signed before the name of the testatrix was signed. The authority of
247 that case cannot be weakened *by saying that the question was not discussed by the counsel nor considered by the court. It cannot be supposed that the able counsel who argued, and learned judges who decided that case, would have overlooked so important a question, or passed it by without notice, if they had entertained a doubt about it. Nor can the authority of the case be weakened by saying that the codicil was executed under a power of appointment; for the whole settlement creating the power superadded a requisition not made by the statute of wills; it did not dispense with any of the statutory requisitions; and it was not pretended that a compliance with any of them was unnecessary. The question considered by the court was, whether the codicil was well executed according to the statute of wills, and had also the superadded requisition? The court, consisting of four judges, decided the question unanimously in the affirmative.

In Rosser v. Franklin, the testatrix made her mark after the subscription of the witnesses. It was argued by the learned counsel against the will, that the witnesses must attest a perfect, not an imperfect instrument; a will signed by the party, and not a paper without a signature. And he cited Olding's Case, 7 Eng. Ecc. R. 341, and Byrd's Case, Id. 391, in which the precise question arose, and was adjudicated in that way, although both the attestation and signing occurred at the same interview, and the one immediately preceded the other. It was held by the court, however, in disregard of these decisions of the Ecclesiastical court, that "the fact whether in the order of time the testatrix made her mark before or after the subscription of the witnesses, is, under the circumstances, in nowise material, in so much as the whole transaction must be regarded as one continuous, uninterrupted act, conducted and

completed within a few minutes, while all concerned in it continued present,
248 *and during the unbroken, supervising, attesting attention of the subscribing witnesses."

In Sturdivant v. Birchett, the will was subscribed by all the witnesses out of the presence of the testator; but they immediately returned to his presence with the will. Their subscription was invalid until their return; and was made effectual by what then occurred, though they did not resubscribe the will.

These decisions of our own court are strongly sustained by cases decided elsewhere. The case of Swift v. Wiley, 1 B. Monr. R. 114, goes farther than any of our own cases in favor of the validity of a subscription by witnesses before the signing or acknowledgment by the testator. In that case two of the witnesses subscribed the will some hours before it was signed by the testator; but having remained with him until it was signed by him in the presence of themselves and another, and having then again acknowledged their respective signatures as subscribing witnesses, their subscription was held to be valid. To resubscribe their names, said the court, "would have been a superfluous and puerile act of mechanical repetition, not necessary for indentification; because they had once subscribed the same paper in the presence and at the request of the testator, and which fact was recognized by him as well as by themselves, after his own name had been subscribed, and when the document thus recognized and identified, was finally and conclusively published as his will; nor can we perceive any other end of either utility or security that could have been promoted by again subscribing names already sufficiently subscribed." For the other cases on the subject, I refer to the opinion of Judge Lee in Sturdivant v. Birchett, in which they are fully collected and commented on.

The case under consideration is stronger in favor of the will than either of the
249 four last cited. In this *case these important circumstances concur, some one or more of which did not exist in either of those cases, viz: both of the witnesses subscribed their names as such to the will in the presence and at the request of the testator, after it had been perfected by his signature, and he then acknowledged it in their joint presence: The whole transaction having been begun, continued and ended at one time and without interruption. And I think there existed in neither of those cases a single essential circumstance which did not exist in this. For though there was no verbal recognition by Corbin of his signature after the acknowledgment by the testator in the joint presence of the two witnesses, there was an actual recognition of it by him, at least as effectual as words could make it.

I conclude, therefore, that both reason and authority are against the appellant on the first ground on which he rests his objection to the execution of the will; and I will now consider the other ground, which is

2dly. That the witnesses must subscribe the will in the presence of each other.

The old law certainly did not require the witnesses to subscribe in the presence of each other. As the acknowledgment might be made before them separately and at different times, it followed necessarily that they might subscribe separately and at different times. Nor does the new law expressly require them to subscribe in the presence of each other. But it is contended that this is implied by certain phraseology used in the new law, and not to be found in the old. That phraseology is, that the acknowledgment by the testator must be "in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator." The statute of Victoria uses nearly the same words; the only difference being that the word "competent" in our law is not in that
250 statute *and the words "shall attest and," which in that statute precede the words "shall subscribe," are omitted in our law; but that difference is merely verbal in regard to the question under consideration. It is admitted that the two laws in this respect are substantially identical; and it would seem they ought to receive the same construction. There has yet been no judicial construction of our law. But a case has been recently decided by the judicial committee of the queen's privy council in England which was much relied on by the counsel for the appellant, and is supposed to have conclusively settled that the statute of Victoria requires the witnesses to subscribe in the presence of each other. That case is Casement v. Fulton, decided in 1845, and reported in 5 Moore's Privy Council Cases, p. 130. It was an appeal from the Supreme court of judicature at Calcutta; and arose on the 7th section of the India will act, which is a copy of the 9th section of the statute, 1 Vict. ch. 26, except that, like our law, it omits the words "shall attest."

The case was this: A testator signed his will in the presence of a witness who subscribed it in his presence; about two hours afterwards, upon the arrival of another witness, the testator in the joint presence of the former witness and the other subscribing witness, acknowledged his signature at the foot of the will. The second witness then subscribed the will, and the first witness, in his and the testator's presence, acknowledged his subscription, but did not resubscribe. It was held by the judicial committee, (affirming the sentence of the Supreme court at Calcutta,) that the requirements of the act had not been sufficiently complied with; it being necessary that both witnesses should be jointly present at the same act of the testator, and jointly subscribe it in his presence. Lord Brougham in delivering the opinion of the committee, said, "We think the words
251 admit of no other construction, *for it

is, 'and such witnesses shall subscribe.' Now this forms one sentence with the preceding words, 'present at the same time,' and 'such' must plainly be read, 'such present witnesses, or such witnesses so being present at the same time.' 'Such' describes not merely the names of the witnesses, but all that is previously enacted respecting them. One quality of these witnesses is, their being present at the same time. Therefore, we cannot limit the meaning of the large word of reference, 'such,' to the mere names or persons of the witnesses; it must embrace what had just been said of their presence; it must mean the witnesses, &c. present at the same time."

It will be observed that in Casement v. Fulton the will was signed by the testator and subscribed by one of the witnesses at one time, and the acknowledgment by the testator, in the joint presence of both witnesses, was at a different and subsequent time. And it had been decided by the English Ecclesiastical court in the cases before cited, that such an attestation was not sufficient; even though the first witness acknowledged his signature at the time of the acknowledgment by the testator in the joint presence of both witnesses. If these cases were regarded as authority, there seems to have been no necessity for deciding, if it was decided, in Casement v. Fulton, that the witnesses must subscribe in the presence of each other; for the attestation was otherwise insufficient. It will also be observed that there is a very important difference between that case and the one under consideration, in this, that in the latter the whole transaction occurred at one and the same time; there being no breach of continuity, and little if any greater interval between the different parts of the transaction than the necessary order of sequence required. The decision of the committee might possibly have been different, if the facts before it had been like
252 the facts of this case, *with the single exception that both of the witnesses had signed after the testator: a fact decided to be material by the English courts, but immaterial by ours. But whatever would have been its decision in such a case, and whatever may have been its actual decision in the case before it, there can be no doubt, from the language used by Lord Brougham, that in the opinion of the committee the statute requires the witnesses to subscribe their names in the presence of each other. The opinion is certainly entitled to great respect: And if it had been before the legislature when the present law of wills was enacted, it might have had a very important influence in the construction of our law.

But that opinion was not before the legislature; and it is almost certain that not a member of that body had then any knowledge or information of any such opinion, or that any such case had been decided. The case had not, I believe, been reported in any form in this country. There has yet, I believe, been no American edition of Moore's Privy Council Cases; and the London edition of that work has, during the present year, for the first time, been added to our state library. The 5th volume of the work, which contains that case, embraces the decisions of the committee during the years 1845–47, and could not have been long published even in England when the new law of wills was enacted in this state. The last volume of Reports of English Probat Cases, which had then been published in this country, was 7 Eng. Ecc. Rep. containing 2 and 3 Curteiss. While that volume, as we have seen, contains several cases bearing upon the first ground of objection to the will in this case, it contains none which can have any material effect upon the second ground of objection now under consideration. Nor is there any such case in any prior volume of English Probat Cases. Indeed I believe 1
253 Curteiss commences *about the time that the statute of Victoria went into operation. On the contrary, it is manifest from the decisions of Sir Herbert Jenner Fust, in some of the cases before cited, that in his opinion the statute does not require the witnesses to subscribe in the presence of each other; though he is of opinion that it requires both of them to subscribe the will immediately after it is signed by the testator, or his signature acknowledged in their joint presence. In Cooper v. Bockett, 7 Eng. Ecc. R. 542, he expressly says, "By the 9th section of the act of parliament, it is absolutely necessary that the deceased shall have signed the will, or have acknowledged his signature, in the presence of two witnesses present at the same time, and that they should have attested it in the presence of the testator, though not of each other." While Casement v. Fulton was unknown to the legislature when the present law of wills was enacted, Cooper v. Bockett was reported in a volume which had some years previously been published in this country, and was then in the state library. If the construction given in either case can be considered as having been tacitly adopted by the legislature in the enactment of our law, it is that given in the latter, rather than that given in the former case. The opinion given in the former is, therefore, entitled to no other consideration in this case than that which is always due to the opinion of learned jurists, and that which may be due to the reasons on which it is founded.

Giving to the opinion expressed in Casement v. Fulton all the consideration to which it is entitled, I must say that I cannot see the force of the reasons on which it is founded. It seems, almost entirely, to rest on the import of what is called "the large word of reference, such;" which, it is supposed, "describes not merely the names of the witnesses, but all that is previously enacted respecting them." It "must
254 plainly be read; *(says Lord Brougham,) such present witnesses, or such witnesses so being present at the same time." Admitting this to be the true import of the word "such," I think it by no

means follows that, according to the grammatical construction of the sentence, the witnesses are required to subscribe in the presence of each other. "Such witnesses so being present at the same time" when the signature is made or acknowledged, surely need not of necessity subscribe in the presence of each other.

But whatever may be said of that case, I think the legislature of Virginia, in the enactment of our new law, did not intend to require the witnesses to subscribe the will in the presence of each other. It was a very important change in the law to require them to be together when the will is signed or acknowledged. Good reasons existed for that change; and yet, as I have before remarked, it was strongly opposed in the legislature. Surely no greater change was intended than the words express. If the supposed change had been intended, it would have been made plainly, and not by mere implication, or the use of a word of equivocal import. The obvious mode of making it would have been, by the insertion of the words "and each other;" so as to make the sentence read "and such witnesses shall subscribe the will in the presence of the testator and each other." The express requisition that they shall subscribe "in the presence of the testator," seems to exclude any implication that they shall subscribe "in the presence of each other." There would have been as much reason for expression in the one case as the other, if both had been intended. The word "such" would have had as much efficacy in requiring the act to be done by the witnesses in the presence of the testator, as in requiring it to be done in the presence of each other. The law of wills should be plainly written, and no room should
255 be left *for doubt or implication. It is a law of almost universal application, and must often be acted on by unlearned persons, in a situation which precludes the possibility of obtaining professional aid. The most important family settlements, which are often postponed to the last day or hour of life, may depend upon an observance of its requisitions. How important then that it should impose no needless requisition; none that is not productive of some substantial good; and that it should plainly express what it means. A requisition that the witnesses shall subscribe in the presence of each other, would be a fruitful source of litigation, would defeat many fair wills, and would, I think be productive of no corresponding good. It would very much clog the exercise of the testamentary power, without throwing around it, so far as I can perceive, a single additional safeguard. It would render it necessary to enquire in every case, whether the witnesses, when they subscribed the will, were not only in the presence of the testator or in the range of his vision, but also in the presence of each other or in the range of each other's vision. It would be questionable whether range of the vision would be sufficient in regard to the witnesses inter se, and whether actual sight would not be necessary. For though a testator may dispense with actual sight of the witnesses if they are in the range of his vision, it being his own matter, it would for that very reason, be doubtful whether the witnesses could dispense with actual sight of each other. Nothing is more common or natural than for a scrivener to subscribe a will as a witness before his fellow witness is called in to join him in the attestation; or, for a witness called on to attest a will, after doing so, to turn his back and walk off without noticing what is done by others afterwards. No case could present a more striking illustration of the application of these remarks and
256 the ill effects of *such a requisition than the case under consideration. The two attesting witnesses, Corbin and Bloxom, being in the room with the testator, the latter requests Bloxom to step out awhile. The testator and Corbin being then alone in the room, the door is closed, and the will is written by Corbin, signed by the testator, and subscribed by Corbin in the presence of the testator, and at his request. The testator then requests Corbin to call in the other witness, that he may subscribe it also. Bloxom is accordingly called in from another room; comes immediately in, and the three being then alone in the testator's room, and the will lying on the table with the names of the testator and Corbin thereto just subscribed; the testator acknowledges the will, and at his request Bloxom subscribes it in the presence of the testator and Corbin, and the will is then handed by Corbin to the testator. If this will were defeated because the witnesses were not in the presence of each other when Corbin subscribed it, then indeed might it be said that substance would be sacrificed to form, and the end of the law to the means used for attaining it. But I think form as well as substance, the means as well as the end, sustain the validity of this will, and that its excution is not defective on the second, any more than on the first ground relied on by the appellant.

2dly. As to the codicil.

The facts in regard to the execution of the codicil are very much like those in regard to the execution of the will. Many of them have been already stated, and need not be repeated. Corbin and Robert J. Silverthorn, two of the subscribing witnesses, spent a night together at the testator's. Early next morning the codicil was written by Corbin, who signed the testator's name thereto in his presence, and at his request; the testator made his mark in the presence of Corbin, who, in his presence and at his request, subscribed it
257 *as a witness. R. J. Silverthorn, who had not come down stairs, was then called in by Corbin to witness the codicil also, and accordingly came in; when Corbin took up the will and carried it to the testator, who according to Corbin's testimony, said, "I acknowledge this, and want you to witness it;" or, according to R. J.

Silverthorn's testimony, Corbin asked the testator if he acknowledged it, and the testator said he did. R. J. Silverthorn then subscribed it in the presence of the testator and of Corbin.

The grounds of objection to the execution of the codicil are the same as those taken to the executon of the will; and the facts in regard to each being substantially the same, I am of opinion that the codicil was well executed, for reasons which have been already given. I think it makes no difference whether the instrument was called a codicil or not by the testator at the time of its acknowledgment, and that the principle, declared in the cases of The British Museum v. White and Rosser v. Franklin, is at least as applicable to the new law as to the old. It is necessary that the testator should understand the contents and nature of the instrument when he executes or acknowledges it; but not that he should call it by any particular name, or even by any name at all. The old law, by judicial construction, accepted acknowledgment, in lieu of signature, by the testator in presence of the witnesses, and did not require the instrument to be named in the acknowledgment. The new law adopts that construction, by expressly authorizing such acknowledgment, which may be made in any form in which it might have been made under the old law. No formula of acknowledgment is prescribed by law.

I am therefor of opinion that there is no error in the sentence of the Circuit court to the prejudice of the appellant. This opinion, however, is intended to
258 *be referred and confined to the peculiar facts of this case; and especially the important fact that the whole transaction in regard to the execution and attestation of the will occurred at one and the same interview, and without any breach of continuity. The same observations apply to the codicil. I do not mean to say that either would have been well executed and attested if there had been a substantial interval of time between the acknowledgment by the testator in the joint presence of the two witnesses, and the subscription by the witnesses or either of them. As was said by my brother Lee in Sturdivant v. Birchett, "It will be quite time enough to decide that question when a case requiring it to be decided shall come before us for adjudication."

My opinion is intended to have no reference to the attestation of the will by Walker, or the codicil by William T. Silverthorn; but to be confined to the attestation by the other two witnesses to each.

But I think there is an error in the sentence to the prejudice of the appellee, in refusing to admit to probat that clause of the codicil which relates to Poplar Grove. Though the testator at first objected to that clause, and said it ought not to have been put there, and that he would send for Mr. and Mrs. Parramore and have that matter settled; yet it does not appear that any fraud was used in having the clause inserted; and when the effect of it was explained to him by Corbin, the testator refused to let it be stricken out; and executed and acknowledged the codicil containing the clause as part thereof. The execution was not conditional but absolute; and the codicil was not afterwards revoked in whole or in part.

The result is that I am for affirming so much of the sentence as admits the will and part of the codicil to probat; for reversing so much as refuses to admit the
259 *residue of the codicil to probat; and for admitting such residue to probat also; with costs to the appellee as the party substantially prevailing.

LEE and SAMUELS, Js., concurred in the opinion of Moncure, J.

ALLEN and DANIEL, Js., dissented.

Sentence reversed in favor of the appellee.

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260 *Stainback v. The Bank of Virginia.

April Term, 1854, Richmond.

1. **Foreign Bills of Exchange—Protest—Sufficiency of Case at Bar.**—The notarial protest of a foreign bill of exchange states that the notary took the bill to the counting-house of the drawee, and there exhibited it to a clerk of the drawee, and demanded acceptance thereof; and that the said clerk replied that the same could not be accepted. HELD: That the protest is sufficient to bind the endorser.
2. **Same—Acceptance—Parol Evidence.***—Parol evidence that the clerk was authorized to refuse acceptance of the bill, is admissible in an action by the holder against the endorser.
3. **Same—Same—Same.**—As the protest is sufficient itself to bind the endorser, if parol evidence was not admissible to prove the authority of the clerk to refuse acceptance of the bill, yet its admission could not injure the defendant; and therefore, it is no ground for reversing the judgment.
4. **Foreign Bills of Exchange—Notice of Dishonor—Sufficiency of—Case at Bar.**—A bill drawn in Petersburg, Virginia, on a house in London, was protested for nonacceptance on the 5th of April 1843. The next Cunard steamer sailed from Liverpool for the United States on the 19th of that month, and notice of the dishonor of the bill was sent by that steamer. At that time these steamers carried the mail between the two countries under a contract with the British government; and it was the usual mode of transmitting letters. There were, however, regular lines of sailing packets between London and Liverpool and the United States, for which letter bags were made up at the London post office, and such packets sailed from London or Liverpool on the 7th, 10th and 17th of April 1843. But it was probable that the steamer of the 19th would arrive before any of them. HELD: The notice was sufficient.

This was an action of assumpsit in the Circuit court of Petersburg, brought by the Bank of Virginia against Littleberry E. Stainback, upon a bill of exchange for one thousand pounds sterling, drawn by F. C.

*The principal case is cited in DeVoss v. City of Richmond, 18 Gratt. 363.

Stainback of Petersburg upon T. W. Clagett of the city of London, endorsed by the defendant, and protested for nonacceptance. Upon the trial the plaintiff introduced the bill of exchange, which bore date the
261 20th *of February 1843, and was made payable sixty days after sight; and then offered in evidence the protest, which stated that on this day, the 5th of April 1843, at the request of Call, Martin & Co. of London, bankers, bearers of the bill of exchange whereof a true copy is on the other side written, I, John Harrison of the city of London, a notary public, &c., went to the counting-house of T. W. Clagett, Esquire, within this city, upon whom the said bill is drawn, and speaking to the clerk, exhibited unto him the said bill, and demanded acceptance thereof, whereunto he answered that the same could not be accepted. Therefore I, the said notary, at the request aforesaid, have protested, &c.

The plaintiffs also offered evidence in respect to the presentment and dishonor of the bill, and the usage of London as to the mode of presenting bills for acceptance. The defendant objected to this evidence, and also to the protest, but consented that it should be heard, it being agreed by the court and the counsel for the plaintiffs, that all objections to the evidence might be made after it was heard, as if made before.

The plaintiffs then offered evidence to prove that it is, and was in April 1843, the usage of merchants and bankers in London to leave a bill for acceptance on one day, and to call for it on the next, leaving it with the drawee in the meantime; that if the bill be returned without acceptance, the holder puts it into the hands of a notary, who again presents it at the place of business of the drawee for acceptance, and, in case of refusal to accept by the drawee, or by a clerk, or other person employed therein, makes out the protest; and that a refusal by a clerk to accept under such circumstances, is, by the custom of London, a sufficient dishonor to charge the previous parties; and that the usage had been observed in this case.

The plaintiffs further offered evi-
262 dence to prove, that *in April 1843 the steamers of the Cunard line sailed from Liverpool for Boston twice, the days of sailing being the 4th and 19th days of the month; that the steamers of that line then carried the mails between Great Britain and the United States, under a contract made in 1841 with the British government; that it had been the usage of the London post office, since that contract, to forward all letters addressed to the United States, by that line, unless specially directed to be forwarded by other vessels, notwithstanding that in the interval between the delivery of any letter into the office and the sailing of a steamer of that line, one or more other vessels, steam or sailing, might leave Great Britain for the United States; and that merchants generally, if not invariably, receive their letters from Great Britain by that line, and did so in April 1843; that it was the usage of merchants, bankers, &c., of the city of London, in April 1843, to forward notices of protest to parties in the United States by the steamers of that line, and that such notices are, by the usage of London, considered sufficient, if dispatched by the first mail made up in London after the dishonor of the bill, for conveyance to the United States by that line.

The defendant offered evidence to prove, that in April 1843, there were five regular lines of sailing packets between New York and Liverpool, the regular days of sailing each way being the 1st, 7th, 13th, 19th and 25th days of each month; that at the same time there were two regular lines of sailing packets between New York and London, which sailed from London on the 7th, 17th and 27th days of each month; and from Portsmouth, on the 1st, 10th and 20th days of each month; that it was the usage of all these packets at that time to carry letter bags which were made up at the post office, and that such is still the usage; and that it was, in April 1843, and
263 still is, the *usage of the London post office to issue, daily, a sheet called the "Packet List," announcing the days of sailing of packets from London and Liverpool for the United States and other foreign countries.

The defendant also offered evidence to prove that it was, in April 1843, the usage of merchants and bankers in London and in New York to forward notices of dishonor across the Atlantic by the first regular packet after the dishonor, whether using sails or steam, or both; that the usage of London was, and had long been, to deposit in the post office, the next day after the dishonor of a bill, a notice addressed to the party in the United States, to be forwarded by the next mail, and that the usage in London did not require or authorize the notice to be withheld for Cunard's line if a packet of any other regular line sailed in the interval.

The evidence on both sides being closed, the defendant objected to the protest as evidence in the cause, on the ground that it did not state facts sufficient, if true, to make out the dishonor of the bill for nonacceptance, and moved the court to exclude the same from the jury; or, if, the court should admit the protest as evidence, to instruct the jury that it is not competent for the plaintiffs to add to or explain the protest, or to prove the facts of presentment, demand and refusal, or either of them, or the circumstances of either, by parol or other extrinsic evidence.

Whereupon the court permitted the said protest to go in evidence to the jury, and refused to give the instruction asked for; but instructed the jury that the said protest is sufficient, provided the jury believe from the evidence in the cause, that the clerk to whom the said bill was presented by the notary for acceptance, was authorized by the drawee T. W. Clagett to refuse acceptance thereof.

And then the defendant, by counsel,

264 moved the *court further to instruct the jury as follows: "If you believe that the bill on which this suit is founded was protested for nonacceptance on the 5th day of April 1843, that the letter from the holder, containing notice to the plaintiffs of the nonacceptance, was written on the 17th of April, and forwarded by the Cunard steamer of the 19th from Liverpool to Boston, that being the first steamer of that or any line that left England for the United States after the date of the protest; that during the interval between the 5th and 17th days of April, one or more regular sailing packets left London for New York, by which the holders of the bill might have forwarded the notice; and that during the same interval one or more regular sailing packets left Liverpool for New York, the regular days of sailing of which were known in London, by which the holders of the bill might have forwarded the notice; that mails or letter bags were regularly made up at the London post office for the regular sailing packets from that city, and also for those from Liverpool to New York; then the notice of dishonor was not despatched in due time, and you should find for the defendant. And that this is so, although you find that the Cunard line of steamers carried the mail between the United States and Great Britain, under a contract with the British government; that commercial letters from merchants in Great Britain to their correspondents in the United States, were usually forwarded by that line, and that the steamer of the 19th of April might have been reasonably expected to arrive as soon as any of the sailing packets referred to, or sooner." But the court refused to give said instruction, and instructed the jury that the "notice of the dishonor of the said bill given to the defendant was sufficient, if the jury believe from the evidence that the Cunard line of steamers was the regularly established mail line between Great Britain and the United States,
265 *and was the regular, ordinary mode of communication generally used and adopted by merchants, bill brokers and other men of business in Great Britain, as the channel of communication from that country to this; and that such notice was transmitted by the first steamer of that line which left Great Britain after the protest of said bill.

To these several opinions of the court the defendant excepted.

The jury found a verdict for the plaintiffs, and assessed the damages at five thousand one hundred and eighty-five dollars and five cents, with legal interest on four thousand seven hundred and eleven dollars and eleven cents from the 24th of February 1843, that being the day when the bill was discounted by the bank, until paid; and the court rendered a judgment according to the verdict. Whereupon the defendant applied to this court for a supersedeas, which was awarded.

Joynes and Patton, for the appellant.
D. May and Stanard, for the appellees.

SAMUELS, J. Two questions are presented by the record before us:

1st. Whether the protest made by the notary is sufficient in itself, or when aided by the parol proof offered, to charge the plaintiff in error as endorser.

2d. Whether the notice of dishonor was duly forwarded to the endorser, so as to charge him.

As to the first: The protest sets forth the facts that the notary took the bill on which the suit is brought, to the counting-house of Clagett the drawee, and speaking to a clerk, exhibited the bill and demanded acceptance thereof; whereunto he answered that the same could not be accepted; and that thereupon the notary protested the bill
266 for nonacceptance. In the *argument here, the plaintiff's counsel made but one objection to the sufficiency of the protest; that is, that it does not state that the clerk of the drawee had authority to refuse acceptance. This objection should not prevail, if the protest had no extrinsic support: The most formal words could not more fully express the notary's opinion of the clerk's authority in the premises, than is set forth in the protest. The notary at the counting-house of the drawee, exhibited the bill to a clerk, demanded acceptance, which was refused, the answer to the demand noted, and thereupon the bill protested. This means that in the judgment of the notary it was proper to exhibit the bill to this clerk, and demand acceptance from him; that the clerk had authorityto act on that demand; that his answer was a proper refusal: And upon all this the notary made his protest, which plainly enough expresses his opinion in regard to the sufficiency of every step on which he founded that official act.

The protest in this case is in the same form as that in Nelson v. Fotterall, 7 Leigh 179. In that case the whole court seems to have thought that parol proof was admissible to show the clerk's authority to refuse acceptance; two of the judges thought it necessary in aid of the protest; two others thought it unnecessary, and that the protest of itself was sufficient: It was not intimated by any one, that if the protest did not sufficiently verify the fact of the clerk's authority, parol proof was inadmissible to supply the defect. The court is the proper tribunal to decide what facts are proved by written documents. If the court, as it might have done, had decided that the protest proved a proper demand, and the other facts set forth therein, it was unnecessary, and therefore improper, to hear parol proof in regard to it, unless proof had been previously offered to assail the truth of facts alleged therein. If this be error at all, it certainly
267 is not to *the prejudice of the plaintiff in error here; it can do him no harm, after facts are proved by appropriate written testimony, the truth of which is in nowise impeached, to admit parol proof of the same fact.

Thus, whether we regard the protest as sufficient in itself, or as supported by the

parol proof fully showing the clerk's authority and other facts, the court did not err to the prejudice of the plaintiff in error in permitting the protest and evidence to go to the jury: The parol proof established the fact that the clerk had authority to refuse an acceptance.

As to the second: The law requires notice of dishonor of commercial paper to be transmitted to the parties thereto for the purpose of enabling them to do what is needful to protect their interests; to this end it may be important to have early notice, and the law requires it to be given. In the case before us the notice was sent in a mode which would bring it to the hands of the plaintiff in error at the earliest practicable day: Yet it is alleged that it should have been sent by another mode, which, although it might have commenced the transmission at an earlier day, yet would not have delivered it so soon as the mode adopted. If we could yield to the argument of the plaintiff's counsel, we should sacrifice the object of the law. The notice was transmitted in the mail by an ocean steamer belonging to the Cunard line, which line carried the mail from Great Britain to the United States. It was sent by the first steamer which started after the bill was dishonored. This brings the case within the stringent rule of requiring that the notice be sent by the first mail. It appears, however, that there are regular lines of sailing packets from London (the place of the drawee's residence) to the United States; that these packets carried letter bags made up at the London post office; and that the times for their sailing from Great Britain occurred between
268 the day * of the dishonor of this bill and the day of the steamer's leaving. It further appears, that although a sailing packet should leave on the regular day for her departure, and thereafter a steamer should leave on her regular day of departure, the steamer would probably arrive first in the United States. It further appears, that the line of mail steamers is used by a very large majority of business men for the transmission of letters from Great Britain to the United States. There can be no question, that of these two modes of transmission, the proper one was adopted. This one has in its favor the facts that it carries the mail, that it is the ordinary mode of transmission, and that it may be expected to deliver a letter at an earlier day than the other; that other having in its favor the facts that it starts at an earlier day, and carries a letter bag. There is nothing to counterbalance the fact that the other line will deliver the letter at the earliest day. I think the notice of dishonor was duly transmitted.

I am of opinion to affirm the judgment.

The other judges concurred.

Judgment affirmed.

269 *Stainback v. The Bank of Virginia.

April Term, 1854, Richmond.

1. **Principal and Agent—Power of Attorney to Draw, Endorse or Accept Bills—Scope of Authority.***—A power of attorney to draw, endorse or accept bills, and to make and endorse notes, negotiable at a particular bank, in the name of the principal, in the absence of anything to show a different intention, must be construed as giving authority to act only in the separate individual business of the principal: And an endorsement of a bill by the agent in the name of his principal, for the benefit of the agent, is beyond his authority, and does not bind the principal.
2. **Same—Same—Knowledge of Third Party That Agent Is Exceeding Authority—Effect.**—A party dealing with the agent, with knowledge or means of knowledge that under such a power he is endorsing the name of his principal for his own benefit, is not entitled to recover from the principal.
3. **Same—Same—Same.**—The fact that the attorney who was the drawer of the bill upon which he endorsed the name of his principal, held the bill at the time it was discounted by the holder, and that the proceeds were passed to his credit, are of themselves full proof that the attorney was acting for his own benefit, and not that of his principal.

This was an action of assumpsit in the Circuit court of Petersburg, brought by the Bank of Virginia against Littleberry E. Stainback, as endorser of three bills of exchange, each for five hundred pounds sterling, drawn by F. C. Stainback upon T. W. Clagett of London, and protested for nonacceptance. The bills purport to be endorsed by Littleberry E. Stainback, by F. C. Stainback his attorney. Two of them bear date the 6th, and the third the 7th of February 1843. This case presented the same questions as to the protest and notice as arose in the next preceding case, but they are not noticed by this court. The case turned upon questions arising out of the endorsement by the attorney.

On the trial of the cause, after the plaintiffs had introduced in evidence the
270 three bills of exchange, the *protests and the evidence as to the dishonor of the bills and the notice, they introduced a power of attorney in the following terms: "Know all men by these presents, that I, Littleberry E. Stainback of the town of Petersburg, state of Virginia, have made and appointed Francis C. Stainback of the town of Petersburg, state of Virginia, my true and lawful agent and attorney, for me and in my name and behalf to make, or endorse my name on, any note negotiable and payable at the office of discount and deposit of the Bank of Virginia in Petersburg; also to endorse my name on any bill of exchange negotiable at the office aforesaid, and to subscribe my name to any such bill or note, or to any endorsement

*The principal case is cited in DeVoss v. City of Richmond, 18 Gratt. 363; also, 2 Va. Law Register, 692. See monographic *note* on "Agencies" appended to Silliman v. Fredericksburg, etc., R. R. Co., 27 Gratt. 119.

thereof, or any acceptance of any such bill; also to draw in my name or sign and subscribe to any check payable and negotiable at the said office of discount and deposit in Petersburg as aforesaid; hereby ratifying, allowing and confirming all and every act that my said agent and attorney shall do in and about the premises. And I the said Littleberry E. Stainback, for myself, my heirs, &c., do hereby covenant with the president, directors and company of the Bank of Virginia, and their successors, that this power of attorney shall continue in full force and virtue until due notice shall be given in writing to the cashier of their office in Petersburg of its revocation; and that all notices of the protests of any bill or note made, endorsed or accepted by me, shall be good and sufficient in law, if given to my attorney aforesaid in my absence from the said town of Petersburg, state of Virginia. In witness whereof, I have hereunto set my hand and seal this 19th day of March 1833.

L. E. Stainback. [Seal.]"

This power of attorney was deposited in the Bank of Virginia at Petersburg
271 when it was executed, and *had remained there ever since, unrevoked, until after the bills of exchange on which the action is founded were discounted by that bank. On the 12th of February 1843 L. E. Stainback addressed a note to the cashier of the bank, directing him to deliver the power of attorney to F. C. Stainback: and on the next day F. C. Stainback, as the attorney of L. E. Stainback, by endorsement on this note, which was attached by wafers to the power, revoked it from that date.

It was proved that F. C. Stainback was born on the 25th of February 1816; that at the date of the power of attorney the defendant was a merchant in Petersburg, and F. C. Stainback, who is his son, was a clerk in his store, and engaged in no business on his own account; that F. C. Stainback had never been engaged in any business on his own account until the partnership of L. E. Stainback, Son & Co. was formed, which commenced business March 5th, 1837; said firm consisting of the defendant L. E. Stainback, F. C. Stainback and James Macfarland, who married a daughter of the defendant. That Macfarland died in the latter part of the year 1841, leaving the defendant and F. C. Stainback surviving him, the latter of whom had the sole charge of settling up the business of the firm. That the bills on which this suit is founded, were received by the Bank of Virginia at Petersburg from F. C. Stainback, and their proceeds passed on the books of the bank to his credit: that two of the bills were lodged with the bank on the 6th, and so passed to his credit on the 7th of February 1843, which was the regular bill day at the bank, and the third bill was lodged with the bank on the 7th, and so passed to his credit on the 9th of the same month, which was a regular discount day at said bank. That at these dates F. C. Stainback was a merchant in Petersburg, and had been since about July 1842, in good credit, engaged in shipping produce
272 and drawing bills. That *the defendant had been engaged in no active business since the dissolution of the partnership of L. E. Stainback, Son & Co.; had removed to his farm, which lies just beyond the corporation line of Petersburg, and was seldom in town; though he was in February 1843 the owner of ships.

It was further proved by the cashier of the Bank of Virginia at Petersburg, that it was understood by him at the time said bills were negotiated, as a matter generally known at the time in Petersburg, that F. C. Stainback went to Charleston in January 1843 to buy cotton, and that he made large purchases, and that the cashier supposed and believed at the time, that the said bills were drawn on shipments, but he did not know on what shipments; nor did he know for whom the purchases in Charleston had been made. That on the morning of the 7th day of February 1843, the account of F. C. Stainback in the Bank of Virginia at Petersburg was overdrawn, the balance against him being three thousand one hundred and ninety-three dollars and eight cents; that his deposits and discounts on that day amounted to eight thousand five hundred and sixty-two dollars and sixty cents, and his checks to seven thousand nine hundred and eighty-nine dollars and thirty cents, leaving a balance of two thousand six hundred and nineteen dollars and seventy-eight cents against him on the morning of the 8th; that his discounts and deposits amounted on the 8th to three thousand seven hundred and ninety-two dollars and twenty-eight cents, and his checks to six thousand nine hundred and ninety-nine dollars and forty-nine cents; leaving a balance of five thousand eight hundred and twenty-six dollars and ninety-nine cents against him on the morning of the 9th; that his discounts and deposits on that day amounted to four thousand seven hundred and seventy-eight dollars and seventy-eight cents, and that no check of his was
273 paid *or presented for payment on that day; and that his account continued to be overdrawn until the 16th of February 1843.

It was further proved that F. C. Stainback was generally regarded as the agent of his father; that the transactions of L. E. Stainback, Son & Co. had been very large, and after the death of Macfarland, one of the partners, sometimes amounted to one hundred thousand dollars a month at the said bank. That after the death of Macfarland in 1841, about July 1842 F. C. Stainback was in the habit of signing and endorsing the name of the defendant on bills and notes negotiated at said bank, as it is endorsed on the bills in evidence in this cause; but that none of the bills so drawn or endorsed had been dishonored, and that none of the said notes had been taken up by the defendant. That P. C. Osborne, one of the endorsers on the bills

on which this action is founded, is a son in law of the defendant, and resided in Petersburg. That from about the month of April 1842 the indebtedness of L. E. Stainback, Son & Co. to the plaintiffs on their accommodation was rapidly reduced, and F. C. Stainback frequently used his own checks, and funds apparently his own, to make payments and deposits for the benefit of that firm; and that F. C. Stainback frequently put his name on paper of L. E. Stainback, Son & Co. as last endorser, so that he might have the control of the proceeds of the discounts. That when the bills in evidence in this case were negotiated, F. C. Stainback had on deposit to his credit at said bank, notes and inland bills considered good, to the amount of upwards of thirty thousand dollars, running to maturity, which were withdrawn by him on or about the 13th of February 1843.

It was also proved by the cashier of the bank at Petersburg, that he was present at the meeting of the board of directors when the bills in this case were
274 *negotiated, and that he had no knowledge that the proceeds of said bills were not to be used for the benefit of the defendant; that several foreign bills drawn by F. C. Stainback after the revocation of the power of attorney, were endorsed by the defendant with his own hand and by P. C. Osborne, and were negotiated by the Bank of Virginia at Petersburg, and the proceeds passed to the credit of F. C. Stainback; one of them for one thousand pounds, being drawn on T. W. Clagett of London; and that in February 1843 there was an account in the name of L. E. Stainback, Son & Co. on the books of said bank, which was, however, merely a continuation of their accommodation at the bank, which was about the 1st of February 1843 reduced, by F. C. Stainback's check for six hundred dollars, to about five thousand dollars.

The said cashier also proved that he was authorized by the board of directors, and that it is not unusual, where large dealers with the bank, especially dealers who are drawing foreign bills, and persons having large deposits of bills and notes to their credit running to maturity, to permit them to overdraw their accounts for a few days in the course of business, where he has reason to believe that a discount will be obtained of the bills or notes lodged with him on next discount day. That the overdrawing aforesaid of F. C. Stainback was known to the said cashier, but was not made known by him, nor, as far as he knows, in any other way, at the time said bills were discounted, to the board of directors by whom they were discounted.

Upon this evidence the defendant moved the court to instruct the jury as follows:

1st. If you believe from the evidence that the bills on which this suit is brought were received by the plaintiffs from F. C. Stainback, and discounted by them for his accommodation; and that the plaintiffs knew or had reason to believe, that the
275 money was *obtained by the said F. C. Stainback for his individual benefit, then the plaintiffs are not entitled to recover against the defendant by force of the power of attorney given in evidence by them. But if the jury believe that the plaintiffs received the said bills from the said F. C. Stainback, and passed the proceeds to his credit, then it was incumbent on them to satisfy themselves that the money was obtained for the use and benefit of the defendant.

2d. If you believe from the evidence that the power of attorney given in evidence in this case, was made by the defendant whilst a merchant in Petersburg, and F. C. Stainback his son, was under age and a clerk in his store, and engaged in no business on his own account, and that the object of the defendant in making the said power was to authorize his said son to transact his business at the Bank of Virginia at Petersburg, and that this was known to the plaintiffs: And if you believe that the bills on which this suit is founded were not endorsed by the said F. C. Stainback in the course of transacting and attending to the business of the defendant at the said bank, but for the said F. C. Stainback's own use and accommodation, and that the same were discounted by the plaintiffs for the accommodation of said F. C. Stainback, then the plaintiffs are not entitled to recover against the defendant by force of said power of attorney.

3d. If you believe from the evidence that the power of attorney given in evidence in this cause was made by the defendant whilst a merchant in Petersburg, and whilst the said F. C. Stainback his son was a clerk in his store and under age, and engaged in no business on his own account, and that the object of the said defendant in making the said power was to authorize and empower his said son to sign his name to bills, notes, &c., in the business of the said defendant, and not to authorize the said F. C. Stainback to use the name
276 of *the defendant for his the said F. C. Stainback's own benefit, and that this was known to the plaintiffs: And if you believe that the bills on which this suit is brought were not endorsed by the said F. C. Stainback in the business or for the benefit of the defendant, but for the said F. C. Stainback's own use and accommodation, and that the same were discounted by the plaintiffs for the accommodation of said F. C. Stainback, then the said plaintiffs are not entitled to recover against the said defendant by force of said power of attorney.

The court refused to give these instructions or any of them; and instructed the jury as follows:

That the power of attorney offered in evidence in this cause, from the defendant to his son F. C. Stainback to endorse bills, notes, &c. for the defendant at the branch Bank of Virginia in Petersburg, gave the said F. C. Stainback no power to endorse bills or notes for his own benefit, or that of any other person except the defendant

himself: that the endorsements made upon the bills exhibited in evidence in this cause, in the manner in which the same are made, are not inconsistent with the power of the said F. C. Stainback to endorse bills and notes for the benefit of the defendant, but within the scope of his authority to endorse bills for that purpose. If, therefore, the jury shall believe from the evidence in the cause, that the plaintiffs discounted said bills without notice of, or just cause to suspect, any intended fraud or misapplication of the proceeds thereof from the use and benefit of the principal, that then the defendant is bound by said endorsements; and any subsequent misapplication of the proceeds of said bills (if there were any) will not defeat the right of the plaintiffs to recover of the defendant. The defendant excepted to the opinion of the court.

There was a verdict for the plain-
277 tiffs, and a motion *by the defendant for a new trial, which was overruled, and judgment rendered for the plaintiffs; when the defendant again excepted; and applied to this court for a supersedeas, which was awarded.

Joynes and Patton, for the appellant.
D. May and Stanard, for the appellees.

SAMUELS, J. The several endorsements on which this suit is founded, were made under color of authority conferred by the power of attorney which was the subject of consideration in the case of Stainback v. Read & Co. recently decided in this court. This case, like the case above mentioned, turns upon the questions:

1st. Whether the endorsements were made in the proper exercise of the agent's authority.

2d. If not, whether there is anything in the dealing between the bank and the agent, which should bind the principal, notwithstanding the agent's want of authority.

After the evidence had been heard on the trial in the court below, three several instructions were moved for by the defendant's counsel, predicated upon portions of the evidence tending to show that the agent, in making the endorsements, was not acting in the business of the principal, but for the agent's own benefit, and praying the court to instruct the jury, if they believed this fact, they should find for the defendant. These instructions were refused by the court; and therein the court erred. If the agent did in fact endorse the name of his principal on the bills for the agent's own accommodation, he exceeded his authority, and the endorsements standing alone do not bind the principal.

2d. As to the second question: In the case above mentioned it was declared that under certain circumstances
278 *therein mentioned, a principal might be bound by the act of the agent, although the agent may have exceeded his authority. This modification of the general rule in regard to a power to endorse, &c., applies in the case of an innocent holder for value, who has become such by the act of an agent apparently within the scope of his authority. The court, in the absence of all proof tending to prove the fact, should not have submitted it to the jury to find whether the bank was an innocent holder. So far from showing that the bank might have been deceived and was probably deceived by the agent, the evidence tends strongly to prove the reverse. In legal intendment the bank knew the limits of the agent's written authority; they had that authority in their own keeping; the bills were drawn by the agent in his own name and behalf; the name of the principal, who was the payee, was endorsed by the agent; and yet the bills are found in the hands of the drawer and offered by him for discount for his own benefit, and they are discounted accordingly, and the proceeds applied to the credit of the agent's own individual account. At the time the proceeds of the bills were so applied to the agent's credit, he was indebted to the bank in a large amount; and thus his debt was paid, so far as the proceeds of the bills extended. In every stage of the proceeding with which the bank was connected, it was perfectly apparent that the business of the agent, and not of the principal, was to be promoted.

It will not do to say that the agent might, by a certain disposition of the proceeds, have indemnified his principal; and that the bank could not know that he would not do so. The answer is obvious, that the proceeds of the bills were at once applied to his own benefit on the books of the bank, with its full knowledge and consent. If the possibility that an agent may indemnify his principal against abuse of power
279 *may be relied on to bind the principal, the practical and beneficial effects of limitations in powers will be destroyed; for in every case the agent may possibly indemnify his principal against such abuse.

The remaining questions growing out of the protests, and the mode of transmitting the notices of dishonor, are considered in another case between the same parties; and I refer to what is there said as expressing my opinions on those questions.

I am of opinion to reverse the judgment, and remand the case for a new trial to be had in conformity with the principles herein declared, if on such new trial the proof shall be the same in substance as on the former trial.

ALLEN and DANIEL, Js., concurred.

MONCURE and LEE, Js., dissented.

The judgment was as follows:

It seems to the court here, that the power of attorney from L. E. Stainback to F. C. Stainback, given in evidence at the trial, as between the principal and agent, gave the attorney no authority to endorse the bills given in evidence, with the name of L. E. Stainback, for the accommodation of the attorney; and that parties dealing with

the attorney, and having the means of knowing that he, in endorsing the name of the principal and obtaining a discount thereon, did so for the accommodation of the agent and not of the principal, cannot recover of the principal. It further seems to the court, that the facts appearing in the record, that the attorney, who was also the drawer, held the bills at the time they were offered for discount and discounted by the defendants in error, and that the proceeds were passed to the credit of the attorney, the drawer as aforesaid, are
280 of themselves full proof *that the attorney was acting for his own benefit and not that of his principal; all which was known to the defendants. It therefore seems to the court that the Circuit court erred in refusing to give in substance the three several instructions moved for by the plaintiff, and in giving that which was given in lieu thereof.

Therefore, it is considered by the court that the judgment aforesaid be reversed and annulled, and that the defendants pay to the plaintiff his costs expended in this court; that the verdict of the jury be set aside, and the cause remanded, with instructions that if upon any future trial the evidence shall be in substance the same as at the former trial, and if the defendant in the court below shall ask it, the court shall instruct the jury in accordance with the opinion of this court, as herein declared.

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281 *Stainback v. Read & Co.

April Term, 1854, Richmond.

1. **Powers of Attorney—Construction and Scope.**—A power of attorney given to an agent to act in the name and on behalf of his principal, in the absence of anything to show a different intention, must be construed as giving authority to act only in the separate individual business of the principal.

2. **Same—Authority to Draw, Endorse or Accept Bills—Scope of Authority.**—A power of attorney to draw, endorse and accept bills, and to make and endorse notes, negotiable at a particular bank, in the name of the principal, does not authorize the attorney to draw a bill in the joint names of himself and his principal.

3. **Same—Same—Effect Where Bill Drawn on Person Having No Funds of Principal.**—Such a power does not authorize the attorney to draw a bill in the name of his principal upon a person having no funds of the principal in his hands. And if such a bill is accepted and paid by the drawee for the accommodation of the drawer, there is no implied obligation of the principal to repay him.

4. **Same—Same—Abuse of Power—Notice to Third Persons—Effect.***—Such a power does not authorize the attorney to draw a bill in the name of his principal for the benefit of the attorney; and a party dealing with the attorney, and having the means of knowing that the agent was exceeding his powers in thus drawing the bill for his own benefit, cannot recover of the principal.

This was an action of assumpsit in the Circuit court of Petersburg, brought by C. C. Read & Co. against Littleberry E. Stainback. Upon the trial the plaintiffs introduced in evidence a bill of exchange, which bore date the 14th of December 1842, and was directed to them, whereby they were requested to pay to P. C. & J. D. Osborne & Co. one thousand nine hundred and sixty-nine dollars and forty-two cents. The bill was signed by L. E. Stainback, by F. C. Stainback, attorney, and by F. C. Stainback, and was endorsed by the payees and F. C. Stainback; and was paid by the plaintiffs, who charged the amount on their books to F. C. Stainback and the defendant; neither of whom had at the date of the bill, any funds in the hands of the plaintiffs.

282 *The plaintiffs also introduced in evidence the power of attorney from L. E. Stainback to F. C. Stainback, set out in the next preceding case. They also offered evidence to prove that up to some time about the beginning of 1842 the defendant F. C. Stainback and another, who died in 1841, were in business in Petersburg as merchants under the name of L. E. Stainback, Son & Co. That the defendant is far advanced in life, attends to no business, and that F. C. Stainback had the management and settlement of the business of L. E. Stainback, Son & Co. up to the time of his failure in 1843. That L. E. Stainback, Son & Co. and also F. C. Stainback, had an account at the Bank of Virginia in Petersburg in December 1842, and previously, and that L. E. Stainback, Son & Co. were indebted to that bank until 1843. That on the 15th of December 1842 the bill aforesaid was discounted by said bank, and the proceeds passed to the individual credit of F. C. Stainback, the draft not then having been accepted by the plaintiffs. That in managing the bank business of L. E. Stainback, Son & Co., F. C. Stainback frequently endorsed notes and bills last, that he might control the proceeds.

The plaintiffs also introduced two letters, both of them in the handwriting of F. C. Stainback, and addressed to them. One bears date September 21st, 1842, and is

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*Powers of Attorney—Abuse of Power—Notice to Third Persons.—In Dyer v. Duffy, 39 W. Va. 152, 19 S. E. Rep. 541, it is said: "One dealing with an agent under written power must take notice of his powers, as an act not authorized is not binding on the principal. Curry v. Hale, 15 W. Va. 867; Hewes v. Doddridge, 1 Rob. (Va.) 143; *Stainback v. Read, 11 Gratt. 281.*"

In Glover v. Ames, 8 Fed. Rep. 357, it is said: "In Stainback v. Read, 11 Gratt. 291, this principle was applied to a case in some respects similar to the present. There a power of attorney was given to an agent to draw bills, indorse notes, etc., but it was held that the agent was not authorized thereby to draw bills for his own benefit, but only for the benefit of his principal."

The principal case is also cited in DeVoss v. City of Richmond, 18 Gratt. 363.

See generally, monographic *note* on "Agencies" appended to Silliman v. Fredericksburg, etc., R. R. Co., 27 Gratt. 119.

signed L. E. Stainback, Son & Co. The only part of it having any bearing on this case is as follows:

"I enclose some paper, for which please send me your notes, payable at Farmville, viz:

My note dated 2d September, at 90 days, favor L. E. S.	– –	1619 48
Do. do. 7th do. do.		1941 67
		$3561 15

For which be pleased to send me
283 your notes in favor *of L. E. Stainback, Son & Co., dated 1st September, at 90 days, for $1618 38, and dated 8th September, at 90 days, for $1942 77, which will balance. You can use the notes if you wish.

"L. E. Stainback, Son & Co. have $15000 to pay on 4th of next month, and I wish to provide myself with paper in time. Your notes you will make payable in Farmville."

The second letter bears date December 15th, 1842, and is signed F. C. Stainback. In it he says, "I have yours of 10th, handing your check for $1000. Your draft fell due to day, not on 16th, and I had to alter the date to 15th. I would not have used it if I could have avoided it."

"P. S. The draft of $1740 92 is right. We had another discounted to day for about $1900. Will duly take care of them."

The plaintiffs also introduced in evidence certain bills or drafts, one of which was endorsed by L. E. Stainback, by F. C. Stainback attorney, F. C. Stainback, and L. E. Stainback, Son & Co.; and another was signed as the bill on which this action is founded is signed.

The defendant offered evidence to prove that at the date of the power of attorney aforesaid, the defendant was engaged in mercantile business in his own name in Petersburg, F. C. Stainback being a clerk in the defendant's house; and that F. C. Stainback was at that time under age, and engaged in no business on his own account; and that the firm of L. E. Stainback, Son & Co. was formed about 1836 or 1837.

The evidence being through, the defendant moved the court to instruct the jury as follows:

1st. That under the power of attorney given in evidence in this cause, F. C. Stainback had no authority to draw the bill on the plaintiffs, the payment of
284 which *constitutes the foundation of this action; and that the drawing of such bill on the plaintiffs, and the payment thereof by them, did not authorize the said plaintiffs to maintain this action against him.

2d. That if they believe from the evidence, that the bill, the payment of which by the plaintiffs constitutes the foundation of this action, was drawn by F. C. Stainback for his own benefit, and the proceeds thereof went to his own use, that it was not authorized by the power of attorney in evidence in this cause, and that it was the duty of all persons dealing with the said F. C. Stainback as attorney, to notice the limitations of his authority, as the same was conferred by the said power, and that he could only bind his principal in such cases and upon such bills as were included in said authority.

3d. That the power of attorney given in evidence in this cause, gave no authority to F. C. Stainback to bind the defendant, by drawing or endorsing bills, &c., for the benefit of F. C. Stainback, nor unless the same were drawn or endorsed for the benefit and in the business of the defendant.

4th. That if the jury believe from all the evidence in the cause, that the object of the defendant in executing the power of attorney in evidence in this cause, was to enable and authorize his son F. C. Stainback the attorney to attend to and transact the bank business of the defendant at the Virginia Bank in Petersburg, the defendant being then a merchant in Petersburg, and the said F. C. Stainback being under age; and that the bill the payment of which by the plaintiffs is the foundation of this suit, was not drawn by the said attorney in the course of attending to and transacting the bank business of the defendant at said bank, but for his own use and accommodation, then the said attorney had
285 no power to bind the defendant *by the drawing of the said bill, so as to enable the plaintiffs, on payment thereof, to recover the amount from the defendant.

The court refused to give the first and fourth instruction, and gave the second and third; but qualified the same by further instructing the jury, that the agent F. C. Stainback had the power, under the letter of attorney made evidence in the cause, to draw the bill on which this suit is founded, and subscribe the name of his principal L. E. Stainback thereto, in the manner in which it is done; and that if the jury shall believe that the plaintiffs accepted the same, and paid it at maturity, without notice of, or just cause to suspect, any intended fraud or misapplication of the proceeds thereof from the use or benefit of the principal, that then they ought to find for the plaintiffs, though they may believe it was an accommodation acceptance.

And further, that if the jury shall believe that no fraud or collusion with the agent is chargeable on the plaintiffs, then the fact that the said agent executed the bill in the name of his principal L. E. Stainback, designating himself as attorney, is equivalent to a declaration on his part, that he was acting in the business and for the benefit of his principal; and that any misapplication of the proceeds by the agent after they came to his hands (if there was any), would not defeat the plaintiffs' recovery.

To the opinion of the court refusing the first and fourth instructions, and instructing the jury as aforesaid, the defendant excepted. There was a verdict and judgment for the plaintiffs; and thereupon the defendant applied to this court for a supersedeas, which was awarded.

Joynes and Patton, for the appellant.
D. May and Stanard, for the appellees.

286 *SAMUELS, J. A proper analysis of this case will show that it turns upon two questions:

First. Whether F. C. Stainback had the authority of L. E. Stainback his principal, to draw the bill which is part of the foundation of this suit, or to subject his principal to an action on a collateral contract in regard thereto.

Second. If he had no such authority, is L. E. Stainback still liable for the act of the agent, because of anything in the dealing between the agent and the plaintiffs?

It may be laid down as a rule of law, sanctioned alike by reason and authority, that a power of attorney given to an agent, to act in the name and on behalf of his principal, in the absence of anything to show a different intention, must be construed as giving authority to act only in the separate, individual business of the principal. See Story on Agency, from § 57 to § 143; Atwood v. Munnings, 7 Barn. & Cress. 278; North River Bank v. Aymar, 3 Hill's N. Y. R. 262; Stainer v. Tysen, 3 Hill's N. Y. R. 262; Hewes v. Doddridge, 1 Rob. R. 143.

It is equally well settled that a party dealing with an agent acting under a written authority, must take notice of the extent and limits of that authority. He is to be regarded as dealing with the power before him; and he must at his peril, observe that the act done by the agent is legally identical with the act authorized by the power. See cases above cited; also 1 American Leading Cases 392, in notes.

These rules of law applied to the facts of the case, are decisive of the first question. The bill was not drawn in the business of L. E. Stainback, but in that of F. C. Stainback exclusively. It was not identical with a bill drawn in the separate name of L. E. Stainback. A joint bill imposes 287 a joint liability on the *drawers in case it be not honored. In case of loss in the business in which the bill is drawn, both parties are bound; and in case one of the drawers be insolvent and the other solvent, as in this case, the whole loss must fall on the solvent party. If, however, a profit be made, it must be divided between those jointly concerned. A contract such as this is widely different from one in which the party liable for a loss, if one occur, is solely entitled to the profit, if one result.

Again: The power in any event must be held to authorize the agent to draw such bills only as L. E. Stainback might himself have rightfully drawn. In the case before us neither L. E. Stainback alone, or L. E. & F. C. Stainback jointly, had any right to draw the bill in question, having no funds in the hands of the drawees; and having, at the time, no other reason to suppose it would be accepted. The drawer of a bill, when he negotiates it, is to be understood as affirming that he has the right to draw. In the case before us L. E. Stainback is made to falsely affirm such right; to commit a fraud by means of the falsehood; and all this under color of the authority conferred by him. Under certain circumstances a principal may be bound by the act of his attorney going beyond his power, yet he can be so bound only to an innocent holder for value. Read and company are not holders at all; they knew perfectly well that L. E. Stainback, either solely or jointly with another, had no right to draw on them; that a power to draw bills rightfully, would not extend to their house, in the then state of business relations between them and the drawers, or either of them.

The letter of attorney authorized the agent to do certain specified acts, including the drawing of bills; this, as already stated, is to be construed as applying to the rightful drawing of bills in the 288 business of the *principal. Within these limits the agent had authority to pledge the credit of his principal, and subject him to the consequent liability. Yet in the case before us the defendant is sued not upon a direct undertaking as drawer, nor upon a liability incident to his position on the bill; he is sued upon an alleged contract to transpose the positions of the drawers and acceptors, to make the drawers liable to the acceptors: And all this is said to be implied in the drawing the bill under the circumstances existing at the time. It cannot be held that an agent may, by implied contract, bind his principal beyond those limits within which he might bind him by express contract; nor can it be held that a power to draw a bill, in itself gives the further power to make another original and express contract to indemnify the acceptor against his acceptance. If the attorney could not make an express contract of indemnity, it is impossible to suppose that it can be implied from his drawing the bill.

The second question has, to some extent, been anticipated in considering the first. There are, however, certain considerations peculiar to this branch of the case, which require some notice. It is well settled that although an agent may in fact exceed his power, yet if he apparently keep within its limits, and deal with innocent parties for value, the principal will be bound. Mann v. King, 6 Munf. 428; North River Bank v. Aymar, 3 Hill's N. Y. R. 262. It is but just that the principal should suffer the consequences of his own misplaced confidence, rather than they should fall on innocent parties. This rule of law, however well established, can afford no aid to Read & Co. upon the facts of this case. They dealt with an agent acting under a power of attorney, and, as already said, must be regarded as dealing with that power before them. They were bound, at their peril, to notice the limits prescribed therein, 289 either by its own terms, or *by construction of law. With this knowl-

edge, they nevertheless make a contract, which is not one of those specified in the power; but an original contract to subject the drawers to a liability not incident to their position on the paper. They accepted the bill, having no funds of the drawers; they knew that their acceptance would make them liable to any subsequent holder for value; they relied upon the undertaking of F. C. Stainback for indemnity; this undertaking is contained in the letter dated December 15th, 1842, the day the bill was discounted, advising the drawees of the bill and its discount, and promising "to take care of it;" obviously meaning thereby to provide funds for its payment at maturity. This undertaking is contained in a letter from F. C. Stainback to Read & Co. given in evidence upon the trial. The letter is signed by F. C. Stainback with his own name only; is wholly upon his own business with them; and must be held to be an express guarantee by F. C. Stainback alone. This excludes all possibility of an implied guarantee by L. E. Stainback, either joint or several.

The law, as here declared, required that the first and fourth instructions should have been given; and seeing that by necessary legal intendment Read & Co. did know the limits of the attorney's power, and that in making the contract sued on he was exceeding his authority, there was no foundation in the facts of the case for the qualification with which the second and third instructions were given. The court, therefore, erred in annexing such qualification.

I am of opinion to reverse the judgment of the Circuit court, and remand the cause for a new trial, with directions to give the four instructions as moved for, if the evidence on the new trial shall be substantially the same as on the former trial, and if the instructions shall be again asked for.

290 *ALLEN and DANIEL, Js., concurred.

MONCURE and LEE, Js., dissented.

The judgment was as follows:

It seems to the court here, that the power of attorney from Littleberry E. Stainback to F. C. Stainback, given in evidence on the trial in the court below, did not give authority to F. C. Stainback to draw the bill given in evidence, binding said L. E. Stainback as a joint drawer with F. C. Stainback; and that the Circuit court erred in refusing to give the first instruction moved for by the plaintiff in error.

It further seems to the court here, that the power of attorney, as between the principal and agent, gave no authority to the agent to draw the bill aforesaid for the accommodation of the agent; and that parties dealing with the agent and having the means of knowing that the agent was exceeding his power in thus drawing the bill for his own benefit, cannot recover of the principal.

It further seems to the court that the facts, that F. C. Stainback held the bill and had it discounted for his own benefit; that he wrote the letter of December 15th, 1842, addressed to the defendants; that they accepted, after receiving that letter, and charged their acceptance to F. C. Stainback; if believed by the jury, taken in connection with the written evidence, were sufficient to show that the defendants had the means of knowing that F. C. Stainback the agent, in procuring the acceptance of defendants, was procuring it for his own accommodation and not that of his principal; and that the principal was not bound: that the court below should have so instructed the jury, and that it erred on plaintiff's second motion to instruct.

It further seems to the court here, 291 that the court *below erred in its action on the plaintiff's third and fourth motions to instruct; that it should have given the instruction above stated as proper to be given on the second motion to instruct.

Therefore, it is considered by the court that the said judgment be reversed and annulled; that the plaintiff recover of the defendants his costs in this court expended; that the verdict of the jury be set aside, and the cause remanded for a new trial to be had therein; upon which trial, if the evidence shall be the same in substance as that at the former trial, the Circuit court shall conform its action to the principles hereby declared.

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292 *Morris, Ex Parte.

April Term, 1854, Richmond.

1. **Misdemeanor—Free Negro Coming in State—Statute.**—The offence of a free negro in coming into the state and remaining therein in violation of the 28th and 29th sections of chapter 198 of the Code of Virginia, is a misdemeanor, for which he is liable to be prosecuted and punished in the manner provided in said 28th section.

2. **Same—Same—Appeal as Matter of Right.**—Upon conviction of such a misdemeanor the party is entitled, as of right, under the 15th section of chapter 213 of the Code, to an appeal from the justice's decision to the court of the county or corporation in which his conviction was had: And it is the duty of the justice to allow the appeal, if duly applied for.

3. **Same—Same—Same—Refusal—Mandamus.***—If in such case the appeal is duly applied for and re-

*Mandamus Cases Relating to.—In Lowther v. Davis, 33 W. Va. 134, 10 S. E. Rep. 21, it is said: "Mandamus is an extraordinary writ, and lies only in cases where the party has no other specific or adequate remedy. 2 Cooley, Bl. Comm. bk. 3, p. 110, note 13; 4 Minor, Inst. pt. 1, p. 362; Justices v. Munday, 2 Leigh 165. It would not lie in a case such as the one before us, because the statute gives a plain and adequate remedy by petition to the court. This remedy did not exist in Virginia when the case of *Ex parte* Morris, 11 Gratt. 292, was decided, and therefore that case has no application since the enactment of our statute authorizing the circuit court, or the judge thereof, to grant appeals."

fused by the justice, the party may have relief by *mandamus* from the Circuit court.

4. **Refusal of Circuit Court to Issue Mandamus—Supersedeas from Supreme Court.**—If the Circuit court refuses to issue a *mandamus* in such a case, the party may apply to the Supreme court of appeals for a *supersedeas* or writ of error, and have the action of the Circuit court reviewed and corrected by that court.

William W. Morris a free negro, applied by petition verified by his affidavit, to the Circuit court of the city of Richmond for a mandamus to the mayor of Richmond, to compel that officer to allow to the petitioner an appeal from a judgment pronounced against him. In his petition he stated that on the 1st day of May 1854 he was arraigned before Joseph Mayo, the mayor of the city of Richmond, for remaining in the commonwealth contrary to law, upon the allegation that he had forfeited his right to stay therein by reason of his having once gone beyond its limits, under the 28th and 29th sections of ch. 198 of the Code of Virginia. That upon this charge he was tried by the said mayor, and was required to give bond in the penalty of five hundred dollars,

293 that he would leave *the state within ten days. From this decision he appealed to the Hustings court, and offered any security which might be required of him. But the mayor refused to allow the appeal, and exacted from him the bond aforesaid. He insisted that his right to appeal from the decision of the mayor was absolute. That by § 1 of ch. 199, of the Code, the offence of which he had been convicted is a misdemeanor; and by § 15 of ch. 212, the right of appeal from any such judgment is made absolute. He therefore prayed that the court would award a mandamus to compel the mayor to allow to him an appeal to the Hustings court.

The Circuit court refused the writ; and thereupon Morris applied to this court for a supersedeas to the judgment of the court; which was allowed.

Crump, for the petitioner.

LEE, J. The plaintiff in error, who was a free negro, was charged before the mayor of the city of Richmond with remaining in the commonwealth contrary to law, after having forfeited his right to return to the state or remain therein, by going to a non-slaveholding state. Upon this charge he was tried, and being adjudged to have violated the law in this respect, he was required to give bond in the penalty of five hundred dollars, with condition that he would leave the state within ten days. From this sentence he prayed an appeal to the Hustings court, and offered to give any security that might be required; but the mayor not thinking him entitled to an appeal in such a case, refused to grant it. He then presented a petition to the Circuit court of the city of Richmond, setting out the facts, and verified by affidavit, praying a mandamus to compel the mayor to grant him an appeal; but that court, upon consideration of the matter, refused to grant the writ prayed for; and he then

294 *presented a petition to this court praying a supersedeas to the order of

. In Woodford v. Hull, 31 W. Va. 471, 7 S. E. Rep. 451, it is said: "If the judgment pronounced by the justice, the plaintiff in error, had been one from which an appeal lay to the circuit court, then mandamus would have been the proper remedy. *Ex parte Morris, 11 Gratt. 292*; Supervisors v. Minturn, 4 W. Va. 300. This was evidently the theory upon which the petitioner, Woodford, and the circuit court, proceeded in this case. But this court having, since the judgment was rendered by the circuit court, decided that no appeal will lie from the judgment of a justice rendered upon the verdict of a jury, whether the defendant appeared and contested the action or not (Hickman v. Railroad Co., 30 W. Va. 296, 4 S. E. Rep. 654), it is plain that mandamus did not lie in this case, and therefore the circuit court erred in overruling the motion of the justice, Hull, to quash the alternate writ. The justice could not be compelled by mandamus, or any other writ, to do that which the law forbids him to do."

The principal case is also cited in Page v. Clopton, Judge, 30 Gratt. 419, and *note*. Further, upon the subject of mandamus, see the following cases: Com. v. Fairfax Justices, 2 Va. Cas. 9; Dawson v. Thruston, 2 H. & M. 132; Brown v. Crippin, 4 H. & M. 173; Harrison v. Emmerson, 2 Leigh 827 [764]; Manns v. Givens, 7 Leigh 689; Yeager, *Ex parte*, 11 Gratt. 655, and *note*; Randolph Justices v. Stalnaker, 13 Gratt. 523, and *note*; Cowan v. Fulton, Judge, 23 Gratt. 579, and *note*; Kent v. Dickinson, Judge, 25 Gratt. 817, and *note*; King William Justices v. Munday, 2 Leigh 165; Barnett v. Meredith, 10 Gratt. 650, and *note*; Antoni v. Wright, 22 Gratt. 833, and *note*; Milliner v. Harrison, 32 Gratt. 422, and *note*; Peters v. Auditor, 33 Gratt. 368; Tyler v. Taylor, 29 Gratt. 765, and *note*; Sights v. Yarnalls, 12 Gratt. 292; Dew v. Judges, 3 H. & M. 1, 3 Am. Dec. 639, and *note*; Booker v. Young, 12 Gratt. 303; Smith v. Dyer, 1 Call 488 [562]; Moon v. Wellford, 84 Va. 34, 4 S. E. Rep. 572; Brander v. Chesterfield Justices, 5 Call 548; Com. v. Justices of Kanawha County, 2 Va. Cas. 499; Jones v. Justices of Stafford, 1 Leigh 584; Bracken v. W. & M. College, 3 Call 495 [574]; Chew v. Justices of Spottsylvania, 2 Va. Cas. 208; Delaney v. Goddin, 12 Gratt. 266; Powell v. Tarry, 77 Va. 250; Taliaferro v. Franklin, 1 Gratt. 332; Dillard v. Dunlop, 83 Va. 755, 3 S. E. Rep. 383; Delaplane v. Crenshaw, 15 Gratt. 457, and *note*; Cowan v. Doddridge, 22 Gratt. 458; Neal v. Allen, 76 Va. 437; Blair v. Marye, 80 Va. 485; Wolfe v. McCaull, 76 Va. 876; Wise v. Bigger, 79 Va. 269; Clay v. Ballard, 87 Va. 787, 13 S. E. Rep. 262; Webb v. Barbour, 4 H. & M. 462; Mayo v. Clark, 2 Call 234 [276]; Poulson v. Justices of Accomack, 2 Leigh 804 [743]; Amory v. Justices of Gloucester, 2 Va. Cas. 523; Frisbie v. Justices of Wythe County, 2 Va. Cas. 92; Goolsby, *Ex parte*, 2 Gratt. 575.

Same—Refusal of Circuit Court to Grant—Remedy.—For the proposition that, where the circuit court refuses to grant a mandamus to an inferior court, in a case in which it is proper that it should be granted the party may apply to the supreme court of appeals for a supersedeas or a writ of error, and have the action of the circuit court reviewed, the principal case is cited and followed in Welch v. County Court, 29 W. Va. 81, 1 S. E. Rep. 351.

the Circuit court refusing the mandamus, which was allowed.

I think there can be no question as to the power of this court to review the action of a Circuit court in refusing to award a mandamus upon an appeal from or writ of error or supersedeas to the order refusing the same. The order is final, and in a case involving a civil right, not a matter of controversy merely pecuniary, and the case is thus within the general terms of the law providing the appellate jurisdiction; and the 9th and 10th sections of the act of June 5th, 1852 (Sess. Acts 1852, p. 53), although they do not in totidem verbis declare that an appeal, &c., shall lie to the Court of appeals from the judgment of a Circuit court in a case of mandamus, yet they do so in effect; for they provide that when a petition for an appeal, &c., in such a case shall be presented, the certificate of counsel as to the propriety of reviewing the decision may be counsel or attorney of the Supreme court of appeals or a District court; and if the appeal, &c., be allowed, that the case shall be docketed in the Supreme court, unless the petitioner ask that it be docketed in a District court; in which case it may be docketed in such last named court, subject to be transferred to the Supreme court of appeals in the manner provided in the act. The review of an order refusing a mandamus is in entire conformity with the long settled previous practice of this court in similar cases. In Mayo v. Clark, 2 Call 276, a District court had refused to grant a supersedeas to an order of a County court concerning a road. The Court of appeals refused to grant a mandamus to compel the District court to grant the supersedeas, but did grant a supersedeas to the order of the District court refusing it. In another case a Superior court of law had refused to grant a mandamus to compel a County court in which an action
295 *had been brought against a party claiming to be a lieutenant in the navy of the United States and a citizen of Pennsylvania, to remove the case into the United States court pursuant to the act of congress on that subject. The Court of appeals reversed the order of the Circuit court refusing the mandamus, and proceeded to award it. Several other cases may be found in which the Court of appeals has allowed writs of supersedeas to orders of inferior courts refusing to grant writs of mandamus. Dawson v. Thruston, 2 Hen. & Munf. 132; Dew v. Judges of Sweet Springs District Court, 3 Hen. & Munf. 1; Manns v. Givens, 7 Leigh 689.

The 28th and 29th sections of chapter 198 of the Code, p. 745, prohibiting the migration of free negroes into this commonwealth, or the return of one who has once gone to a nonslaveholding state, contain provisions of a highly penal character, to be enforced in the manner therein prescribed. They cannot be called "police regulations" in any other sense than one affecting the state at large. They cannot properly be so called in the usual and restricted sense of those terms, which applies them to the ordinances enacted by the local authorities of a town or city for its internal government, and the preservation of good order within its limits. Any violation of these provisions constitutes an offence against the laws of the commonwealth, for which the party is liable to be arrested and summarily dealt with as the act provides; and it cannot be distinguished from a breach of any other penal enactment embracing the whole state, to be found in the Code. It is true that in this case no other sentence has been pronounced than that the party must give the bond to leave the state, and no order for stripes has been yet made; and if the bond be given, the party is no longer liable to the stripes. But he is under arrest, and if the bond be not given, the order for the stripes may be made at any time,
296 and *may be repeated from time to time. If the bond be given, the penalty is forfeited if he fail to leave the state within the ten days, or if, having left it, he should afterwards return within its limits. And in an action upon the bond to recover the penalty, he cannot defend himself by showing that he was not liable to give such a bond. That is concluded by the judgment of the mayor, whose sentence is accordingly the conviction of the party of the offence charged.

A violation of the provisions of these sections being thus an offence against the laws of the commonwealth, it falls of course within the class of misdemeanors under the first section of ch. 199, p. 750, which declares all offences to be either felonies or misdemeanors; and under the 15th section of ch. 212, p. 788, a negro convicted of a misdemeanor by a justice is entitled to appeal from the decision to the County or Corporation court; and it is the duty of the justice to grant such appeal, if the same be applied for.

The act has made no provision for the case of a refusal by the justice to grant an appeal, where the party is legally entitled to demand it, but he does not thereby lose the benefit of it, though he of course must resort to such remedy as the common law affords. That the mandamus is the rightful remedy, I have no doubt. This lies where there is a distinct legal right, and no other means of asserting it; and the case under consideration is precisely in that category. Here the party has a plain, unquestionable right to appeal from the sentence of the mayor, and that officer has no discretion in the matter. Unless his right to the appeal be asserted, there will be a failure of justice; and there is no mode in which it can be asserted save by a resort to the general power possessed by the Circuit court to "oblige all inferior courts and magistrates to execute that justice to which a party is entitled, and which they are enjoined to do by law; especially
297 if it *be enjoined by statute." That a mandamus will lie from the Circuit court to the justices of the County court, both as members of the court and individ-

ually in pais, is shown by numerous cases. Commonwealth v. Justices of Fairfax, 2 Va. Cas. 9; Dawson v. Thruston, 2 Hen. & Munf. 132; Brander v. Chesterfield Justices, 5 Call 548; Brown v. Crippen, 4 Hen. & Munf. 173; Harrison v. Justices of Norfolk, 2 Leigh 764; Manns v. Givens, 7 Leigh 689.

I think, therefore, the Circuit court erred in wholly refusing the prayer of the petition, and that it should have awarded a rule or a mandamus nisi, and upon the return thereof, should have proceeded to investigate the facts of the case, and if found substantially as stated in the petition, should have awarded a peremptory mandamus.

I am of opinion to reverse the judgment of the Circuit court, but without costs; the mayor not having been summoned or otherwise made a party in the Circuit court, and regarding the proceeding hitherto as ex parte merely; and to remand the cause to the Circuit court, with directions to proceed in the manner above indicated.

The other judges concurred in the opinion of Lee, J.

The following is the judgment of the court:

The court is of opinion, that it is competent for this court to review the order of the Circuit court refusing said writ of mandamus, upon a writ of error or supersedeas; and if found erroneous, to reverse the same, and make such further order in the premises as shall be right and proper.

And the court is further of opinion, that the offence of a free negro in coming into this state and remaining therein in violation of the 28th and 29th sections
298 *of ch. 198 of the Code of Virginia, is a misdemeanor, for which he is liable to be prosecuted and punished in the manner provided by said 28th section.

And the court is further of opinion, that upon conviction of such a misdemeanor, the party is entitled, as of right, under the 15th section of ch. 213 of said Code, to an appeal to the court of the county or corporation in which such conviction was had: and that in the present case it was the duty of the said mayor to have allowed such appeal, if duly applied for, as alleged in the plaintiff's petition to the said Circuit court.

And the court is further of opinion, that such appeal having been duly applied for and erroneously denied by said mayor, according to the allegations and suggestions of the said petition, the petitioner had no other legal means to assert his right to the same save by mandamus, and that such writ of mandamus was the rightful remedy to be resorted to in the premises.

And the court is further of opinion, that the said Circuit court had full authority and jurisdiction to entertain said application, and to award a mandamus nisi upon the filing of said petition; and upon due return thereof, if the facts of the case were, on proper investigation, found to be substantially as alleged in said petition, it was the duty of the said Circuit court to award a peremptory mandamus.

Wherefore the court is of opinion, that the order of the said court, wholly denying the prayer of said petition, is erroneous.

Therefore, it is considered by the court, that the said order be reversed and annulled, but without costs; the court being of opinion that the said mayor not having been summoned or otherwise made a party to the proceeding in the Circuit court, the proceeding in this court is to be regarded as in the nature of an ex parte proceeding on
299 behalf of the petitioner, in *which the said mayor is no party nor liable for costs. And it is further ordered, that the cause be remanded to the said Circuit court, with directions to award a writ of mandamus nisi in the matter of said petition, and upon due return thereof, to take such further proceedings in the cause as justice and the rules of law shall require. Which is ordered to be certified to the said Circuit court.

Judgment reversed.

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300 *Fitzhugh's Ex'or v. G. F. Fitzhugh.

April Term, 1854, Richmond.

[62 Am. Dec. 653.]

1. **Executors and Administrators‡—Liability for Services Rendered Decedent's Estate.***—A personal representative cannot be sued as such for services rendered or goods furnished to his testator's or intestate's estate since his death.
2. **Same‡—Liability for Funeral Expenses.**—It seems that an action will not lie against the personal representative as such for the funeral expenses of his testator or intestate.
3. **Same‡—Liability for Money Paid by Joint Surety of Decedent.**—In some cases where money has been paid for a deceased person, there an action for money paid will lie against the personal representative as such: As where money has been paid by a joint surety.
4. **Same‡—Declaration—Descriptio Personæ as Surplusage.†**—Where the demand made in all the

*Executors and Administrators—Liability for Services Rendered Decedent's Estate.—Daingerfield v. Smith, 83 Va. 91, 92, 1 S. E. Rep. 599, citing the principal case as authority, also holds that a personal representative cannot be sued as such for services rendered or goods furnished decedent's estate since his death.

Same—Power to Bind Estate by Contract.—In Staples v. Staples, 85 Va. 76, 81, 7 S. E. Rep. 199, the principal case and Morgan v. Fisher, 82 Va. 417, were cited, among others, as authorizing the proposition that a fiduciary has no authority to bind *ex directo* those for whom he acts by executing bonds, notes, or other evidences of indebtedness; but he becomes, generally, personally liable on such contracts.

†Same—Declaration—Descriptio Personæ as Surplusage.—For further authority in keeping with the propositions laid down in the fourth and fifth headnote, see Belvin v. French, 84 Va. 81, 83, 3 S. E. Rep. 891.

‡Same.—See generally, monographic *note* on "Executors and Administrators."

counts in a declaration are such that an action cannot in any case be maintained upon them against the personal representative as such, the description of him as such may be considered as mere surplusage, and the judgment may be against him personally.

5. **Same‡—Same—Same.†**—But if the demand set out in any one of the counts may possibly be maintained against the personal representative as such, then the description of him as such cannot be treated as surplusage, and if the action cannot be maintained against him in his representative character, it must fail.

6. **Appellate Practice—Instruction Refused—Failure of Exception to Show Relevancy.§**—An exception to an opinion of the court refusing an instruction asked, does not state the facts of the case so as to show its relevancy. The appellate court will not undertake to decide whether the court did right or wrong in refusing the instruction.

7. **Same—Demurrer Sustained in Appellate Court.‖**—A demurrer to a declaration having been overruled in the court below, and there being a judgment for the plaintiff, upon appeal the judgment is reversed and the demurrer sustained. The cause will be sent back with leave to the plaintiff to amend his declaration.

This was an action of assumpsit in the Circuit court of Fauquier county, brought by George F. Fitzhugh against Henry Fitzhugh and Berkeley Ward, executors of Thomas Fitzhugh deceased. The writ abated as to Henry Fitzhugh by the return of "no inhabitant."

301 *The declaration contained three counts. The first count was for medicine and other necessaries, feed for horses, and board of negroes, furnished by plaintiff to defendants, as executors as aforesaid, at their special instance and request. The second count, was for attendance upon the slaves of their testator's estate and work and labor done and performed by plaintiff for and about the said slaves, &c., which attendance, work and labor, &c., were done, performed and rendered to defendants as executors as aforesaid, at their special instance and request. The third count was for money paid, laid out and expended by plaintiff for the use of the defendants as executors as aforesaid, at their special instance and request.

The defendant demurred generally to the declaration; but the court overruled the demurrer. The defendant also pleaded non assumpsit, and non assumpsit within five years. And upon the trial he moved the court to instruct the jury, that unless they believe from the evidence, that the charges and items mentioned in the bill of particulars in this case, were furnished and rendered by the plaintiff at the instance and request of the defendant, they must find for the defendant. This instruction the court refused to give, and the defendant excepted; but the bill of exceptions does not set out any of the evidence, so as to show the relevancy of the instruction asked. There was a verdict and judgment for the plaintiff: And the defendant thereupon applied to this court for a supersedeas, which was awarded.

Patton, for the appellant.
Morson, for the appellee.

DANIEL, J. It seems to be well established as a general principle, that contracts made with an executor or administrator are personal, and do not bind the

302 *estate of the testator or intestate. The representative has no power to charge the assets in his hands by contracts originating with himself; nor can any other person reach the assets for claims originating since the death of the decedent, by suit against the representative as such. For such contracts and claims the remedy is against the executor or administrator in his private capacity: Whilst on the other hand, for the contracts of the decedent, the representative is bound not personally, but in his representative capacity. Jennings v. Newman, 4 T. R. 347; Sumner v. Williams, 8 Mass. R. 162, 199.

It is also equally as well settled that promises which charge a man as executor cannot be joined with those which charge him personally: Because the judgment in the one case would be de bonis propriis, and in the other de bonis testatoris. 2 Saund. R. 117 e, note; Epes' adm'r v. Dudley, 5 Rand. 437.

The declaration contains three counts. The charges exhibited by the two first, have all originated since the death of the testator, and unless they can be excepted from the general rule, they lie not against the executor as such, but against him personally. The counsel for the appellee

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§**Appellate Practice—Instructions—Failure of Exceptions to Show Relevancy.**—In Shrewsbury v. Miller, 10 W. Va. 124, it is said: "It has been held repeatedly, that if a bill of exceptions is taken to instructions to the jury, and sufficient facts are not set forth to show whether the instructions were relevant or irrelevant, the appellate court will not decide upon the correctness of the instructions, as the presumption, is the court decided correctly in the absence of proof to the contrary. *Fitzhugh v. Fitzhugh, 11 Gratt. 308;* 2 W. Va. 90; Wise v. Postlewait *et al.*, 3 W. Va. 452." See also, in accord, Valley, etc., Ass'n v. Teewalt, 79 Va. 427; Shepherd v. McQuilkin, 2 W. Va. 100; Wise v. Postlewait, 3 W. Va. 455; Hooff v. Rollins, 5 W. Va. 541; Strader v. Goff, 6 W. Va. 264; Hall v. Hall, 12 W. Va. 21; Campbell v. Hughes, 12 W. Va. 209; Patton v. Elk River, etc., Co., 13 W. Va. 273; Ball v. Cox, 29 W. Va. 409, 1 S. E. Rep. 675, all citing the principal case.

For other cases in point, see monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887; monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192; *foot-note* to Harman v. Lynchburg, 33 Gratt. 37.

Exceptions—Exclusion of Evidence—What Bill Must Show.—See the principal case cited in Lawrence v. Com., 86 Va. 579, 10 S. E. Rep. 840; *foot-note* to Johnson v. Jennings, 10 Gratt. 1.

Appellate Practice—Demurrer Sustained in Appellate Court.—See, in accord, Hale v. Crow, 9 Gratt. 263; Strange v. Floyd, 9 Gratt. 474; White v. Toncray, 5 Gratt. 179.

argues that they may be so excepted; that they are of a nature entitling them to stand on the same footing with the funeral expenses of the deceased, for which, he says, a recovery may be had against the executor in his representative character. In the case of Corner v. Shew, 3 Mees. & Welsb. 350, the authorities on the subject were reviewed, and the subject fully discussed and examined as well by the counsel of the respective parties as by the court. The authorities relied on in that case for the proposition that the funeral expenses constituted a charge on the estate and could be demanded of the executor as such, were Tugwell v. Heyman, 3 Camp. R. 298; Rogers v. Price, Young & Jer. 28; and Lucy v. Walrond, *32 Eng. C. L. R. 349. "With respect to the two first cases (Parke B. said), it was no doubt decided by them that there is an implied promise on the part of an executor, who has assets, to pay the reasonable expenses of such a funeral of his testator as is suitable to his degree and circumstances. It was contended, however, at the bar that those decisions were against a prior authority and were wrong, (a question upon which it is not necessary for us to give any opinion,) but that, if they were right, the only point really determined was, that the law implies a contract on the part of the executor personally, and not in his representative character; and we are all of that opinion." And of the last case he disposes by saying that the point was not then discussed, and that the case was decided on the ground of payment of money into court. I have examined these cases, and think that the foregoing views with respect to the authority to be deduced from them, is correct; and that the conclusion to which the whole court, in Corner v. Shew, arrived, viz: that the executor as such cannot be made liable for the funeral expenses of the testator, may now be regarded as the well settled law in England. In this country the weight of authority is in favor of the same conclusion. In Myer v. Cole, 12 John. R. 349, and in Demott v. Field, 7 Cow. R. 58, counts, on promises by the testator, were joined with counts on promises by the executor as such, to pay for the funeral expenses of the testator; and in each case it was held that the declaration could not be sustained; the counts on the promises by the testator requiring a judgment de bonis testatoris, and the counts on the promises by the executor to pay for the funeral expenses, judgments de bonis propriis. The court said that the last mentioned promises were personal; and though the estate of the testator in the hands of the defendant *would be liable over to him for the funeral expenses, that did not alter the form of the proceeding.

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In Hapgood v. Houghton, 10 Pick. R. 154, which was assumpsit against an executor, a count on a promise by the testator, was joined with a count for the funeral expenses, alleging that they were incurred at the request of the executor, and that he as such promised to pay therefor; and the court held there was no good objection to the joinders. It will be seen, however, that the plaintiff mainly relied on a statute, the count for the funeral expenses, after stating that they were incurred with the consent and knowledge and at the request of the defendant, adding "that thereby and by force of the statute in such case made and provided, the said defendant in his said capacity became liable to pay the same, and in consideration thereof as executor promised," &c. And the court, in delivering its opinion, is, I think, fairly to be understood as resting its judgment mainly on the statute. In the case of Parker v. Lewis, 2 Dev. R. 21, it must be conceded the question seems to have been untrammeled by such considerations, and to have been decided on the views which the court entertained of the rule of the common law on the subject; and it was then held that such expenses are a charge on the assets, independently of any promise by the administrator, upon the ascertainment of the fact that they are of that description, and proper for the estate and degree of the deceased. And an instruction given in the court below that the defendant was liable for them in his character of administrator, without a previous request or promise, was sustained. The case, however, stands opposed to the current of decisions on the subject; and I think we are well justified in regarding it as settled that such expenses constitute no exception to the general rule, which charges the executor in his individual and not *in his representative character, for claims against the estate, originating since the death of the decedent. Be this as it may, the authorities seem to be almost uniform in holding that all other services, rendered for the estate after the death of the testator, charge the executor, if at all, personally. And in addition to those already referred to as sustaining the general principle, from which such a rule may be deduced, may be cited the cases of Vaughn v. Gardner, 7 B. Monr. R. 326, and Lovell v. Field, 5 Verm. R. 218, in which the precise question was decided. In the former, it was decided that with promises by the testator to pay for work and labor done and services rendered for him in his life time, might be joined promises to pay for the same, by the executor; whilst promises by the executor in consideration of services performed for him as executor could not be: Because the judgment in both of the first mentioned promises would have to be de bonis testatoris, and on the last de bonis propriis. And in the latter, the same principle was announced. The court said that the administrator could not promise to bind the estate for goods furnished for the benefit of the estate. The promise is his own, and he is personally liable. He may make it on the credit of the estate in his hands; but whether he has a right to pay out of the same depends on its receiving the sanction of the probat court.

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It seems to me, from this view of the law, that the promises set forth in the two first

counts can create no liability on the executor as such, and charge him only personally. If the third count was of the same kind, the judgment of the court overruling the demurrer might most probably be sustained. For in the case of Corner v. Shew, heretofore cited, it is stated as law, that if the defendant could not, under any circumstances, be liable to the charges made against him as executor, those words,
306 in the declaration, might be *struck out as surplusage, which, however, could not be done in a case in which a defendant could on any supposition be liable in that character to the contract or demand declared on. And in 2 Williams' Ex'ors 1096, it is said that where the nature of the debt is such as necessarily to make defendant liable personally, the judgment will be de bonis propriis, although he be charged as executor. In the case of Sims v. Stilwell, 3 How. Miss. R. 176, the rule is stated in very much the same terms; and in 2 Williams' Ex'ors 1099, it is said that when the executor is personally liable, the naming him executor may be regarded as surplusage.

The third count is for divers sums of money paid, laid out and expended by plaintiff for the use of the defendants as executors. Under such a count facts might have been shown which would have justified a recovery de bonis testatoris. It seems to be now well settled that a count against an executor for money had and received cannot be joined with a count for money due to plaintiff by the defendant as executor upon an account stated with him of money due from him as executor: The first being treated as showing a personal charge on the executor, and the last a charge against the estate. Ashby v. Ashby, 14 Eng. C. L. R. 77. In that case there were three counts against the defendant as executor. The first for money paid, &c., to the use of defendant as executor; the second for money received by defendant as executor to the plaintiff's use; and the third on an account stated. The court holding it clear according to the authorities, that there was an improper joinder of the second and third counts, did not deem it necessary to decide upon the character of the first, though there was a strong intimation of opinion that the first count was for matter which charged the executor in his representative character.

Bayley, J., said, "In the first count of
307 the *declaration before us, the money is stated to have been paid by the plaintiff, to the use of the defendant as executor. That imports that the plaintiff has paid it, not on the personal account of the defendant, but that he has paid it for him because he was executor; that is, as it seems to me, in release of something which would otherwise have been a burden on the assets of the testator. I think that the plaintiff, having paid the money to the use of the defendant as executor, has the same right that before such payment belonged to the person to whom it was made, and consequently, that he (the plaintiff) may charge the assets of the testator. To put a plain case: Suppose two persons are jointly bound as sureties; one dies; the survivor is sued, and is obliged to pay the whole debt. If the deceased had been living, the survivor might have sued him for contribution in an action for money paid; and I think he is entitled to sue the executor of the deceased for money paid to his use as executor." Like opinions were expressed by other members of the court. In the argument of the case of Corner v. Shew, it seems to have been conceded that such was the law; and it was also thus held in the case of Collins v. Weiser, 12 Serg. & Rawle 97. The character of a count for money had and received and of a count on account stated against an executor, had been considered by this court, and adjudged in accordance with the decision in Ashby v. Ashby; it being decided in Fairfax's ex'ors v. Stover, 2 Call 514, that on the former the judgment should be de bonis propriis, and in Epes' adm'r v. Dudley, 5 Rand. 437, that on the latter the judgment should be de bonis testatoris. I see no reason for doubting that the opinion expressed in that case (Ashby v. Ashby) with respect to the count for money paid, &c., to the use of the executor, is also now the law. Such being the case there was an improper
308 joinder of *counts in the declaration; and the court, instead of overruling ought to have sustained the demurrer.

On the trial an exception was taken to the action of the court in refusing to give certain instructions asked by the defendant. The facts of the case are, however, not stated, and in their absence we cannot undertake to decide whether the court did right or wrong in refusing.

I think, therefore, that in accordance with Hale v. Crow, 9 Gratt. 263, and Strange v. Floyd, 9 Gratt. 474, the judgment should be reversed, and the cause remanded, in order that the defendant in error may amend his declaration, if so advised; and on his failure to make a motion to that effect, that the court may render judgment for the plaintiff in error.

The other judges concurred in the opinion of Daniel, J.

Judgment reversed.

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309 *McNeel v. Herold.

July Term, 1854, Lewisburg.

Absent DANIEL, J.

1. **Waste and Unappropriated Lands—Entry—Essentials.**—An entry of waste and unappropriated land, to be valid, must call for objects which possess that notoriety in themselves, or they must be so particularly described, that other persons, by using due care and reasonable diligence, may readily find them.

2. **Same—Same—Descriptive and Locative Calls—Certainty of.***—The general or descriptive calls, and

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***Waste and Unappropriated Lands—Entry—Certainty of.**—Upon the question of the certainty of

the particular or locative calls, of the entry must possess that reasonable degree of certainty which will put a subsequent adventurer duly upon his guard; and the locative calls must be found to be embraced within the descriptive calls, and they should properly be consistent with the latter and with one another: Though in certain cases, where all the calls of an entry cannot be satisfied, the courts, for the purpose of sustaining it, will reject such as appear vague and repugnant, and hold to those appearing to be certain and consistent.

3. **Same—Same—Same.**—Where there are several distinct and independent calls in an entry, it is not necessary that all the objects thus called for should be known and recognized by the public; or that they should all be described with that specialty that a subsequent locator can readily find them: But it is necessary that some one or more of the leading calls should be thus known, or so described that other persons, with due care and proper diligence, may be led to ascertain their positions, and thus distinguish the land appropriated from the adjacent residuum.

4. **Same—Same—Same—When Court Takes Notice of without Proof.**—The objects called for are sometimes so connected with the general history or geography of the country or its legislation, that the courts will take notice of them; and they will be deemed of general notoriety, and sufficiently identified, without further proof: And an entry calling for such objects may be supported without proof of notoriety or identity.

5. **Same—Same—Same—When Must Be Proved.**—When the objects called for possess but a local notoriety, the party affirming the validity of the entry, must prove the identity of the land intended to be appropriated, and that the calls of the entry are such that a subsequent locator, in the exercise of proper judgment and reasonable diligence, would be enabled to distinguish it from the surrounding lands, so as to appropriate for himself the adjacent residuum.

6. **Caveat—Objects Called for Not of Public Notoriety—Special Verdict—Requisites of.**†—In a *caveat*, where the objects called for in the entry
310 are not of such *public notoriety as that the courts will take notice of them, a special verdict must find that the objects called for have a real existence, and are such as is required to make it a valid entry; and a finding defective in these respects will not be remedied by finding that the survey was made in conformity with the entry.

7. **Same—Party Who Files Must Show Title.**—A party who files a *caveat* must show a title to the warrant under which his own entry and survey were made; and if he fails to do so, his *caveat* will be dismissed.

On the 23d of July 1849, Benjamin Herold made an entry with the surveyor of Pocahontas county, of three thousand acres of land on the waters of the Slate fork and Big Spring fork of Elk river, being the same land embraced in a deed to the said Herold and one David Hanna from Lewis Pennell, recorded in the clerk's office of said county. The entry also described the land as adjoining the lands of G. B. Moffett and five other persons named, and a survey called "Adams' survey;" and it purported to have been made by virtue of part of a warrant of three thousand five hundred and ninety acres, No. 17,826.

On the 27th of April 1850, Herold made a survey, purporting to be on his said entry, but embracing three thousand nine hundred and seventy acres. The local description of the land is the same as in the entry, with the addition of the courses and distances of the lines constituting the exterior boundary, the different kinds and position of timber trees adopted as the corners, and the crossings of water courses intersected by some of the lines. This survey purports to have been made as to three hundred and eighty acres, by virtue of part of a warrant of one thousand acres, No. 18,216, and as to three thousand five hundred and ninety acres, by virtue of a warrant of three thousand five hundred and ninety acres, No. 17,826.

On the 4th of May 1850, Paul McNeel entered with the same surveyor two thousand acres of land on both sides of the Big Spring fork of Elk river, to include all the vacant land between a tract known as
311 the *"Sherwood and Pennell land," also as "lot No. 7;" which was believed to corner on a crooked sugar tree, near the old Augusta county line, lands of Samuel V. Gatewood, particularly the old place patented to Jacob Warwick, the land purchased of Rowland, known by the names of "Cherry-tree hollow" and "Tallow knob," an entry made by William Skeen on the 29th of April, an entry made by William H. Floyd of the same date, a survey made for William Sharp on the 22d April, a survey made for John Hanna, David Hanna and Henry Buzzard on the 23d of April, and a survey made for David Gibson on the 24th of April, all of the same year.

On the 22d of January 1851, McNeel made a survey upon his said entry, embracing within its lines one thousand four hundred and fifty acres only.

On the 2d of March 1851, McNeel filed a caveat in the Circuit court of Pocahontas, against the issuing of a grant to Herold upon his said survey, upon the ground of better right in himself to one thousand two hundred acres of the land embraced in Herold's survey, under and by virtue of his entry of two thousand acres, and his survey thereon of one thousand four hundred and fifty acres. The caveat also assigns in detail, the various grounds upon which the caveator claimed to have better right to the said one thousand two hundred acres, all impeaching the regularity and validity on Herold's survey.

In September 1852, the parties came to trial, and a jury was impaneled for the

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the entry for waste and unappropriated lands, see the principal case cited in Stockton v. Morris, 39 W. Va. 441, 19 S. E. Rep. 533; Simpkins v. White, 43 W. Va. 127, 27 S. E. Rep. 361.

†**Caveat—Special Verdict—Certainty of.**—In Clements v. Kyles, 13 Gratt. 485, and *note*, the cause was sent back to the lower court to have a more perfect finding of the facts upon which the rights of the parties depend, citing Cropper v. Carlton, 6 Munf. 277; *McNeel v. Herold, 11 Gratt. 309.*

finding of the facts. They found the entry and survey of Herold, setting them out in their finding in hæc verba. They also found an entry made by him on the 7th of August 1850 (after his survey and after McNeel's entry), of nine hundred and seventy acres of land, calling to begin at Adams' corner on the top of Elk mountain, and running with his line to Mathews' sur-
312 vey, and to *embrace all the land between said line and his own survey, adjoining the land of Porter and others. They also found McNeel's entry, setting it out in hæc verba; and they found that he had made a survey upon his said entry; but they do not set out this survey or otherwise describe it than as embraced within the lines shaded pale red on the plat accompanying the surveyor's report made in the cause. They also found "that the defendant's survey was made in conformity with his entry; and that said entry and survey are correctly represented by the lines" shaded green on the surveyor's plat.

The foregoing being all the facts found by the jury, and none appearing to have been agreed by the parties, the caveator moved the court to set aside the finding, because contrary to evidence, because it did not find all the material facts proved by him, and because those which were found were too uncertain and insufficient to authorize a judgment in favor of the caveatee. But the court overruled the motion; and the caveator excepted; setting out in his bill of exceptions the evidence given on both sides at the trial. This consisted of the entries and survey before mentioned of Herold, the entry and survey of McNeel, the deed referred to from Pannell to Herold and Hanna, a grant from the commonwealth to Joseph Pennell for five thousand acres of land, an act of assembly annexing a portion of the county of Augusta to the county of Monongalia, together with parol testimony as to the locality and boundaries of the land granted to Pennell, and of that portion conveyed to Herold and Hanna, and as to the locality of the lands claimed by Moffett, Gibson and others, called for in the entries of Herold and McNeel respectively. The court then proceeding to pronounce on the facts found by the jury, gave judgment in favor of the caveatee; and the caveator obtained an appeal to this court.

313 *Reynolds and Price, for the appellant.

Smith and Caperton, for the appellee.

LEE, J. This is a caveat from the Circuit court of Pocahontas county, under the provisions of the statue in relation to the mode of acquiring title to waste and unappropriated lands within this commonwealth, originally introduced into our system by the act of May 1779, ch. 13, entitled "An act for establishing a land office, and ascertaining the terms and manner of granting waste and unappropriated lands." Neither party has the legal title, but it is a contest of equities, both claiming under entries made with the surveyor of Pocahontas. The entry of the caveatee was made on the 23d of July 1849, that of the caveator was made on the 4th of May 1850. The caveatee, it appears made a second entry for nine hundred and seventy acres of land, under which also he claims; but this was not made until the 2d of August 1850, after he had made a survey upon his first entry, and after the caveator had made his entry. Each party has made a survey conforming, as he claims, to his entry, and as they are found to conflict, the question is, which has the better right? Thus the validity of the respective entries is directly and necessarily involved, and each party has in turn assailed the validity of the entry of the other.

To constitute a valid entry, there must be a reasonable degree of certainty and precision in the description which it gives of the subject intended to be appropriated. In the case of a grant, if the description be such that when verified by the proofs of what is found on the ground, the land can be identified, it is sufficient, and the grant can be maintained: but more is required in the case of an entry. It is not sufficient that the land can be identified by means of the proofs of the land-marks called
314 for, which the private knowledge *of the claimant can supply; but the entry must be made with that degree of certainty and specialty that a subsequent locator may be enabled, by the exercise of due care and reasonable diligence, to appropriate the adjacent residuum. The objects which it calls for must possess that notoriety in themselves, or must be so particularly described, that others, by using such care and diligence, may readily find them. These principles have been repeatedly illustrated in the numerous cases which have been decided by the courts, involving their discussion. Of these I will content myself with referring to the following: Hunter v. Hall, 1 Call 206; Currie v. Martin, 3 Call 28; Miller v. Page, 6 Call 28; Moore v. Whitledge, Hardin's R. 89; Smith v. Smith, Ib. 190; Buckner v. Feagins, 2 Bibb's R. 138; Davis v. Davis, 2 Bibb's R. 134; Bodley v. Taylor, 5 Cranch's R. 191; Finley v. Williams, 9 Cranch's R. 164; Watts v. Lindsey's heirs, 7 Wheat. R. 158; Johnson v. Pannel's heirs, 2 Wheat. R. 206; Matson v. Hord, 1 Wheat. R. 130; McArthur v. Browder, 4 Wheat. R. 488; Littlepage v. Fowler, 11 Wheat. R. 215; Garnett v. Jenkins, 8 Peters' R. 75; Key v. Matson, Hardin's R. 70.

Entries in Virginia and Kentucky, made for the purpose of acquiring title to waste and unappropriated lands, in the mode prescribed by law, usually first refer to some prominent and notorious object which serves to direct attention to the particular neighborhood in which the land is situate, and then call for some particular object or objects which shall describe it with precision. The former has been termed the "general" or "descriptive" call, the latter the "particular" or "locative" call of the entry. Both must possess that reasonable degree

of certainty which will put a subsequent adventurer duly upon his guard, and the locative calls must be found to be within the limits embraced by the descriptive
315 calls, and they should *properly be consistent with the latter and with one another: Johnson v. Pannel's heirs, 2 Wheat. R. 206; McDowell v. Peyton, 10 Wheat. R. 454: Though, in certain cases, where all the calls in an entry cannot be satisfied, the court, for the purpose of sustaining it, will reject such as appear to be vague or repugnant, and hold to those appearing to be certain and consistent. Marshall v. Currie, 4 Cranch's R. 172; McIver's lessee v. Walker, 9 Cranch's R. 173; Massie v. Watts, 6 Cranch's R. 148; Shipp v. Miller's heirs, 2 Wheat. R. 316; Evans v. Manson, 1 Bibb's R. 4; Patterson v. Bradford, Hardin's R. 101; Bosworth v. Maxwell, Ibid. 205.

Where there are several distinct and independent calls in an entry, it is not required that all the objects thus called for should be known and recognized by the public, or that they should all be described with that specialty that a subsequent locator can readily find them; but it is necessary that some one or more of the leading calls should be thus known, or so described that other persons, with due care and proper diligence, may be led to ascertain their positions, and thus to distinguish the land appropriated from the adjacent residuum. Garnett v. Jenkins, 8 Peters' R. 75; McCrackin v. Steele, 1 Bibb's R. 46.

The objects sometimes called for are so connected with the general history or geography of the country, or its legislation, that they will be taken notice of by the courts and deemed of general notoriety, and sufficiently identified without further proof: Such are rivers used as public highways, or thoroughfares between different parts of the country, or which are referred to in general laws and designated as boundries of the counties or other districts of country. Mountains and points on the same may possess this character. And an entry calling for such objects may be supported without proof of notoriety
316 or identity. *Such was the entry in Watts v. Lindsey's heirs, 7 Wheat. R. 158. There the "Ohio river" and "Little Miami river" were regarded as sufficiently notorious and identified without further proof. So the notoriety of the "Lower Blue licks" was presumed. Hart v. Bodley, Hardin's R. 98. In Speed v. Severe, 2 Bibb's R. 131, "Salt river" was regarded as a stream sufficiently notorious to be taken notice of without proof of its course or locality. So of "Licking river," Bowman v. Melton, Ibid. 151. So the "Blue licks," from their connection with the general history of the country were deemed notorious, and sufficiently identified without further proof. McKee v. Bodley, Ibid. 481. So of the "Kentucky river," Winslow v. Holders' heirs, 2 Litt. R. 34.

In other cases, the objects called for possess but a local notoriety or furnish a description of the land which must be verified and applied by means of facts to be ascertained on the spot; and the party affirming the validity of the entry in such a case must make out in proof the necessary facts to show the identity of the land intended to be appropriated, and that the calls which it contains are such that the subsequent locator, in the exercise of proper judgment and reasonable diligence, would be enabled to distinguish it from the lands surrounding, so as to appropriate for himself the adjacent residuum.

The entries of the respective parties in this case are of the class just described; and to maintain their validity, it should be shown that there were such objects to be found as are called for, that their relative positions were such as to mark out and identify the land intended to be entered, and that they or some of them were so well known in the neighborhood as to furnish such a precise and certain description of the land that it could be found by strangers using reasonable diligence and making proper enquiry. But upon examining
317 *the meagre finding of the jury, it will be seen that it is entirely silent upon these most material subjects. It no where finds that there are streams known as the "Big Spring fork" and "Slaty fork" of Elk river; or what is the particular or general course of either. It does not find that there is any tract of land known as "Lot No. 7," or as the "Sherwood and Pennell land," its situation and boundaries. It does not find there were such lands claimed by Gatewood, as those referred to and described in the entries, nor any such as are said to be claimed by Moffett, Gibson and others, nor that there were such entries or surveys as those referred to; nor does it ascertain the land said to be embraced in the deed to Herold and David Hanna, nor that there was such a deed either in fact or by general reputation; nor does it ascertain the positions of any of the objects called for. In short, it wholly fails to find the material facts upon which, and upon which alone, the court could safely undertake to pronounce that either entry had been made with the necessary certainty and precision.

No aid is derived from the finding that the entry and survey of Herold are correctly represented by the lines shaded green on the plat of the surveyor, and that those of McNeel are described by the lines shaded light red. The validity of the plat and report of the surveyors is not ascertained, nor are the objects intended to be represented on the plat found as part of the facts of the case. Nor indeed could they have been so found by reference to the plat, because the lands represented are laid down according to the pretensions of the parties respectively; and the plat is only referred to in the finding for the purpose of exhibiting the exterior boundaries of the surveys. Nor is the defect cured as to the entry of Herold by the finding that his survey was made in conformity with his entry; because, as we have seen, an entry

318 might well *be susceptible of identification by means of a survey made by the party himself, and yet its calls might lack that certainty and precision which would be required to render it valid as against a subsequent locator. And moreover, whether a survey does conform to an entry, is a matter to be determined by the court upon the facts found, and not to be disposed of in a summary way by the jury, as in the finding in this case.

Nothing is said in the finding of the jury as to the ownership of the warrants on which the respective entries were made; nor is it found in whose names they were issued. The numbers and quantities of land are the only items of description given. Yet a party who caveats must show a title to the warrant under which his own entry and survey were made, and if he fail to do so, his caveat will be dismissed. Currie v. Martin, 3 Call 28. In that case, it is true the entry of the caveator Martin was made by virtue of part of two warrants issued, one in the name of one McWilliams, and the other in the name of one Goodwin; and it was not proven that they had ever been assigned to Martin. His caveat was accordingly dismissed. Whether upon a special finding of facts in a caveat case the court can infer that the caveator was the ower of the warrant under which the entry was made, where it does not appear in whose name it issued, and no other proof of ownership is offered except that the entry purports to have been made upon it, is a question not free from difficulty. In the view I take of this case, however, it is perhaps not necessary that it should be decided, and I therefore forbear the expression of any opinion upon it.

But there are still other objections to the finding of the jury. I think it is plainly obnoxious to the charge of repugnancy upon its face. Thus it finds that Herold's entry and survey are both correctly
319 represented *by the lines shaded green on the plat of the surveyor; yet it ascertains that the entry is for three thousand acres, while the survey is for three thousand nine hundred and seventy acres, and thus that both quantities are embraced within and bounded by the same identical lines.

Again: The entry of Herold is dated on the 23d of July 1849, and purports to have been made by virtue of part of a warrant of three thousand five hundred and ninety acres, No. 17,826. The survey was made on the 27th of April 1850, and purports to be as to three hundred acres, by virtue of part of a warrant of one thousand acres, No. 18,216, and as to three thousand five hundred and ninety acres, by virtue of a warrant of three thousand five hundred and ninety acres, No. 17,826. But it also finds that the entry of the nine hundred and seventy acres, the excess in the quantity of the survey over the original entry of three thousand acres, was not made till the 7th of August 1850, upwards of three months after the survey of the three thousand nine hundred and seventy acres. Yet it finds that the caveatee's survey was made in conformity with his entry.

It will be found too, upon examining the evidence given on the trial, that the finding is in one and perhaps a very material particular, not to be reconciled with it. Herold's entry, as we have seen, purports to be for the same land embraced in the deed from Pennell, and thus in terms is confined to the land embraced within the boundaries of that deed. McNeel's entry calls to adjoin a tract of land known as the "Sherwood and Pennell land" or "Lot No. 7," and thus is confined to the land lying outside of the boundaries of that tract. The grant for this lot No. 7 of five thousand acres, and the deed for the three thousand acres of land referred to in Herold's entry, are given in evidence, and it distinctly appears
320 that the latter is part *and parcel of the former, being the northeastern portion thereof. Thus the entries are shown to call for wholly different lands, and there should be no conflict between them. Yet the finding of the jury ascertains that the entry of Herold embraces much the larger part of the land entered by McNeel, the interlock being from one thousand to one thousand two hundred acres in extent.

I deem it unnecessary to enquire whether the finding may not be obnoxious to criticism in other respects. I think it must be apparent that the facts which it ascertains were not sufficient to enable the court to render judgment safely and understandingly upon the merits of the case. The only alternatives were to dismiss the caveat or to set aside the finding and award a venire facias de novo. The court adopted the former; and in this, according to the modern and more liberal practice, I think it erred. As the caveator's case may be a good one, though certainly not made out by the facts found; and as the merits of the controversy could not be presented and adjudicated upon the finding of the jury, I think it would have been right to set it aside, and to give the parties an opportunity upon another trial, of presenting the real case between them for adjudication.

I am of opinion to reverse the judgment, to set aside the finding of the jury, and to remand the cause for a venire facias de novo.

The other judges concurred in the opinion of Lee, J.

Judgment reversed, and venire de novo awarded.

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321 *Johnston & Wife v. Slater & al.

July Term, 1854, Lewisburg.

1. **Husband and Wife—Deeds—Subscribing Witnesses—Competency.***—A husband is not a competent sub-

*__Husband and Wife—Witnesses—Competency.__—In Warwick v. Warwick, 31 Gratt. 77, and *note*, it is held that a husband is not a competent witness to prove

scribing witness to a deed executed during the marriage, by which real estate is conveyed to his wife, either for the purpose of proving the due execution of the deed when called in question, or for the purpose of having it admitted to record.

2. **Deeds—Invalid Recordation—Effect as to Creditors.**†—A deed admitted to record upon proof by the subscribing witnesses one of whom was the husband of the grantee, is null and void as to creditors; not having been duly recorded.

This was an action of ejectment in the Circuit court of Ohio county, in which the lessees of James C. Johnston and Sophia his wife were plaintiffs, and Thomas Slater and John T. Churchill were defendants. The facts are stated by Judge Samuels in his opinion. The parties dispensed with a jury, and submitted the case to the decision of the court. There was a judgment for the defendants; from which the plaintiffs obtained a supersedeas to this court.

Baxter and Bibb, for the appellants.

There was no counsel for the appellees.

SAMUELS, J. This cause is brought here by supersedeas to a judgment of the Circuit court of Ohio county, in favor of the defendants, in an action of ejectment, in which the plaintiffs counted on a joint demise by James C. Johnston and Sophia his wife, and on a separate demise by James C. Johnston: Slater and Churchill, on their motion, were admitted defendants.

The plaintiff and defendants respectively relied upon titles to the property in
322 controversy, derived from *Hampden Zane; and the case before the court must be decided by a comparison of those titles. That of the plaintiff is under a deed from Zane, dated April 1842, conveying to Sophia H. Johnston, one of the plaintiff's lessors, the subject in controversy, being a lot or piece of ground in the city of Wheeling in Ohio county. This deed was attested, and subsequently proved by William F. Peterson, W. W. Shriver and James C. Johnston, before the clerk of the County court of Ohio county, in his office, and recorded by him. The witness James C. Johnston, at the time of the attestation, and at the time of proving the deed, was the husband of the bargainee Sophia H. Johnston. The plaintiff's lessors, or either of them, at no time had actual possession of the lot conveyed.

The title of the defendants is derived under a deed from Hampden Zane, dated March 14th, 1844, by intermediate conveyances. By that deed he conveyed to William H. Churchill a large quantity of real property in trust to secure certain creditors certain sums of money due to them from the grantor. At the time of executing this conveyance, neither the trustee nor any of the creditors secured by the deed had any actual notice of the deed of April 1842 to Mrs. Johnston. The parties claiming the legal title derived by conveyances after the deed of March 14th, 1844, and embracing the property in that deed, are shown by the record to have had no actual notice.

In the argument here, the plaintiff's counsel make the question whether the lot conveyed in the deed of April 1842 is embraced by the deed of March 14th, 1844. The record shows that Hampden Zane derived title to all the property embraced by either deed, by devise from his father Noah Zane; and the deed of March 14th, 1844, declares that "it is understood that all the lands and tenements, rights and privileges devised and bequeathed by said Noah
323 Zane to said *Hampden Zane, are hereby conveyed and intended to be conveyed to said William H. Churchill," &c. This description embraces the lot in controversy.

The plaintiffs' counsel earnestly insist that the deed of April 1842 was duly recorded within the true intent and meaning of the registry acts; and that being prior in date,

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his payments of the debt made out of the trust fund of his wife and children, citing *Johnston v. Slater, 11 Gratt. 321, 323;* William and Mary College v. Powell, 12 Gratt. 372 (also citing the principal case); Steptoe v. Read, 19 Gratt. 1; Murphy v. Carter, 23 Gratt. 477; Hord v. Colbert, 28 Gratt. 49. The principal case is cited in Taliaferro v. Pryor, 12 Gratt. 289. See generally, monographic *note* on "Husband and Wife."

†**Deeds—Recordation—Validity of.**—In Herring v. Lee, 22 W. Va. 672, it is held that, if a record is interlined or erased by some unauthorized person, such alteration constitutes no part of the record and it may be assailed by parol testimony, this is not controverting the absolute verity of the record, but it is simply enquiring what really constitutes the record, and if this were not so a forged record could be imposed upon the court as genuine by a mere intruder or usurper, citing State v. Vest, 21 W. Va. 796; Bias v. Floyd, 7 Leigh 647; Rose v. Humely, 3 Cr. 268; Forbes v. Hyde, 31 Call 347; Turner v. Stip, 1 Wash. 319; Maxwell v. Light, 1 Call 117; Dawson v. Thruston, 2 H. & M. 132; Horsley v. Garth, 2 Gratt. 472; Johnston v. Slater, 11 Gratt. 322; Starbuck v. Murray, 5 Wend. 148.

In Bowman v. Hicks, 80 Va. 809, it is said that had a paper witnessed by one witness alone been recorded by the clerk, such paper would not have been duly recorded, and would have given constructive notice to no one, citing Turner v. Stip, 1 Wash. 319; Johnston v. Slater, 11 Gratt. 321; Davis v. Beazley, 75 Va. 491.

In the case of *In re* Wynne, 30 Fed. Cas. 756, the principal case is cited as authority for the proposition, that registration is not necessary between the parties as a deed; and that it is not necessary as against volunteers or purchasers with notice.

In National Bank of Fredericksburg v. Conway, 17 Fed. Cas. 1204, it is held, that an interested person may take the acknowledgment of a deed when the act is merely ministerial; though if the act be judicial, such as taking the acknowledgment, after privy examination, of a married woman, an interested person cannot take it, citing Harkins v. Forsyth, 11 Leigh 294; Carper v. McDowell, 5 Gratt. 212; Horsley v. Garth, 2 Gratt. 471; Taliaferro v. Pryor, 12 Gratt. 277; *Johnston v. Slater, 11 Gratt. 321;* Turner v. Stip, 1 Wash. 319; Hampton v. Stevens (1871), 10 Am. Law Reg. 107; Boswell v. Flockheart, 8 Leigh 364; Dimes v. Grand Junction Canal Co., 16 Eng. Law & Eq. 63.

should be held to pass title to the lessor Sophia H. Johnston. The only objection to the registration of this deed is the fact that its execution was proved before the clerk by Johnston, the husband of the bargainee. Was he a witness within the meaning of the statute? The obvious reply is that the legislature must have intended that the witnesses to the deed should be competent to prove the transfer of property from the bargainor to the bargainee: that they should be competent, according to the general rules of evidence, to prove the very fact to which they testify. If Johnston can be held competent to prove the execution of a deed to his wife, it must be held that he would be competent to prove the execution of a deed to himself; from the intimate relation between husband and wife, and from the strong bias of feeling towards each other, the law has provided that neither shall be a witness in regard to any subject in which the other is interested. There are circumstances in which, from necessity or convenience, the evidence of a party himself may be heard; as for instance, to prove cause for postponing a trial, or to prove the loss of papers for the purpose of letting in secondary evidence of their contents; but there is, perhaps, no case in which the evidence of a party can be heard to prove in his own behalf his title to property. If the witness to this deed would have been disqualified by interest as a witness to a deed to himself, the interest of the wife and his own interest consequent thereon, would disqualify him as a witness to this deed. If we look to the consequences of the construction
324 contended for by *the appellants' counsel, we must see strong reasons why it should not prevail. A recorded deed is evidence of itself. Baker v. Preston, Gilm. 235; Pollard's heirs v. Lively, 4 Gratt. 73. By holding that an interested party may by his own oath aid in putting his deed on the record, and thereby absolve himself from the duty of offering further proof when the execution of the deed is thereafter drawn in question, or that thereby he may impose on others the burden of disproving the execution, is to give such party an undue advantage; such as neither the plain letter or the spirit of the statute requires or sanctions.

The cases above cited show a difference between our law of evidence and that of North Carolina, which requires at our hands a different decision from that rendered by the Supreme court of that state in the case of Jones' lessee v. Ruffin, 3 Dev. R. 404.

The plaintiff's counsel, in effect, if not in terms, argued further, that the registration of a deed has two several and distinct functions: 1. To give notice to purchasers. 2. To furnish evidence when the execution of the deed shall be drawn in question. That the first of these functions will be effectually performed, whatever may be the proof upon which the registration was made; that the defect in the proof of execution may be supplied at the trial when the deed is offered as evidence. This argument but carries out the case from North Carolina above cited, and that of McKinnon v. McLean, &c., 2 Dev. & Bat. Law R. 79, to their legitimate results. The argument cannot avail here, in view of our statute and the decisions under it. It is clearly within the scope of the legislative power to declare what shall be essential to making a valid deed between the parties to it, and as against third parties. In the exercise of this power, it has been declared that certain things shall be essential to all deeds; that registration is not necessary be-
325 tween *the parties to a deed; that it is not necessary as against volunteers or purchasers with notice: but it has further declared that a deed shall be void as against purchasers for value without notice, unless recorded upon authentication in one of the modes prescribed. One of these modes is proof by three witnesses, which was attempted in this case. As against such parties registration is equally essential with signing, sealing, delivery, or any other thing required to give validity to the deed. Carter v. Champion, 8 Conn. R. 549.

By holding a deed irregularly registered to be a valid instrument of notice, and that by proving its execution on any trial in which it may be drawn in question, it shall have the effect of a deed, the statute is effectually repealed. There can be no purchaser without notice of such deed. The statute is found, 1 Rev. Code, p. 361–2, § 1, 4; the cases are Turner v. Stip, 1 Wash. 319; Currie v. Donald, 2 Wash. 58; Dawson v. Thruston & als., 2 Hen. & Munf. 132; Manns v. Givens, 7 Leigh 689; Pollard's heirs v. Lively, 2 Gratt. 216; Hodgson v. Butts, 3 Cranch's R. 140.

Adhering to what I regard as the meaning of the statute, and following the cases in this court, I am of opinion that the deed of April 1842 cannot be regarded as a recorded deed.

The record shows distinctly that the parties holding the title and claiming under the deed of March 14th, 1844, had no other notice of the deed of April 1842 than such as might be implied from the registration of that deed; and this registration I have shown was void by the terms of the statute.

The plaintiff's counsel further argued that the parties claiming under the deed of March 14th, 1844, were not purchasers at all; or at least were not purchasers for value. It is well settled that a creditor taking a deed of trust on real estate to secure his debt, is a purchaser
326 *within the purview of the law. Beverley v. Brooke, 2 Leigh 425; Tate v. Liggatt, Id. 84.

That the creditors secured by the deed of March 1844 were purchasers for value, is shown by the fact that their bona fide debts thereby secured amounted in the aggregate to about ten thousand dollars.

The deed of April 1842 having no effect as a recorded deed, the parties to the subsequent deed of March 14th, 1844, at the

time it was executed, having no notice of the first, and the parties now holding the legal title derived by intermediate conveyances from the deed of March 14th, 1844, having acquired that title by purchase for value without notice, their title is doubly secured by their own purchase and that of the bargainees in the deed of March 14th, 1844.

I am of opinion to affirm the judgment.

The other judges concurred in the opinion of Samuels, J.

Judgment affirmed.

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327 *Jarrett v. Johnson.

July Term, 1854, Lewisburg.

Absent ALLEN and DANIEL, Js.

1. **Land—Joint Purchase—Interest of Vendees.***—Where there is a joint purchase of land by two, to whom it is conveyed, and who give their bond for the purchase money; in the absence of proof of any agreement between them to the contrary, they are entitled to the land in equal proportions.
2. **Same—Same—Same—Case at Bar.**—One of the purchasers having previously made a conditional contract for the purchase of the land, agreed in writing with the other, that if the contract was completed this other should have a specified part of the land; but the contract was not completed. This agreement between the purchasers was then at an end, and cannot affect their rights under their joint purchase.
3. **Same—Same—Same—Parol Evidence.**—In such case of a joint purchase parol evidence is not admissible to prove an agreement between them for an unequal division of the land.
4. **Same—Same—Partition.**†—In such a case the purchaser claiming to be entitled under an agreement between them, to the largest portion of the land, files a bill for a specific performance of the agreement, and for partition accordingly: Though he fails in this, the court may go on to make a partition according to the legal rights of the parties.

By an agreement under their hands and seals, between James McDowell of Rockbridge and Barnabas Johnson, bearing date the 8th day of September 1849, McDowell contracted to sell to Johnson a tract of land containing about eight hundred acres, lying in the county of Monroe, upon the Greenbrier river and Wolf creek, for the sum of nine thousand dollars; to be paid one-third by the 10th of October 1849, and the balance in two equal annual payments, with interest from this last date. But it was provided that this agreement should not be absolute and conclusive upon either of them before the 1st of October 1849; up to which time each of them
328 should have the right to *withdraw from it, by giving to the other a written notice to that effect. But if McDowell withdrew from it because some higher price was offered him for the land than that contracted to be given, he should in that case first offer the refusal of it to Johnson, before he should have the right to sell to any other person.

On the 26th of September 1849 an agreement, also under the seals of the parties, was entered into between Barnabas Johnson and James Jarrett, by which they agreed to divide the land that Johnson had conditionally purchased of McDowell. If Johnson should get the land, Jarrett was to have the river end of the land; the dividing line to be the middle of the turnpike commencing at the river near to Newman's canal landing opposite the turn of the turnpike; thence with the turnpike through the land; and he was to pay his proportion of the purchase money according to the number of acres he should get.

Within the time prescribed in the agreement between McDowell and Johnson, McDowell declined to execute the contract, and gave notice thereof to Johnson; and he was not induced to this course by the offer of a better price for the land by any other person. Having declined to execute the contract with Johnson, McDowell, on the 15th of October 1849, executed a power of attorney, whereby he authorized Robert J. Taylor to investigate and settle, as he might think just, a certain claim or obligation in writing which James Jarrett alleged that he held upon McDowell for the sale to him, upon specified terms and conditions, of his land in Monroe county, on Greenbrier river and Wolf creek. And he also authorized his said attorney to enter into a written contract with said Jarrett, or with any other person, for the full and complete sale to him, or any of them, of the said land; upon certain terms as to the purchase money, which was not to be
329 less than nine thousand *five hundred dollars. Taylor states, That in October 1849 he carried a letter from McDowell to Jarrett, and told him that the land was up again for sale, and made to him a proposition for the sale of it to him; but he declined making any offer until Taylor had seen or was done with Mr. Johnson. That he went to see Johnson and made him several propositions; but he declined all the offers made to him. That the next day Jarrett, Johnson and himself all met on the land. Johnson was asked if he was done, and declared he had gone as far as he could go, in the conditional purchase he had made of McDowell. That several propositions then passed between Taylor and Jarrett, all of which were declined, and Jarrett said he was off. Jarrett and Johnson then held a private conference between

*Land—Joint Purchase—Interest of Vendees.—See principal case approved in Livesay v. Beard, 22 W. Va. 595.

†Chancery Practice—Partition.—In Royston v. Miller, 76 Fed. Rep. 58, the court, citing among others the principal case, says: "In cases of equitable titles in suits for the partition of lands, it seems now to be the settled practice for courts of equity to take jurisdiction of the whole matter or grant full relief." On the subject of "Partition," see also, *footnote* to Howery v. Helms, 20 Gratt. 1.

them; and after it was over Johnson came up to Taylor and said that he and Jarrett would take the land at nine thousand five hundred dollars. This proposition was accepted; and by an agreement bearing date the 20th day of October 1849, executed by the three, McDowell by his said attorney sold to Jarrett and Johnson the tract of land aforesaid for the sum of nine thousand five hundred dollars, for the deferred payments of which Jarrett and Johnson agreed to execute their bonds. And by deed bearing date the 5th of November 1849, McDowell conveyed the land to Johnson and Jarrett.

Immediately upon the purchase of the land there was a controversy between Johnson and Jarrett as to how the land should be divided between them: Johnson insisted that Jarrett was to have only that part lying north of the turnpike road, which he was to have under the first agreement between them; and Jarrett insisted that he was entitled to one-half of the land. In July 1850 Johnson instituted a suit in the Circuit court of Greenbrier county against Jarrett for a partition of the land. In
330 his bill he set out his first *contract with McDowell and his agreement with Jarrett. And he stated that he proceeded to close his contract with McDowell through Taylor the agent of McDowell, by adding something to the price. That relying upon the agreement between himself and Jarrett, he took from McDowell a title bond binding him to convey the land jointly to Jarrett and himself. That he never dreamed of any other partition than that indicated by the article between Jarrett and himself; nor did Jarrett utter a syllable to show that he looked to any other arrangement. But that notwithstanding all this Jarrett had taken possession of and held a part of the land which, by the terms of the agreement, was to be allotted to the plaintiff. That McDowell had conveyed the land to Jarrett and the plaintiff; but that though Jarrett is thus vested with an undivided moiety of the land, he must be considered as the owner of only that part of the land which under their written agreement he was to have, and as to all over that he held it in trust for the plaintiff. He asks for a partition of the land according to the agreement, an account of the profits, and for general relief.

Jarrett answered the bill. He insisted that Johnson's conditional purchase of the land had been set aside. That afterwards McDowell had authorized Taylor to sell the land to the defendant or any other persons. That under this authority Taylor had sold to the plaintiff and defendant. He denied that the conditional contract between McDowell and Johnson had been carried into effect; or that the plaintiff made any purchase for himself; or that the agent of McDowell sold to him individually. He said that the plaintiff did not propose to purchase the land on his individual account; nor did he assert any right whatever to take the land for himself at the higher price demanded by McDowell. That the price of the land and terms of sale were adjusted by the agent of McDowell, the
331 *plaintiff and defendant; and that the purchase was a joint one in which the plaintiff and defendant had an equal interest, each entitled to a moiety. And he denied that there was anything in his language or conduct which could induce the plaintiff to suppose that he regarded the written agreement between himself and the plaintiff as in force, or as regulating in any manner whatever their interest in the land purchased by them.

In October 1851 the court made an order directing Commissioner Cary, among other things, to ascertain and report to the court what was the agreement between the plaintiff and defendant in regard to the purchase of the land in controversy, and especially the interest which each was to have in said land. And the parties were directed to appear before the commissioner and answer upon oath such interrogatories as the commissioner should propound touching the question in controversy.

In November 1851 the plaintiff filed an amended and supplemental bill, in which he charged, that at the time the plaintiff and defendant were making the purchase of the land from Taylor, they held a conference, in which the defendant desired to have more land than he was to have under the agreement of the 26th of September 1849; he desired to run up to a ditch. That the plaintiff positively dissented from the proposition or to vary the said agreement in any way so as to let the defendant cross the turnpike. That with this understanding the parties went into the contract. That the plaintiff believed that he was to have the benefit of that agreement, or he would not have engaged in the purchase. That the defendant left plaintiff so to understand; and he charges that if the defendant designed at the time to set up a claim to an equal moiety of the land, he suppressed and concealed his design, and was thereby guilty of a fraud,
332 *knowing as he did, that the plaintiff understood him differently.

Jarrett answered, admitting the conference, but denying explicitly that he made the proposition as stated in the amended bill, or that he finally assented to the alleged dissent of the plaintiff; or that they went into the contract with the understanding that the land was to be divided by the turnpike as prescribed in the agreement aforesaid. He denied that he had said or done anything to excite any such belief or expectation on the part of the plaintiff; and alleged that on the contrary his language was explicit, and could have had no other effect than to lead the plaintiff to a directly opposite conclusion. That it was not true that he committed a fraud upon the plaintiff by suppressing his design to assert his claim to an equal moiety of the land; but that he distinctly informed the plaintiff that he would have half the land; and he stated to the plaintiff at their conference that the agreement aforesaid

was no longer binding upon them; and that they ought to agree upon a division of the land and reduce their agreement to writing. And he told the plaintiff expressly that if the defendant bound himself for the whole of the purchase money he would have half of the land.

The parties were examined on oath by the commissioner, but their statements differed as widely as did their allegations in the bill and answer. There were also many witnesses examined by both parties, among whom was the agent Taylor, whose statement is hereinbefore given. The commissioner reported that he was unable to state what was the agreement between the parties as to the division of the land; and referred the question to the court; and returned with his report the evidence which had been taken before him.

It is impossible to state the evidence bearing on the question whether there
333 was an agreement between *Johnson and Jarrett at the time of their purchase of the land, as to how it should be divided between them. The only fact that is certain is, that from the moment of the sale they disputed as to how the land should be divided; Johnson insisting that Jarrett should be limited to the land north of the turnpike road, which he was to have had under their agreement of September 26th, 1849, and Jarrett insisting that he was entitled to more land. The nature of the evidence is referred to by Judge Moncure in his opinion.

The cause came on to be heard in May 1852, when the Circuit court sustained the pretensions of the plaintiff, and directed an enquiry to ascertain the portion of the purchase money which each should have paid. And from this decree Jarrett applied to this court for an appeal, which was allowed.

William Smith and Fry, for the appellant.

Price and Caperton, for the appellee.

MONCURE, J. Johnson and Jarrett contracted jointly for the purchase of the land in controversy. It was conveyed to them jointly, and they executed their joint and several bonds for the purchase money. They are, therefore, entitled to the land in equal proportions, unless it can be shown that their relative rights have been changed by some valid agreement or other transaction between them. It is contended, in behalf of the appellee Johnson, that they have been so changed. And

First. It is contended that the agreement of the 26th of September 1849 is still in force, and that the land should be divided accordingly. That agreement depended entirely upon the contract between McDowell and Johnson of the 8th of September 1849. By the express terms of that contract it was not to be absolute and conclusive upon either of the contracting
334 *parties before the first of October 1849; up to which time either had the right to withdraw from it, by giving the other a written notice to that effect. McDowell did withdraw from it, and the contract was then at an end. It is true there was a stipulation in it, that if McDowell should withdraw because of some higher price being offered to him for the land, he should in that case offer the refusal of it to Johnson before he should have the right to sell it to any other person. But it is not pretended that he withdrew from the contract for that cause. The said agreement, being dependent on the said contract, ceased to have any effect when the latter ceased to have effect; which was on or before the first of October 1849. After that day, McDowell was at liberty to sell the land without being affected by the contract; and Johnson and Jarrett were at liberty to purchase it, jointly or severally, without being affected by the agreement. Accordingly, on the 15th of October 1849, McDowell empowered Taylor to contract with Jarrett or any other person for the sale of the land. On the 19th of the same month Taylor, Johnson and Jarrett met upon the land; and Taylor endeavored to effect a sale, first to one and then to the other. After several propositions had been made, each declined to purchase. They then held a private conference and concluded to purchase jointly at the price of nine thousand five hundred dollars, being five hundred dollars more than the price which had been stipulated for in the said conditional contract between Johnson and McDowell, and on the next day the joint contract was executed. If Johnson or Jarrett had severally purchased the land, the one so purchasing would have been entitled to the whole in exclusion of the other. Having purchased it jointly, they are entitled to it equally; notwithstanding the agreement of the 26th of September 1849. But

Secondly. It is contended that even
335 if that agreement, *proprio vigore, be not still in force, yet Johnson and Jarrett made the joint purchase with an express or tacit understanding that the land should be divided in the manner and on the terms prescribed by the said agreement; and that this understanding, though by parol, is binding on the parties.

If there had been such an understanding, I think it would have been void by the statute of frauds and perjuries. Henderson v. Hudson, 1 Munf. 510; Parker's heirs v. Bodley, 4 Bibb's R. 102; Davis v. Symonds, 1 Cox's Cas. 402. There is a well settled distinction, in regard to the admission of parol evidence, between seeking, and resisting, the specific performance of an agreement. A suit for specific performance is addressed to the sound discretion of the court, upon all the circumstances. And any evidence which shows that it would be inequitable to enforce the agreement as stated in the bill, is admissible as matter of defence. As was well said in the case of Osborn v. Phelps, 19 Conn. R. 63, 73, "It was not the object of the statute to give any greater efficacy to written contracts

for the sale of lands than they possessed at the common law; but merely to require such contracts to be made in writing, in order to lay the foundation of a suit at law or in equity." Or, as Lord Redesdale expresses the same idea in Clinan v. Cooke, 1 Sch. & Lef. 39, "The statute does not say that a written agreement shall bind, but that an unwritten agreement shall not bind." When parol evidence is offered in resistance of a suit for specific performance, it does not contravene the statute; and though it may contravene the rule of law which forbids the introduction of parol evidence to vary a written agreement, it may sometimes be admissible on account of the peculiar nature of the suit. But when it is offered in support of such a suit, it generally contravenes the statute, and is rarely admissible. For the doctrine on this
336 subject I *need only refer to the case of Woollam v. Hearn, and the notes thereto appended in Hare & Wallace's edition of White & Tudor's Leading Cases in Equity, published in the Law Library, vol. 71, p. 540, 596. There are some exceptions to the general rule excluding parol evidence in support of a suit for specific performance, but it is unnecessary to enumerate them, as they do not embrace this case. The cases of Ross v. Norvell, 1 Wash. 14, and the Bank of the United States v. Carrington, 7 Leigh 566, cited by the counsel for the appellee, fall within the exceptions; the former being the case of an absolute deed intended to operate as a mortgage, and the latter a case of resulting trust. The case of Ambler & wife v. Norton, 4 Hen. & Munf. 23, also cited by the counsel, depended on the construction of the word "averment," in our statute concerning dower, and does not affect this case. This being a suit for specific performance, falling under the general rule, and not within any of the exceptions to it, parol evidence is therefore inadmissible to prove the agreement, or any part of it.

But suppose the evidence were admissible; does it prove that there was any such understanding between the parties? Jarrett, in his answer, positively denies that there was; and on the contrary avers that when the purchase was made he distinctly informed Johnson that he would have a moiety of the land. The evidence does not overthrow, nor contradict, but rather tends to sustain, the answer. No witness testifies to any such understanding. The evidence relied on to prove it consists entirely of mere repetition of oral statements; which kind of evidence, as has been well said, "is subject to much imperfection and mistake; the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens also that the witness, by unintentionally
337 altering *a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say." Greenl. on Evi. § 200. The remarks of Judge Fleming on the evidence in the case of Henderson v. Hudson, before cited, are strongly applicable to this case; and he concludes them by saying, "Such evidence as this (were the statute of frauds and perjuries out of the way) is in my mind too slight and feeble to deprive any one of his freehold and inheritance, or any part thereof." Three witnesses were introduced and relied on by Johnson to prove the alleged understanding, viz: Hinchman, Hines and Humphreys, not one of whom was present at the time of the joint purchase, and all of whom testify only to admissions said to have been made by Jarrett some time thereafter. On the other hand, three of the witnesses introduced by Jarrett, to wit, Ellis, Burdett, and Taylor the agent of McDowell, were present when the joint purchase was made, and heard nothing of any such understanding. Without reviewing the testimony of the different witnesses, suffice it to say, that on the most favorable view of the evidence which can be taken for Johnson, it shows that no agreement was ever made in regard to the division of the land between him and Jarrett, except the agreement of the 26th of September 1849, which expired by its terms as aforesaid; that they made the joint purchase without coming to any understanding about the division; Johnson insisting that Jarrett should have no more of the land than that agreement would have given him, and Jarrett insisting that he would have more, or a moiety of the land; and that their subsequent acts and declarations have been entirely consistent with this view of the manner in which they made the purchase. In this state of the case, whatever may have been the expectation of the parties, they must stand upon their legal rights under the
338 *joint purchase, and each is entitled to an individed moiety of the land.

Thirdly and lastly. It is contended that Johnson entered into the joint contract with the expectation that the land would be divided in the manner indicated by the agreement of the 26th of September 1849; and that Jarrett knew that fact, and did not inform Johnson of his intention to claim any more of the land than that agreement would have given him; which was a fraud on the part of Jarrett, who can take no advantage of it, but must make good the expectation of Johnson. The doctrine referred to in Roberts on Frauds 130, and Roberts on Conveyances 529, is relied on to support this position. But it is unnecessary to investigate this doctrine, or to enquire whether, if the facts were as stated in the proposition, Johnson would be entitled to the relief which he claims? Fraud is positively denied by the answer, and is wholly unsustained by the evidence. The only testimony tending in any way to prove it is that of Hinchman relating to some admissions said to have been made by Jarrett some time after the joint purchase; and this would be altogether too vague and indefinite to establish so grave a charge, even if it were undenied by the

answer. The charge is improbable in itself, and inconsistent with the other testimony in the cause, as I have already sufficiently shown.

The views I have taken of this case render it unnecessary to express any opinion on the questions referred to in the argument, as to the propriety of allowing the amended bill to be filed, and of making the order of the 22d of October 1851, and of the proceedings under that order. Giving the appellee the full benefit of all these proceedings, my conclusion is that the decree is erroneous and ought to be reversed with costs; and the cause remanded, in order that there may be an equal division of the land
339 between the parties, and *that the payments respectively made by them of the purchase money, if unequal, and their receipt of the rents and profits, may be equalized. I had some doubt whether, as the bill only seeks the specific performance of an alleged agreement, and has not been sustained in that respect, it ought not to be dismissed with costs, without prejudice to another bill for the equal division of the land. That course was pursued by Sir William Grant in a somewhat similar case. Woollam v. Hearn, 1 Ves. jr. 211. But as the object of the parties is to have the land divided according to their rights, which can as well be done in this suit as another, it will be for the benefit of both of them to remand the cause for further proceedings, as before indicated. But at all events the costs occasioned by the assertion of the claim of the appellee to an unequal division of the land should be paid by him.

LEE and SAMUELS, Js., concurred in the opinion of Moncure, J.

Decree reversed.

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340 *McKee v. Barley.

July Term, 1854, Lewisburg.

Coparceners—Sale of Portion of Property by One Parcener—Effect on Subsequent Grantee with Notice.*—One of two coparceners contracts to sell a small part of a tract of land, professing to act for both, though without authority, and the other coparcener does not consent to the sale. Both coparceners afterwards convey the whole tract to a grantee having full notice of the agreement. The land sold is but a small part either in quantity or value of one moiety of the tract. HELD: That the grantee will be compelled to perform the agreement.

In the year 1836 John T. McKee and his sister, the wife of Andrew Bratton, of Bath county, owned jointly a tract of land in the county of Rockbridge, lying on Kerr's creek. On this land there was a large spring, the stream from which entered into Kerr's creek, making an acute angle with the creek, and this angle of land belonged to McKee and his sister, and constituted a part of the tract owned jointly by them.

Some years previous to the time stated, Andrew Walkup owned the land on Kerr's creek immediately below McKee's spring branch, and extending up to it, on which land he built a merchant mill and saw mill, which were propelled in part by water taken from the spring branch, and in part by water taken from Kerr's creek below the mouth of the spring branch. The dam across the spring branch seems to have been little if anything, more than a log placed in and across the stream. This land with the mills thereon were purchased by Samuel Barley; and in 1836, for the purpose of better getting the waters of Kerr's creek to his mill, he made a contract with John T. McKee, who acted for himself and Andrew Bratton and wife, though without their authority, by which McKee agreed to sell to Barley the triangle lying be-
341 tween Kerr's creek *and the spring branch commencing at the mouth of the branch, and running up on the branch to a point above the dam in the branch, and running up on the creek to a large rock, the whole being less than an acre; and it was agreed that Barley might take the water out of the creek above the rock, and carry it across the land sold to him into his dam across the spring branch, and thus into his mill race.

This agreement was contained in a deed bearing date the 2d day of December 1836, purporting to be by John T. McKee and Andrew Bratton and wife, but which was only executed by McKee, by which, in consideration of thirty dollars, they convey the piece of ground, with the privilege as aforesaid. This deed was attested by one witness, as to McKee's execution of it; and he gave to Barley a receipt of the same date for fifteen dollars as one-half of the purchase money.

By deed bearing date the 20th of May 1839, John T. McKee and wife and Andrew Bratton and his wife conveyed to Samuel W. McKee, the son of John T., the tract of land owned by them jointly on Kerr's creek, embracing in the conveyance the triangle

*Tenants in Common—Conveyance of Specific Portion of Property by One Tenant—Effect upon Partition.—Although a party holding in common with others can do nothing to impair or vary in the slightest degree the rights of his cotenants, yet, if he execute a deed for a specific portion of the common subject, or make a contract in regard to it, and upon partition such portion is assigned to the party so making the deed or contract (indeed, the court will so assign it if the cotenant is not prejudiced thereby), he will be bound by his act. The principal case was cited as authorizing this proposition in Boggess v. Meredith, 16 W. Va. 29, Worthington v. Staunton, 16 W. Va. 240, Cox v. McMullin, 14 Gratt. 82, 90, and *foot-note*.

Specific Performance.—The principal case, Evans v. Kingsberry, 2 Rand. 131, and Jackson v. Ligon, 3 Leigh 161, are cited in Creigh v. Boggs, 19 W. Va. 252, as authorizing the proposition that, if the purchaser can get substantially what he contracted for, the agreement will generally be enforced at the suit of the vendor. On this point, see also, *foot-note* to Griffin v. Cunningham, 19 Gratt. 574.

of land sold and conveyed by John T. McKee to Barley: But of the agreement with Barley, Samuel W. McKee had been informed at the time it was entered into. After this conveyance to Samuel W. McKee, differences arose between him and Barley as to the rights of the latter under his contract with John T. McKee. These differences referred to the questions how far above the rock on Kerr's creek which was a corner of the triangle sold, Barley might take the water out of the creek and carry it through McKee's land; and how high he was authorized to maintain his dam across the spring branch. These differences resulted in two actions of trespass brought by McKee against Barley in the Circuit court of Rockbridge, to
342 recover damages *for injuries done, as he alleged, by Barley to his land and to his spring. Barley then filed his bill in the same court, setting out his agreement with John T. McKee, and exhibiting his deed as marked A, insisting that he had not transcended his rights under the agreement; asking for a specific performance of that agreement by Samuel W. McKee, who had received his conveyance with notice of it; that his rights under it might be ascertained and adjudicated; and that the actions at law brought against him by McKee might be enjoined. To his bill he made John T. McKee, Samuel W. McKee and Bratton and wife parties, all of whom answered. Samuel W. McKee resisted the specific execution of the contract, on the ground that John T. McKee had no authority to act for Bratton and wife, and that they never assented to it, and because the terms of the agreement were uncertain. But his objection to the specific execution of the agreement arose principally from the extent of Barley's claims under it, and the injury which he insisted he would sustain if these claims were sustained. On this last subject an immense mass of testimony was filed in the cause: But when the cause came on finally to be heard, the court declined to determine upon the true construction of the agreement, or upon the injuries of which Samuel W. McKee complained. But leaving these subjects to be settled in the actions at law, the injunction was dissolved, and a decree was made for a specific execution of the agreement, and that Samuel W. McKee should execute to Barley a deed in all respects similar to that executed by John T. McKee, except that it should be with special warranty. From this decree McKee applied to this court for an appeal, which was allowed.

Michie, for the appellant.
Stuart, for the appellee.

343 *ALLEN, P. The only question presented for the consideration of the court by this appeal, is, whether the final decree directing the specific execution of the contract therein mentioned, by the appellant Samuel W. McKee, was correct. Other matters were put in issue by the pleadings, involving the construction of the contract and the privileges it was intended to confer; some proceedings were had which looked to a decision of these questions; and nearly all the testimony in the record relates to this branch of the controversy. When the case came on for final hearing, the court properly declined expressing an opinion on any part of the case made by the pleadings, except the right of the appellee Barley to a decree against the said Samuel, for a specific execution of the contract, so as to invest Barley with the legal title to the lot of land and the water privileges alleged to have been purchased by him from John T. McKee and Bratton and wife. All other questions of law and fact as to the effect of that legal title, the extent of the privileges conferred by it, and whether they had been abused, were left to the determination of a court of law with the aid of a jury, in the actions then pending, or which might be thereafter instituted.

It appears from the record that John T. McKee and his sister Mary Jane, the wife of Andrew Bratton, were seized as coparceners of a tract of land on Kerr's creek in Rockbridge county, containing two hundred and eighty-one acres. Bratton and wife resided in Bath county; John T. McKee seems to have resided on or near the land, and to have had it under his charge. From the answer of the appellant Samuel W. McKee, it appears that in the year 1835 he rented the land from his father, the said John, and Bratton and wife; that he took possession thereof in March 1835, and has remained in possession ever since; and that on the 20th of May 1839, his father
344 and Bratton *and wife conveyed the land to him in fee: And he files a copy of the deed with his answer.

Whilst the appellant thus held possession as tenant, the appellee, as appears from the answer of said appellant, made an abortive effort to obtain the privilege from him to raise his dam, and presented to him a deed which he had prepared for him to execute; alleging that John T. McKee had given to the appellant his moiety, and he would become the purchaser from Bratton and wife of the other moiety; but the appellant refused to negotiate with him on several grounds: one being that he had no title to the land. The appellee then said he would see John T. McKee on the subject, and left for that purpose: And in the after part of the same day, John T. McKee informed the appellant that he had signed an agreement for the sale of the small triangle, according to the provisions of the deed or agreement from John T. McKee to the appellee, referred to in the bill and answer as exhibit A. The deed was prepared to be executed by John T. McKee and Bratton and wife, but was signed by the former only; and taken in connection with a receipt given by John T. McKee to Barley of the 2d of December 1836, of the same date with the deed, for fifteen dollars, in part of the purchase money of a lot of

land and other privileges bought of him and Bratton by the appellee, is evidence of a contract on the part of John T. McKee acting for himself and professing to act for Bratton and wife, to sell to Barley a small triangle between Kerr's creek and a spring branch, containing, as appears by the survey made in this cause, 151.80 perches, with certain privileges set forth in the deed; amongst the others, the privilege of turning the water out of the main channel of Kerr's creek by means of a dam or otherwise, above a rock (the corner on Kerr's creek), through a race to be cut through said lot.

345 *The authority of John T. McKee to act as the agent of Bratton and wife in this transaction, though averred in the bill, is denied in the answers, and is not proved. There is nothing, therefore, which would bind Bratton and wife to execute the contract. But it is clear as well from the deed of John T. McKee, which is valid as to him, though Bratton and wife did not execute it, and his receipt, as from the admissions in the answers of both the McKees, that the sale and purchase was not limited to John T. McKee's undivided moiety, but embraced the whole subject described in the deed. The deed itself, signed by John T. McKee, describes the land intended to be conveyed by metes and bounds; the receipt is for a part of the purchase money of the lot and other privileges sold to Barley; the answer of John T. McKee sets forth the negotiation as between himself alone and Barley, the execution of the deed A by him, and insists that Barley is entitled to nothing but what is provided for in the article: Thereby impliedly admitting that he is entitled by their contract to all the deed did profess to convey. This answer would not be evidence against the codefendants. But Samuel W. McKee in his answer, admits he was informed by his father on the day the contract was entered into, that he signed an agreement for the sale of this small triangle to Barley, and refers in his answer to the deed as showing the extent of Barley's rights. In fact, so far from controverting the right of the appellee as acquired by the contract, the appellant Samuel, in another part of his answer, states that if he had limited himself to the privileges granted thereby, he never would have complained. The lawless abuse of the privileges alleged to have been conferred by the contract, is the principal ground upon which he objects to the appellee's claim to relief. It is manifest that whether John T. McKee was or was not the authorized agent of Bratton

346 and wife, he undertook *to sell and did sell to the appellee the whole subject described in the deed of the 2d of December 1836; and he, and those claiming under him, with full notice of his contract, are bound to comply with it, if it can be done without injury to the rights of the coparcener. The answer of the appellant shows he was fully apprised of the negotiation and sale, and the terms thereof: and the evidence proves that the appellee took possession of the lot of land purchased by him, and made use of it in the mode contemplated when he purchased by opening a race through it.

It was said in Robinett v. Preston, 2 Rob. R. 277, that although a conveyance by one joint tenant of a part of the land might have no legal effect to the prejudice of the cotenant, yet it would be effectual to pass the interest of the grantor in the tract. And if upon partition, the share assigned of the cotenant did not include the part conveyed, the cotenant would get all he was entitled to, and the grantor could not deny his deed. If upon a partition that part of the land described in this deed or affected by the water privileges, had been assigned to John T. McKee, he would have been in a condition to have executed his contract, if he would not, in that event, have been estopped by his deed from disturbing his vendee; and his son claiming under his subsequent conveyance with full notice, can occupy no higher ground.

A court of equity, in making partition, would have respected the rights acquired by a fair purchaser, provided no injury was done thereby to the coparcener. In this case the interest sold was small in extent and of little value. The triangle containing less than an acre, and the whole interest conveyed was valued by the parties at thirty dollars. The coparcener could have had his full share allotted in the residue of the tract. As the conveyance of both the joint owners to the appellant Samuel

347 has invested him with the legal *title to the entire tract, he is now in a condition to perfect the title of the appellee, according to the terms of the contract, as evidenced by the deed of the 2d of December 1836, from John T. McKee, referred to as exhibit A. This is all the decree requires him to do, and I think it should be affirmed.

The other judges concurred in the opinion of Allen, J.

Decree affirmed.

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348 *Cochran v. Paris & als.*

July Term, 1854, Lewisburg.

1. **Deeds of Trust to Secure Creditors—Postponement of Sale—Effect.**†—A deed of trust which among other things conveys growing crops of wheat, rye and oats, and which is not to be enforced for two years from its date, is not necessarily fraudulent as to creditors.

***For monographic note on Fraudulent and Voluntary Conveyances, see end of case.**

†**Deeds of Trust to Secure Creditors—Postponement of Sale—Effect.**—For the proposition, that a deed of trust to secure creditors, which provides for the postponement of the sale for two years, is not necessarily fraudulent, the principal case is cited and followed in the following cases: Dance v. Seaman, 11 Gratt. 782; Sipe v. Earman, 26 Gratt. 567, 568, 569, and *note*; Brockenbrough v. Brockenbrough, 31

2. **Same—Assent of Creditors.**—Though the deed be executed without the knowledge of the creditors secured by it, yet if when informed of its execution they assent to it, it is valid.
3. **Chancery Jurisdiction over Discretionary Trusts.**‡—A court of equity will not, in general, assume the exercise of a discretionary power vested in a trustee, nor interfere to control a trustee acting *bona fide* in the exercise of his discretion. Nor will a suit be entertained to compel a trustee to exercise his power.
4. **Wills—Legacies in Trust—Case at Bar.**§—Testator directs the residue of his estate to be invested by his executors for the benefit of his son, and to pay over to him or his assigns annually the interest accruing thereon. But if his executors should judge from proper information of his son's habits and steadiness, that it would be prudent to entrust him with the full management of the funds intended for his benefit, they are directed to turn over the whole into his hands. And by a codicil he gives the executors the same discretion over the interest of the fund as they had by the will over the principal. The executors having declared their judgment that the son had reformed and might be entrusted with the control of the fund, a court of equity will in such a case compel the executors to perform the trust by delivering over the fund to the son. And before it is done the son has such an interest in the fund that upon taking the oath of an insolvent debtor, it will vest in the sheriff, and the creditor may subject it to the payment of his debt.

John Paris, late of the county of Augusta, died in 1839, having first made his will, which was duly admitted to probat. By his will he directed his executors to sell all his property, real and personal, except a few articles of household furniture, which he gave to his sister Hannah Paris: And out of the proceeds he directed them to pay to his said sister two hundred dollars on account of her portion in her father's estate, for which she had a claim upon him.

349 *And he further gave her the sum of three hundred dollars, which he directed his executors to loan out and pay her the interest; or if they should think it better for her to have the control of the principal, they were directed to place it at her disposal.

All the balance of the proceeds of his estate he directed his executors to lend out upon real security, for the benefit of his son John; and to pay over to him or his assigns annually the interest accruing thereon. But if his executors should judge from proper information of his son's habits and steadiness, that it would be prudent to entrust him with the full management of the funds intended for his benefit, then he directed that they should turn over the whole into his hands. And he appointed Nicholas C. Kinney and Littleton Waddell executors, and also trustees to execute the provisions of his will in favor of his sister and son.

By a codicil the testator directed that his executors and trustees should have the same discretion over the interest of the fund

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Gratt. 590, and *note*: Young v. Willis, 82 Va. 299; Keagy v. Trout, 85 Va. 394, 7 S. E. Rep. 329; Paul v. Baugh, 85 Va. 960, 9 S. E. Rep. 329; Quarles v. Kerr, 14 Gratt. 55, and *note*; Harden v. Wagner, 22 W. Va. 363, 365; Shuttuck v. Knight, 25 W. Va. 597; Gardner v. Johnston, 9 W. Va. 407, 408; Landeman v. Wilson, 29 W. Va. 707, 724, 2 S. E. Rep. 205, 214.

In Livesay v. Beard, 22 W. Va. 590, the principal case is cited and the court seems to disapprove of the cases in Virginia which support the doctrine laid down in the principal case saying that the Virginia courts have gone far indeed to sustain deeds as valid, which in other states would be declared *per se* fraudulent.

In Klee v. Reitzenberger, 23 W. Va. 754, it is said: "The provision that the grantor shall retain the possession, use and enjoyment of the property, until the sale provided for is made, would, if the property were perishable or could be used only by consuming it, make the conveyance, at least, *prima facie* fraudulent. Gardner v. Johnston, 9 W. Va. 403; or if it consisted of a stock of goods or merchandise kept in a store for sale, such a provision would make the deed fraudulent *per se*. Lang v. Lee, 3 Rand. 431; Garden v. Bodwing, 9 W. Va. 121; Claflin v. Foley, 22 *Id.* 434. But when the property is not of such character, and if of the kind conveyed in this deed, such a provision is not even a badge of fraud, unless made so by other provisions or the surrounding circumstances. Skipwith v. Cunningham, 8 Leigh 271; Janney v. Barnes, 11 *Id.* 100; *Cochran v. Paris, 11 Gratt. 348.*"

See Gordon v. Cannon, 18 Gratt. 387, and *note*; monographic *note* on "Fraudulent and Voluntary Conveyances" at end of case.

‡**Chancery Jurisdiction over Discretionary Trusts.**—For the proposition that, a court of equity will not, in general, assume the exercise of a discretionary power vested in a trustee, nor interfere to control a trustee acting *bona fide* in the exercise of his discretion, nor will it entertain a suit to compel such trustee to exercise his power, the principal case is cited and followed in the following cases: McCamant v. Nuckolls, 85 Va. 340, 12 S. E. Rep. 160; Whelan v. Reilly, 3 W. Va. 611; Dillard v. Dillard, 97 Va. 442, 34 S. E. Rep. 60. See, in accord, Thorndike v. Reynolds, 22 Gratt. 21; Cowles v. Brown, 4 Call 477; Steele v. Levisay, 11 Gratt. 454; Morriss v. Morriss, 33 Gratt. 51, and *note*. See Read v. Patterson, 6 Am. St. Rep. 877, and *note*.

§**Equitable Conversion—Discretionary Power.**—In Woodward v. Woodward, 28 W. Va. 208, it is said: "Where a will directs land to be sold at the discretion of trustees or executors, or upon the happening of a contingency, an equitable conversion takes place at the time of the sale or the happening of the contingency. Where in such case, though the will gives the executors a discretion as to the time of selling the land and directs the money arising from the sale to be paid to particular persons, the interest of the legatee in the proceeds of the land is a vested one. The principle will be the same, whether the estate devised to be sold, be an estate in possession or only in remainder. (Tazewell v. Smith, 1 Rand. 313; Washington v. Abraham, 6 Gratt. 66; *Cochran v. Paris, 11 Gratt. 348.*) And it seems to me, in such case, it is immaterial whether the estate in the lands was vested or contingent, if the conversion authorized by the will is actually made. In such case the estate will also be vested, unless the will shows that it was not so intended. (Hinton v. Milburn, 23 W. Va. 171; Corbin v. Mills, 19 Gratt. 438, 472.)"

he had given to his son, as they had by the will over the principal. Both the will and codicil were dated on the 27th of October 1838.

At the time this will was made John Paris, jr. had left home and was living in Louisiana. He was about nineteen years old, and had evinced a disposition to drinking, gaming and extravagance. He returned home a few months before his father's death, apparently reformed in his habits, and soon after married.

In November 1839 John Paris exhibited his bill in the Circuit court of Augusta against the executors and trustees Kinney and Waddell, in which he set out the provisions of his father's will; and stated that the executors were about to sell all the property of the testator. He refers to his previous habits, and expresses the hope that he has amended them. He says he does not wish the substantial provisions of the
350 will *changed until he shall have conformed rigidly to all the provisions imposed by the wishes of his father; but that his inclinations and interest both prompt him to retain the farm on which his father lived in kind rather than to have it sold. And he prays that he may be allowed to elect to keep the land and personal property in lieu of the proceeds of it; that the executors may be directed not to sell it, but to hold it subject to the trusts of the will; permitting him to enjoy the profits of the property instead of the proceeds of the sale; and for general relief.

The executors answered the bill. After stating that they sold personal property enough to pay the legacy to the sister of the testator, and expressing the hope that the amendment in the conduct of the plaintiff may be permanent, they say they have no wish to thwart his views and wishes, or to exert any control in the management of his property; and are perfectly willing, if it can be done with safety to them, that the court shall permit him to elect to hold the land; and they submit the subject to the court.

The cause coming on to be heard upon the bill, the answer and the will of John Paris, the court was of opinion, that, taking into consideration the object of the testator, the reformation evinced by the son, and the future welfare of that son, it was highly expedient that he should, for the present at least, be indulged in his election to hold the land and personal property (except so far as might be necessary for the payment of debts,) in kind: But that he should still hold it subject to the trust declared by the will, and subject to the power of the court to withdraw that indulgence, if, at any future day, such may seem to the court expedient; unless at some future day the court, with the assent of the executors, should deem it expedient to terminate the trust and invest him with the absolute legal estate. And it was
351 decreed that the executors *forbear, until the further order of the court, to sell the real and personal estate in the bill and answer mentioned, except for the payment of debts and legacies.

By deed bearing date the 30th of May 1842, and admitted to record on the same day, John Paris conveyed to Jacob K. Stribling all the interest of Paris in twenty-one acres of land which descended to his wife as one of the heirs of her father, that being his interest as tenant by the curtesy, three horses, one cow, two ploughs, one wheat screen, one bed, bedstead and furniture, plates, dishes, knives and forks, candlestick and snuffers, together with all other household and kitchen furniture belonging to the grantor; also all the crops of grain, including wheat, rye, corn and oats then growing on the land whereon he lived; upon trust that Paris should be permitted to remain in possession of the property until the 30th of May 1844; and then if he made default in the payment of two debts thereby intended to be secured, one due to Hannah Paris for three hundred and fifteen dollars and fifty-two cents, and the other to David Fultz for seventy-five dollars, that upon the request of either of said creditors, the trustee should sell and pay said debts.

The Circuit court of Augusta county commenced its session on the 1st of June, and at that term of the court John Cochran as assignee of Matthew Blair, recovered a judgment upon a single bill against John Paris for three hundred and eighty-nine dollars and thirty-four cents, with interest from March 1841 until paid. Upon this judgment execution against the body of Paris was sued out, and being taken in custody, he took the benefit of the act for the relief of insolvent debtors, surrendering in his schedule only his equity of redemption in the property conveyed in the aforementioned deed of trust.

In September 1842 Cochran insti-
352 tuted a suit in *equity in the Circuit court of Augusta against Paris, the trustee and cestuis que trust in the deed, the executors and trustees in the will of John Paris, Blair and the sheriff. In his bill, after setting out the foregoing facts, he charged that the notes referred to in the deed were drawn in Staunton on the same day the deed was executed, in the absence certainly of Hannah Paris; that she was the aunt of Paris and lived in his family. That he was uninformed whether anything was due from John Paris to either Hannah Paris or Fultz, or whether they claimed under the deed. And he charged that the deed was executed to delay, hinder and defraud the creditors of Paris, and particularly the plaintiff. And he called upon John Paris, Hannah Paris and Fultz to say whether the two latter were consulted or apprised of the intention to make the deed of trust aforesaid.

The plaintiff further insisted that he was entitled to have the property bequeathed by John Paris, sen. for the benefit of his son, subjected to the payment of his debt. That the executors were willing to terminate the trust, being satisfied from the

reformation of John Paris, jr. and his steadiness, that he was entitled under the will to the full control and management of the estate intended for his benefit. And he prayed that the deed of trust might be set aside as fraudulent and void as to creditors, and that the court would subject the property embraced in that deed, and also the interest of John Paris in the property bequeathed to him by his father, to satisfy the plaintiff's debt; and also for general relief.

John Paris, Hannah Paris and David Fultz answered the bill. John Paris denied that the deed of trust was intended to defraud his creditors. He stated the manner in which he became indebted to Hannah Paris, and the proofs sustained the answer.

He said he had borrowed the money
353 from her and promised to secure *her by a deed of trust. That he could not say that Hannah Paris or Fultz knew of his intention to execute said deed of trust at the time it was done; but that on returning home he handed said Hannah his bond, and informed her that he had executed the trust deed to secure it, and that she at once elected to claim under the deed, received the bond, and expressed herself satisfied with the security: And that as soon as said Fultz heard of the deed he elected to claim under it. The answers of Hannah Paris and Fultz was to the same effect. John Paris further insisted that the trust of the will of his father still existed, and that the property bequeathed by his father was not liable to satisfy the plaintiff's debt.

The executors Kinney and Waddell were examined as witnesses. Kinney stated that the property bequeathed to John Paris by his father had been in his possession ever since the decree of the Circuit court, and had been enjoyed by him without the control of either of the trustees. So far as the witness was concerned as trustee, he had been willing, ever since the marriage of John Paris, to relinquish any control which the will gave him over the property as trustee, upon being indemnified against the debts and legacies due from the testator and under his will; as he considered that Paris had reformed, and believing that was the intention or wish of Paris' father. Waddell said that he exercised no control over any portion of the property since the decree of the Circuit court; and that he had been willing, after the payment of all debts and legacies due from the estate, to invest the defendant Paris with the full and legal title thereto. And he repeats, that his belief of the reformation of the habits of the said Paris, would at all times have induced him, so far as he was concerned, to put the full control and management of the estate of the testator into his hands.

354 *When the cause came on to be heard, the court directed a commissioner to sell the property embraced in the deed of the 30th of May 1842; and his report showed that the net proceeds of sale were one hundred and ninety dollars and ninety cents. The court also directed a commissioner to take an account of the crops conveyed in the deed; and he estimated them at eighty-three dollars and seventy-five cents. Of this sum the corn and oats were estimated at forty dollars; and the commissioner reports that a witness examined before him stated that Paris had horses enough to eat up all the corn and oats.

The cause came on to be finally heard in June 1848, when the court held that the trust deed was bona fide, and not made to delay, hinder and defraud creditors; and the proceeds of sale of the trust property was directed to be paid to the cestuis que trust. And the court further held that until the executors and trustees should, in their discretion, a discretion exclusively belonging to them, and not even controllable by the court, see cause, in the execution of the purely discretionary power conferred upon them, to invest John Paris with the legal title to, and power and control over the estate given by the will of his father, and thereby terminate the trust, the said John Paris could acquire no such interest or estate under said will as could be subjected by his creditors to the payment of their debts. And the bill was dismissed with costs. Whereupon Cochran applied to this court for an appeal, which was allowed.

Michie, for the appellant.

Stuart and R. P. Kinney, for the appellees.

DANIEL, J. The decree of the Circuit court, in so far as it sustains the deed of trust of the 30th of May 1842, is, I think, correct. The fact that a deed of
355 *trust embraces articles which must perish or be consumed in the use, before a sale of them can be made according to the terms of the deed, is not one which, of itself, necessarily shows the deed to have been made with a fraudulent design. The amount, in number or value of such articles, may be so inconsiderable, as compared with the main subjects of the trust, as to justify the conclusion that they were embraced through inattention of the parties to the inconsistency of providing a security out of property which, from its nature, would necessarily perish before it could be made available as a means of satisfying the trust. Or the deed may embrace other property, to the improvement, support or sustenance of which, such perishable property is essential; and in such last supposed case the fact that the perishable property is embraced in the deed, so far from being indicative of a fraudulent purpose, might rather serve to show an honest and a provident design and effort to make the main subjects of the trust a more certain and productive security. It would be but fair in such case to construe the deed in accordance with the probable design and motives of the parties, and to relieve it of any apparent inconsistency, by holding the provisions in regard to the continued pos-

session, and the sale of the property, as intended to apply only to such of it as from its nature might reasonably be expected to be in existence at the day of sale.

The main objection to the deed is founded on the fact that it embraces growing crops of wheat, rye, corn and oats, which the bill alleges would be severed and consumed before the trustee would, under the provisions of the deed, be at liberty to execute the trust. It seems to me that it is a fair answer to this objection to say, that even if these crops were of such a nature that they could not be preserved till the day of sale, it would be harsh to construe the
356 provision of the deed *in relation to them as designed merely to cover them up from creditors; seeing that the deed also embraces a number of horses and a cow, to the sustenance of which they would not, according to the testimony, probably be more than adequate. Besides, we have no proof that these crops are of such a nature as necessarily to perish before the day of sale: On the contrary, common observation and experience prove that they may be preserved without material loss or deterioration, for a longer period.

There is, therefore, nothing on the face of the deed, to show that the property conveyed was not designed by the parties to be a substantial and bona fide security for the debts, to secure the payment of which it was made.

It remains to be considered whether the appellee Paris had, at the date of his surrender, on taking the oath of an insolvent debtor, any such interest under his father's will, in the property sought to be subjected to the payment of the appellant's demand, as can, in equity, be so subjected.

A court of equity will not, in general, assume the exercise of a discretionary power vested in a trustee, nor interfere to control the trustees acting bona fide in the exercise of their discretion. Nor will a suit be entertained to compel the trustees to exercise their power. And the refusal of a trustee to exercise a purely discretionary power is not a breach of trust for which he can be removed from office, although the trustee assigns no conclusive reason for the refusal, and the proposed act is apparently beneficial to the trust estate. Hill on Trustees 715.

Again: On page 725 of the same treatise, the author says, the fourth and last class of discretionary powers is where the discretion is to be exercised on matters of pure personal judgment. For instance, when the trustees are empowered to give
357 their opinion *on the good or ill conduct or merits of an individual; or to determine the propriety or impropriety of continuing the payment of an annuity; or to give their approbation to a settlement. The trustees alone are competent to exercise these powers, for they may have private and peculiar grounds for arriving at a proper conclusion, into which the court could not providentially enquire, and which the trustee might refuse to disclose. The exercise of such authorities cannot in general be assumed or even controlled by the court. If, however, a trustee is actuated by fraudulent or improper motives in exercising or refusing to exercise his discretionary powers, a court of equity, upon proof of the improper conduct, interposes its jurisdiction on a totally different principle—not for the purpose of exercising the discretion committed to the trustee, but to check or relieve from the consequences of an improper exercise of that discretion. Ibid. 716.

If the rights of John Paris the son had been left by the will of his father dependent on the mere will or discretion of the trustees, to be exercised or not as they might please, without reference to the conduct of the son; or if the trustees had never expressed themselves satisfied of his reformation; or on being called on to express their opinion as to his habits and steadiness, had either disclaimed doing so, or had said that from "proper information" they had formed the judgment that it would not be prudent to entrust him with the management of the estate intended for his benefit, it would have been difficult, in view of the foregoing authority, to find any ground on which the interference of a court of equity could have been justified. But I do not think that the will is to be so construed: And the course of the trustees has been exactly the reverse of that just supposed. The fifth clause of the will, after directing the funds arising from the sale of the property to be loaned out, and the interest to be paid
358 *over annually to the son, proceeds, "but should my executors judge, from proper information of my son's habits and steadiness, that it would be prudent to entrust him with the full management of the funds intended for his benefit, then it is my will that they turn over the whole into his hands." Let it be that the executors are the sole judges whether the conduct of the son has been such as to render it prudent that he should be invested with the estate, and that no court has a right to correct their judgment, however erroneous it might be, yet when their judgment is formed and announced, and is in favor of turning over the estate, does there not arise a duty on their part to do so? Whenever the trustees, in the exercise of their judgment and discretion, have arrived at the conclusion that it is prudent the son should have the property intended for his benefit, free from their control, the testator says, it is his will that he should so enjoy it. Is not any further holding by, or control over the property on the part of the trustees thenceforward in conflict with the mandatory language of the will? Suppose the will to have been in all respects, as it is, with the exception that the "turning over of the estate into the hands of the son" had been made dependent on the approval of his conduct by persons other than the executors, would not the executors, upon being certified of such approval, have been bound at once

to invest him with the title? And are the rights of the son consequent on the approval of his conduct, modified by the fact that the persons who by the will are to judge of his conduct and those who upon the approval of it are to turn over the property to him, are the same? It seems to me whenever the son shows that his conduct has met with the approbation of the executors, he does all which the testator intended he should do in order to entitle him to the free and uncontrolled enjoyment of the bounty
359 intended *for him. This he has done.

In their answer to the bill filed by him, and in their depositions taken in this cause, the executors express themselves satisfied of his reformation; and in the latter they say that such is their conviction on the subject, that they would, at all times, since his marriage, have been willing to place the full control and management of the estate in his hands. Besides, they are parties to this suit, and have not denied the allegations of the bill. They have exercised their discretion and pronounced their judgment in the only matter which was left to their discretion. From the moment of their having done so the right or power in or over the estate intended for the testator's son remaining in them, call it by whatever name, became subject to the command, in the will, to turn it over to him free from their control. They thenceforward became trustees of an estate, to the full and unrestricted enjoyment of which another is beneficially entitled under the provisions of the instrument whence all their powers are derived.

The executors, in their answer to the bill filed by the appellee Paris, having admitted his reformation, he had, I think, a right to insist on a decree directing them to convey the legal title to the property held by them for his benefit. The decree which was rendered neither affirmed nor denied that right. It is true that the court then expressed the opinion, which it has carried out in the decree rendered in this cause, viz: that it was a matter resting entirely in the discretion of the executors (notwithstanding the reformation of Paris and their approval of his conduct), whether they would invest him with the legal title to the estate. Yet the decree went no further than to stay the sale of the property, except so far as might be necessary for the payment of debts and legacies. The waiver for the present by Paris of a decree direct-
360 ing *the executors to convey the title, did not, I think, conclude his rights, nor deprive him of the power, at any time thereafter, to ask for and insist upon such a decree. The executors still remained clothed with the legal title, but they still stood, as they had always stood, ever since they had announced their judgment of approval of the conduct of Paris, simply as trustees bound by the requirements of the will, and in foro conscientiæ, to invest him with the title and control of the estate. In this state of things, he took the benefit of the insolvent debtors' oath, and whatever right he had, passed to the sheriff for the benefit of his creditor the appellant. In asking the court to subject the property to the satisfaction of his demand, the appellant, it seems to me, seeks no interference with the exercise of any discretion with which the trustees are clothed by the will. He in effect only asks the court to declare, what they have admitted and still admit, that the condition on which they were to convey the estate has been complied with, and to announce the conclusion which follows, that it stands, in equity, freed from their control, and subject to the contracts and engagements of the beneficiary. The case is a peculiar one, and counsel have not furnished us with any precedents, nor have I been able to find any which would seem to rule it. The definition of powers and trusts, as given in the authorities, may be sufficiently plain, yet it often becomes a difficult task, in construing the language of an instrument, to determine whether it confers a mere power or a power in the nature of a trust, and consequently, whether the power is one over the exercise of which a court of equity can take any control. When the executors are clothed with an arbitrary discretion, an absolute power to appoint or withhold the bounty, as in Pink & others v. De Thuisey, 2 Madd. R. 423, where the executor was left at liberty to give to the legatee one thousand pounds, "If he found the thing
361 *proper," or as in the case of Weller v. Weller (cited in the foregoing case as having been decided at the rolls), where the testator gave his son, who had been extravagant, a sum of money, with a power to the executors to advance more, "if they thought proper," the courts have, I think, very properly refused to decide upon the propriety of the executor's withholding the legacy, holding that to do so would be to assume an authority confided solely to the discretion of the executors. But in a case like this, where the judgment and discretion of the executors are limited and directed to a specified enquiry, the reformation of the conduct of the legatee, and where in the event of such judgment being favorable, the will imperatively requires the executors to hand over the legacy; where the executors have exercised their judgment and discretion, have declared themselves satisfied with the result, and have admitted their willingness to hand over the estate; where a refusal on their part to execute the power could be from no motive connected with the conduct of the beneficiary, but would be directly in conflict with their own convictions of right and their own views of the intention of the testator; it seems to me that a claim to the interposition of a court of equity is presented, which it cannot reject without violating the principles which usually govern its action; that the executors stand before the court, not in the attitude of persons clothed with a mere power, but as charged with an acknowledged trust or duty, which, in equity and good conscience, they are bound to perform.

The only person here making opposition to the performance of this duty is the beneficiary, the appellee Paris. Without stopping to comment on the unenviable attitude in which he has placed himself before the court, it is obvious to remark that no desire of his that a power over the estate shall remain in the executors, can prejudicially affect the rights of the appellant.

362 *Regarding that power as one in the nature of a trust, which the executors, at the date of the surrender by Paris, stood bound to perform, I think that he then had such an interest in the estate as could pass for the benefit of his creditor, and that the latter has a right to have it subjected to the payment of his demand.

I am, therefore, of opinion to reverse the decree of the Circuit court, and to render, instead thereof, a decree dismissing the bill so far as it seeks to invalidate the deed of trust; and remanding the cause, in order that the interest of Paris in his father's estate may, after a settlement of the proper accounts, be subjected to the satisfaction of the appellant's debt.

The other judges concurred in the opinion of Daniel, J.

The decree was as follows:

The court is of opinion, that the deed of trust of the 30th of May 1842 is bona fide, and not made to delay, hinder or defraud creditors; and is, therefore, valid against the claim of the appellant. The court is further of opinion that the appellee John Paris, by virtue of the power conferred upon the executors by the will of John Paris the elder, and the action of the executors under it, acquired, and held, at the date of his surrender as an insolvent debtor, at the suit of the appellant, an interest in the estate of his father, which passed by said surrender to the sheriff of Augusta county, and which ought to be subjected to the payment of the appellant's debt. So much of the decree as dismisses the bill as to the appellee Fultz, and orders the proceeds of the sale of the trust property to be paid to the parties entitled under the trust deed, is, therefore, affirmed; and so much of the decree as denies the appellant's right to have satisfaction of his debt out of the interest of the appellee Paris in his

363 *father's estate, is reversed with costs to the appellant as against the appellee Paris. And this cause is remanded to the Circuit court, in order that the accounts of the executors may be settled, and that the debt of the appellant may be satisfied by a sale of the tract of land of one hundred and fifteen acres in the bill and proceedings mentioned, if a resort thereto shall become necessary.

FRAUDULENT AND VOLUNTARY CONVEYANCES.

I. In General.

II. Void Transfers.
- A. Absolute Transfers.
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    - a. Purchases.
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    - b. Liens Given by Confession of Judgment or Otherwise.
  - 2. Transfers Which Are Inoperative as to Certain Persons Though Not Affected with Fraud in Fact.
    - a. Transfers Which Are Voluntary, or upon Consideration Not Deemed Valuable in Law.
      - (a) Common-Law and Statutory Doctrines as to Voluntary Conveyances.
      - (b) Antenuptial Settlements in Consideration of Marriage.
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      - (d) Gifts.
        - (1) Personalty.
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    - b. Fraud Presumed from Inadequacy of Consideration.
    - c. When, and as to Whom Unrecorded Transfers Are Void.
    - d. Effect of Retention of Possession by Vendor.
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- B. Conditional Transfers.
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    - a. In General.
    - b. Provisions Which Postpone the Time for Enforcing the Deed—Effect.
    - c. Deed Furnishing Security against Losses and Liabilities—Potential Lien.
    - d. Reservations to the Vendor.
    - e. Provisions Conferring Special Powers upon the Trustee and Providing for His Compensation—Validity.
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- C. Cases Illustrating Circumstances under Which Transfers Have Been Declared Valid Though Attacked as Fraudulent.

III. Rights and Liabilities.
- A. Immediate Parties.
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    - b. Vendor.
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  - 3. Mortgagor and Mortgagee.
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  - 6. Assignor and Assignee.
- B. Third Persons.
  - 1. Creditors.
    - a. In General.
    - b. Rights and Liabilities of Creditors under Transfers Not Affected with Actual Fraud.
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    - d. Compromises by Creditors.
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IV. Remedies.
- A. In General.
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  - 1. In General.

2. Statute of Limitations as a Bar to Instituting Suit.
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b. Effect When Fraud Is an Element.
3. Specific Lien as a Condition Precedent to the Institution of Suit.
C. Parties.
D. Pleading and Practice.
1. In General.
2. Bill, Complaint or Petition.
a. In General.
b. When a Bill Is Not Multifarious.
c. Allegations and Averments Necessary to Sustain Bill.
d. Right to Sue.
3. Plea, Answer and Subsequent Pleadings.
4. Variance.
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e. Transactions between Husband and Wife.
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g. Intent of Grantor.
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c. When Evidence Is Admissible to Prove Consideration.
d. When and against Whom Recitals in Deeds Are Admissible as Evidence.
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c. Circumstantial Evidence.
d. Nature and Circumstances of the Transaction.
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(c) Possession.
(d) Relationship.
(e) Husband and Wife.
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G. Trial.
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1. Interlocutory Decree—As a Bar to Another Suit.
2. When Decree Is Final.
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4. When Improper for a Court to Decree as to the Sufficiency of Property to Pay Debts.
5. When Vendor of Land and Assignee of Debt Not Entitled to a Decree.
6. Decree When Relief in General Prayed for.
7. Decree Setting Aside a Conveyance.
8. Decree Ordering Sale.
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10. Personal Decree.
11. Operation and Effect of Decree.
J. Lien of Attacking Creditor.
1. Lien of Plaintiff.
2. Petitioning Creditor's Lien.
K. Disposition of the Property.
1. In General.
2. Subjecting Land to Claims of Creditors.
3. Costs and Attorney's Fees.
4. Priorities of Creditors.
L. Review.
1. Presentation and Reservation in Lower Court of Grounds of Review.
2. What Parties Are Entitled to Allege Error.
3. Reversal Dependent upon a Question of Fact.

Cross References.—Monographic *notes* on "Gifts"; "Creditors Bills"; "Assignments"; "Assignments for Benefit of Creditors"; "Decrees."

Subjects Excluded.—The following note does not include within its treatment transfers by husband or wife, void as to each other; transfers by partners void as to partnership or individual creditors; fraud in assignments for the benefit of creditors, by reason of preferences or otherwise; transfers void under acts of bankruptcy or insolvency laws; nor fraud in disposing of property as grounds for arrest, or attachment.

I. IN GENERAL.

Construction of Statutes against Fraudulent Conveyances.—The statute against fraudulent conveyances, chapter 74, section 1, of W. Va. Code 1899, like all other statutes against fraud, is to be liberally expounded for the suppression of fraud. Harden v. Wagner, 22 W. Va. 356.

And in Hutchison v. Kelly, 1 Rob. 123, the policy of the statute of 13 Eliz., chap. 5 (substantially adopted in Va. Code, ch. 109, to prevent frauds and perjuries), was investigated by JUDGE BALDWIN, and the true principle was declared by him to be, that a fraudulent intent of a grantee against one or more creditors is fraudulent against all; and that no distinction exists between prior and subsequent creditors, other than that which arises from the necessity of showing a fraudulent intent against some creditors, which cannot be done in behalf of creditors in existence at the time of the conveyance, but by proving either a prior indebtedness or a prospective fraud against them only.

Meaning of "Void" as Used in Statute, Va. Code 1887, § 2458.—The statute relating to fraudulent conveyances, Va. Code 1887, § 2458, provides that gifts, conveyances, etc., made with intent to "delay, hinder, or defraud creditors, purchasers, or other persons," etc., shall be void as to such creditors, etc. From the provision following in this same section, the true effect intended by the statute would seem to be that such "conveyance," etc., is rendered "voidable" (not void), as the statute expressly protects a purchaser for valuable consideration, who had no notice of fraud affecting the title of his immediate grantor.

Principles Applicable to Voluntary and Fraudulent Conveyances.—Designating the principles applicable to a voluntary conveyance, in a controversy between the creditors of the grantor and the claimant under the deed, BALDWIN, J., in Hunters v. Waite, 3 Gratt. 26 (1846), says that, "If a man in insolvent circumstances conveys away his property to strangers, or settles it upon his wife and children, the law concludes the design to be fraudulent against his creditors, and all evidence to the contrary is idle or delusive; and, so if he renders himself insolvent by a voluntary conveyance, however meritorious in itself merely. It is in vain to speculate upon his motives, or adduce evidence of an honest purpose. It may be that he has acted through igno-

rance, or mistake or misconception. Apologies and excuses may be found to absolve him from moral turpitude, but to these the law cannot listen. He is bound to know his own circumstances and the just demands against him; and the injustice and wrong to his creditors are palpable and unquestionable. On the other hand, if a man is in flourishing or unembarrassed circumstances, and exercises a reasonable and prudent discretion in gifts or advancements to his children, adapted to their wants and justified by his means, leaving an ample fund for the payment of his debts; there can be no propriety in the conclusion of a fraudulent purpose, from the mere fact of indebtedness at the time." At present, however, it is provided by statute, that a voluntary conveyance, etc., which is upon consideration not deemed valuable in law shall be void as to creditors whose debts shall have been contracted at the time it was made, but shall not, on that account, merely, be void as to creditors whose debts shall have been contracted or as to purchasers who shall have purchased after it was made, etc. Va. Code 1887, § 2459.

But where there is a fraudulent intent on the part of the grantor in a deed founded upon a valuable consideration, and such intent is not known to the grantee, the latter is not chargeable with want of good faith, since no rule is better established than that both parties must concur in the fraudulent intent to render the deed absolutely void. Rixey v. Deitrick, 85 Va. 45, 6 S. E. Rep. 615; Skipwith v Cunningham, 8 Leigh 271; Norris v. Jones, 93 Va. 183, 24 S. E. Rep. 911; Hazlewood v. Forrer, 94 Va. 703, 27 S. E. Rep. 507; Bishoff v. Hartley, 9 W. Va. 100; Herring v. Wickham, 29 Gratt. 628; Bank v. Belt (Va.), 30 S. E. Rep. 467; Boggess v. Richards, 39 W. Va. 567, 20 S. E. Rep. 599, 45 Am. St. Rep. 938; Henderson v. Hunton, 26 Gratt. 926.

And, if a conveyance is not fraudulent in its inception, it cannot become so by subsequent matters; because the statute requires that the act should be done with the criminal intent; however, if it be afterwards employed for a fraudulent purpose, a court of equity will interpose to prevent such use of it. Harden v. Wagner, 22 W. Va. 356. Yet a deed which is fraudulent in fact, is void *in toto*, and cannot stand as security for grantees who have notice of the fraud. Livesay v. Beard, 22 W. Va. 585.

Who Is an Insolvent.—And a person is insolvent within the statutory meaning (W. Va. Code 1899, ch. 74, § 2) when all of his property is not sufficient to pay his debts. Carr v. Summerfield (W. Va. 1899), 34 S. E. Rep. 804.

Homestead Deed.—However, the filing of a homestead deed, claiming as exempt, under the homestead law, store fixtures and certain merchandise in stock, is not a conveyance or assignment which can be attacked as in fraud of creditors, under Va. Code 1887, § 2460, as amended. Simon v. Ellison (Va.), 22 S. E. Rep. 860.

Fraud Determined by Inspection of Deed.—When a court is called upon to decide whether a deed is fraudulent upon its face, it must decide the question from the inspection of the deed alone. And unless, upon an inspection of the deed claimed to be fraudulent on its face, the court sees that it contains some provision which clearly shows that the intent of the grantor, in executing the deed, was to hinder, delay, or defraud his creditors, the court cannot hold the deed fraudulent on its face. Landeman v. Wilson, 29 W. Va. 702, 2 S. E. Rep. 203.

A Suit to Set Aside Conveyances on Ground of Fraud Is Not a "Controversy Concerning Land."—A suit to set aside several deeds on the ground of alleged fraud and to subject the lands thereby conveyed to the debt of the complainants, is not in the category of "controversies concerning the title or boundaries of land," within the meaning of the constitution of the state, art. 6, § 2. Fink v. Denny, 75 Va. 663.

Claims Protected against Fraudulent Transfers.—The Va. Code 1873, ch. 114, § 1, protects against fraudulent transfers, all claims, debts and demands, including claims to damages for breach of contract to marry, for which judgment may, after the execution of the conveyance, be obtained. Burton v. Mill, 78 Va. 468.

II. VOID TRANSFERS.

A. ABSOLUTE TRANSFERS.

1. VOID AS TO CREDITORS AND SUBSEQUENT PURCHASERS FOR VALUE AND WITHOUT NOTICE—FRAUD IN FACT.

a. Purchases.

(a) **Realty.**

In General—Fraudulent Intent Vitiates.—A voluntary conveyance will be declared fraudulent as to subsequent creditors, if, from the circumstances and other evidence, the court is convinced the deed was made with intent to defraud such creditors; and the conveyance being voluntary, it is immaterial whether the grantee had notice of the fraud. Mayhew v. Clark, 33 W. Va. 387, 10 S. E. Rep. 785; Duncan v. Custard, 24 W. Va. 730; Connoway v. McCann, 30 W. Va. 200, 3 S. E. Rep. 590.

And while it is true, as held in Lockhard v. Beckley, 10 W. Va. 88 (1877), under the second section of chapter seventy-four of the Code of West Virginia, that a voluntary conveyance, as to subsequent creditors, is not void merely on the ground that it was voluntary, and the party indebted at the time it was made; yet, upon the question whether it is fraudulent in fact, it is proper to consider the circumstances of its being voluntary, and the party indebted at the time; and if additional circumstances connected with these two be sufficient to show fraud in fact, it is void as to subsequent creditors.

When Intent Is to Avoid Payment of Fines.—Thus, if a party engaged in the unlawful retailing of ardent spirits conveys away his land with the intent to prevent the state from subjecting it to the payment of any future fines for such unlawful retailing, such deed is fraudulent, although the sales in which fines were subsequently recovered had not then been made. State v. Burkeholder, 30 W. Va. 593, 5 S. E. Rep. 439.

When Intent Is to Defeat Recovery of Damages in Tort.—Likewise it is a settled doctrine that a deed made with intent to defeat a recovery of damages in an action of tort, and before trial and judgment, is fraudulent and void to the same extent as a conveyance to hinder and delay existing creditors, and the intent need not be established by express proof. Johnson v. Wagner, 76 Va. 587.

A Valuable and Adequate Consideration Passes, but Intent Is Fraudulent.—And although a deed be made for a valuable and adequate consideration, yet if the intent of the grantor be dishonest or unlawful, the deed will be deemed fraudulent, if the grantee had notice of such intent. Harden v. Wagner, 22 W. Va. 357; Goshorn v. Snodgrass, 17 W. Va. 717; Briscoe v. Clarke, 1 Rand. 213; Livesay v. Beard, 22 W. Va. 585;

Bowyer v. Martin, 27 W. Va. 442; Bartlett v. Cleavenger, 35 W. Va. 719, 14 S. E. Rep. 273. Moreover, if a deed is fraudulent in fact, it matters not, whether the grantor had much or little property, when the conveyance was made. Silverman v. Greaser, 27 W. Va. 550.

Fraud on Grantor's Part Alone—Conveyance without Consent or Knowledge of Grantee.—In Roanoke Nat. Bank v. Farmers' Nat. Bank, 84 Va. 603, 5 S. E. Rep. 682, a grantor conveyed land to a certain grantee, as it appears, without his consent or knowledge, and had the deed recorded. A creditor at large under Va. Code 1873, ch. 175, § 3, brought a suit to annul it as fraudulent. The grantor made no appearance. After the decree was entered and during the same term, the grantee filed his answer, denying that he had ever claimed any title, under the deed. The court held the deed fraudulent as to grantor's creditors, and therefore void.

Effect of Inadequacy of Consideration Combined with Subsequent Fraud.—And, as further held in Livesay v. Beard, 22 W. Va. 585, if an insolvent debtor for an inadequate consideration conveys a valuable portion of his real estate to his children, and others, and on the same day makes a conveyance of other property to secure preferred creditors, which deed is fraudulent on its face, and four days thereafter makes a similar deed conveying all the residue of his property, which last deed is also fraudulent on its face, these facts taken together are strong evidence of a fraudulent intent in the execution of the first deed.

Purchasers Participating in Debtor's Design to Avoid Payment of Debts.—So, where the uncontroverted facts in the case show that the debtor, for the purpose of escaping a pursuing creditor, conveyed his real estate to a purchaser, even for value, which purchaser had knowledge of the creditor's pursuit and was aiding the debtor to escape the same, such purchaser will be held to have participated in the fraudulent purpose of his grantor, and the conveyance will be avoided as to such creditors. Gillespie v. Allen, 37 W. Va. 675, 17 S. E. Rep. 184.

Where Only a Part of the Grantees Have Notice of Fraudulent Intent.—But where a deed of several grantees jointly is fraudulent in fact, but it being proven that the grantor executed it with intent to defraud his creditors, it will be void only as to such grantees as had notice of the fraud, and may stand as security for the consideration paid by such grantees as had no notice of such fraud. Livesay v. Beard, 22 W. Va. 585; McGinnis v. Curry, 13 W. Va. 29.

Fraudulent Scheme between Debtor and Grantor to Defeat the Creditor's Recovery.—The case of Davis, etc., Co. v. Dunbar, 29 W. Va. 617, 2 S. E. Rep. 91, affords a striking example, illustrating the fraudulent intent of the grantor in making a conveyance. The facts were that, a certain sewing machine company, by its agent, made a contract with a person by the name of Dunbar, to sell sewing machines for the company; the father of Dunbar, the defendant, gave guaranty, that the son would faithfully pay all sums which he might owe under said contract, and the father and his two sons, the defendant and another, represented that the father was solvent and owned 94 acres of land. Three years before this date, the father had made and delivered a deed for this land to these two sons, but the deed had never been recorded. After the contract with the machine company was made, the two sons and the father agreed that the deed should be made for the land to the brother of the defendant, which was done, and placed on record the day before the defendant entered upon his duties under the contract. The defendant became indebted, soon after, to the company in a large sum of money, and then became insolvent. Upon a bill filed to subject the 94 acres of land to the payment of the debt, it was held, that under the circumstances, the scheme was one to defraud the plaintiff, and the 94 acres of land should be subjected to the payment of the debts.

Fraudulent Intent Evidenced by Grantee's Participation and Notice.—And where property is conveyed for the benefit of creditors to a trustee, and the trustee sells it to the wife of the debtor, and it is afterwards taken on a *fi. fa.*, against the husband, the question whether the transaction is fraudulent depends on the wife's good faith and want of notice, and not on the good faith of the trustee. Hughes v. Kelly (Va. 1898), 30 S. E. Rep. 387.

So, if it appears that the wife actively participated in the attempt to sustain a conveyance from her husband to her, by claiming that certain additional and unfounded indebtedness was a part of the consideration for the property, the conveyance will be treated as fraudulent in fact, and void *in toto* as to the creditors of the husband, and will not be permitted to stand as security to the wife for the valid portion of the consideration paid by her, as against such creditors. Webb v. Ingham, 29 W. Va. 389, 1 S. E. Rep. 816.

Homestead Deed.—See, in this general connection of transfers made with fraudulent intent, the case of Rose v. Sharpless, 33 Gratt. 153, in which it was declared that, where a "householder or the head of a family" executes a homestead deed as a part and in furtherance of a design to hinder, delay, and defraud his creditors in the recovery of their just debts, such deed will be vitiated and invalidated by such conduct.

(*b*) **Personalty.**

Assumed Ownership of Property by Consent of Real Owner—Fraudulent Intent.—In Bolling v. Harrison, 2 P. & H. 532, a resident of Virginia, owned certain slaves in Florida, and wished to bring them to Virginia but fearing lest his creditors should seize them under execution, on their arrival, he persuaded another to assume to be the owner of them and conveyed them, by deed, to a trustee for the benefit of his (true owner's) wife and children. This was done, and the increase were brought to Virginia, and were kept in the possession of the true owner for several years, and were then carried by the true owner, with their family, beyond the limits of the state. Certain judgment creditors of the true owner then sought to hold the pretended owner liable in equity for the value of the negroes. The pretended owner never had the title to the negroes, nor possession or control of them, but merely lent himself to the scheme of the true owner, as above stated. The court held the deed void; and further, that the mere representation in the deed as to the ownership of the property, did not make the pretended owner liable in equity, for the value of the property, as constructive trustee for the creditors, though he would have been so liable if he had acquired the possession or control of the property. And if any creditor had suffered actual damage by the fraudulent misrepresentation, his remedy was at law.

b. Liens Given by Confession of Judgment, or Otherwise.—And in Crawford v. Carper, 4 W. Va. 56, a debtor, who was insolvent, confessed judgment in favor of one of his creditors, giving the creditor

first lien upon his land. The debt thus attempted to be secured, was barred by the statute of limitations. The land upon which the lien rested was not sufficient to pay all of the debts owed. Upon these facts the court declared the judgment void, as coming within the purview of the prohibition, against fraud in obtaining judgments, contained in Va. Code 1860, ch. 118, § 1; Va. Code 1887, § 2458.

But in Elliot v. Trahern, 35 W. Va. 634, 14 S. E. Rep. 223, a judgment was confessed by a son to his father upon notes previously executed to him. The court held that the judgment was not fraudulent as to debts existing against the estate of the intestate, although the son was at the time the judgment was confessed one of the sureties of the administrators of the estate on their official bond; and several months after the judgment was confessed it was ascertained that the administrators had committed a considerable devastavit.

However, where a grantor for another's benefit, puts a lien on his real estate for the amount of a fictitious note that would cover its value, and then refers his creditors to the supposed beneficiary, as a probable purchaser of their debts, and some sell at fifty cents on the dollar, there being a secret agreement between the grantor and supposed beneficiary that the discounts should be shared equally between them, the deed creating the lien is fraudulent in fact and void as to the grantor's creditors. Rucker v. Moss, 84 Va. 634, 5 S. E. Rep. 527.

2. TRANSFERS WHICH ARE INOPERATIVE AS TO CERTAIN PERSONS THOUGH NOT AFFECTED WITH FRAUD IN FACT.

a. Transfers Which Are Voluntary, or upon Consideration Not Deemed Valuable in Law.

(*a*) **Common-Law and Statutory Doctrines as to Voluntary Conveyances.**

Common-Law Doctrine.—Declared and enlarged by 13 Eliza. ch. 5 (substantially adopted in 1 R. C. § 2, ch. 101; Va. Code 1887, § 2458). It seems to have been a well-settled doctrine at common law that a voluntary conveyance, which interfered with or broke in upon the rights of existing creditors, would not be permitted to take effect to the prejudice of other just demands: and this according to many of the cases, without regard to the amount of the debts, or the extent of the property settled, or the circumstances of the party. Nevertheless, numerous cases are to be found, which in effect maintain the doctrine, that a conveyance, although voluntary, may be good, under circumstances, even as against existing creditors; and that the parties being indebted at the time is but an argument of fraud, the question still being in every case, whether the conveyance is a *bona fide* transaction, or a mere device to delude and defeat creditors. The subject is one involving the inquiry into the relations which the two great classes of creditors, prior and subsequent, occupy in relation to a voluntary settlement. And the question is, whether they occupy a common ground, so that the conveyance which would be adjudged fraudulent as to the former, would also be held fraudulent as to the latter; or will a discrimination be made, the effect of which will be to withdraw from inquiry in the case of a prior creditor the various circumstances attending the execution of the conveyance, such as the nature of the consideration, the value of the property settled, compared with that, if any, retained, the extent of the indebtedness, etc.; all of which are in the case of the subsequent creditor most proper to be considered; and upon which, in order to succeed, he must be able to fix the imputation of fraud in the absence of direct and positive proof of the intent. CHANCELLOR KENT clearly recognizes the distinction between the two classes. In the case of the prior creditor, he considers that any inquiry into the amount of debts existing at the time would be embarrassing if not dangerous; and he regards it as wholly unnecessary, considering the debtor as absolutely disabled from making any voluntary settlement to the prejudice of any existing debts; and such, he says, is the clear and uniform doctrine of the cases. See Reed v. Livingston, 3 Johns. Ch. R. 481, 500. JUDGE STORY, on the other hand, evidently considers him as carrying the doctrine too far. He thinks that mere indebtedness would not *per se* avoid a voluntary conveyance even as to subsisting creditors, unless the other circumstances are such as justly to create a presumption of fraud. 1 Story's Eq. Jur. §§ 360-365, inclusive.

The question has been the subject of a most animated and elaborate discussion between two of the former judges of the supreme court of Virginia, in the cases of Hutchison v. Kelly, 1 Rob. 123, Bank of Alexandria v. Patton, 1 Rob. 499, and Hunters v. Waite, 3 Gratt. 26, in which JUDGE BALDWIN opposes the opinion of CHANCELLOR KENT, and JUDGE STANARD maintains the correctness of CHANCELLOR KENT'S opinion. But it seems that both these eminent jurists agree, that in the case of a subsequent creditor, a settlement cannot be impeached on the mere ground of its being voluntary, if there be no actual fraudulent view or intent at the time it is made. To let in such a creditor it must be shown that there was *mala fides* or fraud in fact in the transaction. If the grantor, however, be indebted at the time he makes the voluntary conveyance, and due provision is made of all existing debts, it is maintained by some courts that it is clear, that all just imputation of fraud in respect to them is out of the question. The above discussion of the principles relating to fraudulent and voluntary conveyances, their effect upon the rights of existing and subsequent creditors, at common law, is taken almost verbatim from the well-considered opinion rendered by JUDGE LEE in Johnston v. Zane, 11 Gratt. 552. See this case also for a valuable collection of English, and other authorities supporting propositions set forth in the principal case.

In the light of 13 Eliz. ch. 5 (substantially, Va. Code 1887, § 2458), which is held to be declaratory of the principles of the common law, though "more extensive and salutary," the question as to the validity of a voluntary conveyance made by a debtor, who was perfectly solvent, and retained sufficient property out of which to pay all existing debts, continued to be controverted until the provision relating to "voluntary gifts, conveyances," etc., contained in the revisal of the Code in 1850 (Va. Code 1887, § 2459), in which the view as held by JUDGE STANARD (dissenting opinion in Hutchison v. Kelly, 1 Rob. 128) is adopted, namely, that any transfer of property upon a consideration not deemed valuable in law (or upon consideration of marriage) shall be void as to existing creditors. See W. Va. Code 1899, ch. 74, § 2. For fuller discussion of the statutes involved, and collection of cases on general subject, see the divisions which immediately follow.

Statutory Provisions.—Sections 1 and 2, chapter 74, of the West Virginia Code 1899, make a clear distinction between the rights of existing and subsequent creditors as to a voluntary conveyance; and such a conveyance cannot be impeached by subse-

quent creditors on the mere ground of its being voluntary, and the party making it, or at whose instance it was made, being indebted to some extent, if there be no actual fraudulent view or intent in the party at the time. Lockhard v. Beckley, 10 W. Va. 88. See similar provisions of Va. Code 1887, §§ 2458, 2459; Pratt v. Cox, 22 Gratt. 330; Penn v. Whitehead, 17 Gratt. 528.

But a voluntary transfer of property to be valid against subsequent creditors must be recorded, or possession must remain solely and *bona fide* with the donee. Davis v. Payne, 4 Rand. 332. In this general connection, see Bank of Alexandria v. Patton, 1 Rob. 499; Hunters v. Waite, 3 Gratt. 26; Penn v. Whitehead, 17 Gratt. 503; Huston v. Cantril, 11 Leigh 137; Davis v. Noll, 38 W. Va. 66, 17 S. E. Rep. 791; Wick v. Dawson, 42 W. Va. 43, 24 S. E. Rep. 587.

However, there seems to be a conflict among the decisions in West Virginia, differing among themselves as well as from the Virginia decisions, relating to the construction of similar sections in the respective Codes, regarding "transfers" and "charges" "upon a consideration not deemed valuable in law." The provisions are almost identical in their wording, as will appear from the following extracts: the West Virginia Code, 1899, ch. 74, § 2, is in part as follows: "Every transfer or charge ('transfer' including every gift, sale, conveyance and assignment, and the word 'charge' including every confessed judgment, deed of trust, mortgage lien and incumbrance), which is not upon consideration deemed valuable in law, shall be void as to creditors whose debts shall have been contracted at the time it was made, but shall not upon that account merely be void as to creditors whose debts shall have been contracted, or as to purchasers who shall have purchased after it was made; and though it be declared to be void as to a prior creditor because voluntary, it shall not for that cause be decreed to be void as to subsequent creditors or purchasers." The Virginia enactment, § 2459, reads as follows: "Every gift, conveyance, assignment, transfer, or charge, which is not upon consideration deemed valuable in law, or which is upon consideration of marriage (the latter clause not appearing in the West Virginia statute, it will be observed), shall be void as to creditors whose debts shall have been contracted at the time it was made, but shall not, on that account, merely, be void as to creditors whose debts shall have been contracted, or as to purchasers who shall have purchased after it was made; and though it be declared to be void as to a prior creditor, because voluntary or upon consideration of marriage, it shall not, for that cause, be declared to be void as to subsequent creditors or purchasers."

Earlier West Virginia Doctrine.—In Greer v. O'Brien, 36 W. Va. 277 (1892), 15 S. E. Rep. 74, a husband purchased a tract of land and directed it to be conveyed to his wife. It was charged that the husband was insolvent at the time of this gift to the wife, but the answer denied the fact of the indebtedness or insolvency. In the discussion of the case the effect of the "amount" of the husband's indebtedness as to existing creditors, was held immaterial to the decision as to them. JUDGE LUCAS, in delivering the opinion of the court, held, in substance, as follows: that since the enactment of section 2, chapter 74, West Virginia Code 1891, (§ 2, ch. 74, W. Va. Code 1899) voluntary conveyances are void as to prior creditors, not because they are fraudulent but because they are "voluntary," and because the consequent subordination of the rights of the donee to that of all prior creditors. And in the application of this act to voluntary conveyances or donations, made since its passage, which are confessedly and on their face voluntary, the act itself should be regarded as embraced in the purview of such donation or settlement. And further, that this section should receive the plain common sense, remedial construction, and not be frittered away by resorting to refinement, and to the complicated and almost undeterminable questions of fact and evidence which formerly embarrassed the courts, but which the act referred to was intended to cut up by the roots. By thus construing such instruments, namely, that all existing debts are recognized as liens upon the property superior to the donee in equity and priority, much of the ancient learning about conclusive presumptions of fraud, and much of the inquiry formerly required to maintain a financial standing with reference to his position in life, and his financial capacity to make reasonable advancements, ought to be regarded as cut up by the roots. Consequently the voluntary conveyance to the wife was declared void as to existing creditors, though valid as to subsequent creditors in the absence of any fraudulent intent. Thus, according to this decision, as it seems, the statutory effect is to render void as to existing creditors a gift by the debtor, even though the debtor may retain ample funds out of which his existing creditors may be paid. See Rogers v. Verlander, 30 W. Va. 619, 5 S. E. Rep. 847; Clarke v. King, 34 W. Va. 631, 12 S. E. Rep. 775; Kanawha Val. Bank v. Wilson, 25 W. Va. 242.

Later West Virginia Doctrine.—But it would seem that the doctrine as declared in Greer v. O'Brien, 36 W. Va. 277, 15 S. E. Rep. 74, consequently the construction of the statute, § 2, ch. 74, W. Va. Code 1899, has been inadvertently overruled by the later decision of Hume v. Condon, 44 W. Va. 553 (1898), 30 S. E. Rep. 56. In this latter case it was held, that the husband could make a donation to his wife (or return her a loan of money received, augmented by profits), if he retain an amount of tangible property largely more than sufficient to pay all his just indebtedness. JUDGE DENT, in delivering the opinion of the court, seemingly adopted the following language as his own: "The ancient rule that a voluntary postnuptial settlement can be avoided if there *was some indebtedness existing has been* relaxed, and the rule generally adopted in this country at the present time will uphold it, if it be reasonable, not disproportionate to the husband's means, and clear of any intent, actual or constructive, to defraud creditors." Citing Kehr v. Smith, 20 Wall. (U. S.) 35; Hunter v. Hunter, 10 W. Va. 321. And further, "this rule is generally adopted even where a statute expressly provides that a transfer from husband to wife in prejudice of the rights of subsisting creditors shall be invalid. A husband's love and affection for his wife, and a desire to secure her support, is ample reason for a gift to her. Still his actual intention is a mere question of fact; but whether the gift is a reasonable one, considering his circumstances, seems to be a question of law. It is reasonable if his debts are trifling, or if he retains enough to readily pay them all; but unreasonable if his debts are so great as to embarrass him, or if he is insolvent, or if the gift leaves him insolvent, or if he denudes himself of all his property, or if the property he conveys is easily accessible to creditors, while that which

he retains, though ample in amount, is inaccessible to them." Citing 14 Am. & Eng. Enc. Law 563-64.

However, it is to be observed that in the decision of this case, § 2, ch. 74, W. Va. Code of 1891 (W. Va. Code 1899, § 2, ch. 74) was not referred to or discussed, nor was there any reference direct or indirect, in the majority opinion, to the case of Greer v. O'Brien, 36 W. Va. 284, 15 S. E. Rep. 74. But BRANNON, P., in his dissenting opinion referred to it, and declared as follows: "It is contrary to the Code provisions that every voluntary conveyance is void as to existing creditors, no matter how pure in intent; no matter whether the grantor had, or had not, enough property left to pay his debts; no matter what his debts amounted to. The amount of his indebtedness, and the amount of his property left besides that conveyed were proper matters, before the statute, for consideration, and are now, when we are seeking to set a deed aside as to *subsequent creditors*; but it *is utterly immaterial* and *foreign* to the *question of whether* a *voluntary* conveyance *shall be set aside* as to *prior* creditors. It seems to me that the decision in this case reopens the door to variable oral evidence and opinion as to a man's pecuniary worth, and his indebtedness, and his intent, which the statute was designed to close,—vexatious questions, which 'ought to be regarded as cut up by the roots,' to use the apt and forcible expression of PRESIDENT LUCAS in discussing this statute in Greer v. O'Brien, 36 W. Va. 284, 15 S. E. Rep. 74." See Mayhew v. Clark, 33 W. Va. 387, 10 S. E. Rep. 785.

Virginia Doctrine.—In Chamberlayne v. Temple, 2 Rand. 384 (1824), it is held, that a voluntary conveyance of property to children, at a time when the donor is largely indebted, is void against creditors. But the creditors meant are defined, as those "who are thereby delayed, hindered, or defrauded,"—and further, that only those can be defrauded who have a right to specifically charge the property, viz.: lien creditors. Johnson v. Zane, 11 Gratt. 552. But see Quarles v. Lacy, 4 Munf. 251; Bentley v. Harris, 2 Gratt. 357. When this principle was declared, the present statute, Va. Code 1887, § 2460, had not been enacted, providing that a creditor before obtaining a judgment or decree against his debtor may institute any suit before, that he could bring subsequent to, obtaining a judgment or decree, to avoid a transfer under §§ 2458, 2459. See *ante*, sub-head, "Common-Law Doctrine."

There are few decisions in Virginia involving this point exclusively, since the enactment of the statute in 1850 (Va. Code 1887, § 2459). The tendency of the cases seems to be to give the statute its plain and evident meaning. Furthermore, no conflicting construction is observed. The law seems to be as stated by Mr. Barton, in Barton's Law Practice, p. 860 (2d Ed.), where, in the discussion of the distinction made by the statutes (Va. Code 1887, §§ 2458, 2459) between the rights of prior and subsequent creditors, when a transfer is attacked as voluntary, or fraudulent, he says that, "in respect to after-existing creditors, a fraudulent deed differs from one that is merely void because not upon a consideration deemed valuable in law, in that the former is void as to such creditors, as well as those whose debts were created after the deed was made; while, as we have before stated, the latter is only void as to antecedent debts, and may be wholly sustained as to those coming into existence after its date." Pratt v. Cox, 22 Gratt. 330; Penn v. Whitehead, 17 Gratt. 528; Taylor v. Mallory, 96 Va. 18, 30 S. E. Rep. 472. See also, Broadfoot v. Dyer, 3 Munf. 350; Ruddle v. Ben, 10 Leigh 467; Flynn v. Jackson, 93 Va. 341, 25 S. E. Rep. 1; De Farges v. Ryland, 87 Va. 404, 12 S. E. Rep. 805.

(*b*) **Antenuptial Settlements in Consideration of Marriage.**—Prior to Va. Code 1887, sec. 2459, which went into effect May 1, 1888, rendering marriage an insufficient consideration to support a gift, conveyance, etc., as against creditors of the grantor whose debts had been contracted at the time it is made, it was held, that whatever the design of the grantor might be, in making a settlement on a woman in contemplation and in consideration of marriage, it was valid; unless her knowledge of his intended fraud was clearly and satisfactorily proved. Clay v. Walter, 79 Va. 92 (1884); Herring v. Wickham, 29 Gratt. 628. And the service by creditors of the grantor, of a written notice in accordance with the Va. Code of 1873, ch. 163, sec. 1, on the grantor, before the marriage, of his fraudulent design in making the settlement, cannot affect her constructively with notice of such design; but her actual knowledge of a participation of that fraudulent design must have been clearly established by proof, in order to render the deed of conveyance fraudulent as against creditors of the grantors. See Moore v. Butler, 90 Va. 683, 19 S. E. Rep. 850. And in Bumgardner v. Harris, 92 Va. 188 (1895), 23 S. E. Rep. 229, it was held that, marriage prior to Va. Code 1887, § 2459, constituted a valuable consideration for a settlement by a man on his intended wife, and after the marriage the settlement was valid against existing creditors; but where the settlement was upon the wife for her life, with remainder over to the sister of the grantor and her children, the remainder was without valuable consideration, and void as to creditors whose debts existed at the time of the settlement.

But in Greenhow v. Coutts, 4 H. & M. 485 (1810), upon a given state of facts, the principle was declared by the superior court of chancery for the Richmond district, that a marriage settlement on a wife with whom the husband had long lived in a state of fornication, and by whom he had several children, will be deemed not to have been on valuable consideration, but voluntary and fraudulent as to creditors. However, upon appeal, the court in Coutts v. Greenhow, 2 Munf. 363, reversed this decision, declaring that the wife and children were purchasers for value, and the deed was not void as to creditors, no fraudulent intention being proved.

And an agreement made in contemplation of marriage, though void against creditors because not recorded, is valid between the parties. Dabney v. Kennedy, 7 Gratt. 317.

(*c*) **Postnuptial Settlements.**

Validity at Common Law and in Equity—Dower as a Consideration.—Postnuptial settlements on a wife for value are valid in equity, though void at common law; and relinquishment of her right of dower is a good consideration to the extent of its value as against the husband's creditors. Ficklin v. Rixey, 89 Va. 832 (1893), 17 S. E. Rep. 325.

Thus, in Strayer v. Long, 86 Va. 557, 10 S. E. Rep. 574, it is declared that, a relinquishment of dower, to the extent of the other is a sufficient consideration for a postnuptial settlement as against the husband's existing creditors; and if it is made before the relinquishment, no distinct proof of the agreement is required, and though the settlement is made fraudulently as to the husband's creditors, the fraud will not be imputed to the wife. Nevertheless it must be duly recorded, else it is void as to

the husband's creditors, without notice, whose claims accrued after its execution and before its admission to record. Glascock v. Brandon, 35 W. Va. 84, 12 S. E. Rep. 1102.

Validity When Voluntary.—Nevertheless, every voluntary postnuptial settlement is fraudulent and void as against creditors, when the settler is indebted. Flynn v. Jackson, 93 Va. 341, 25 S. E. Rep. 1.

Presumption and Burden of Proof.—And postnuptial settlements are presumed voluntary, therefore void as to existing creditors, and the burden of proof is on those claiming under them. Perry v. Ruby, 81 Va. 317; Flynn v. Jackson, 93 Va. 341, 25 S. E. Rep. 1; Robbins v. Armstrong, etc., 84 Va. 810, 6 S. E. Rep. 130; Massey v. Yancey, 90 Va. 626, 19 S. E. Rep. 184; De Farges v. Ryland, 87 Va. 404, 12 S. E. Rep. 805; Rixey v. Deitrick, 85 Va. 42, 6 S. E. Rep. 615; Hatcher v. Crews, 78 Va. 460. But a postnuptial settlement will be good against subsequent creditors where there is no fraud, and the settler is not in debt when he makes it. De Farges v. Ryland, 87 Va. 404, 12 S. E. Rep. 805. See *post*, "Evidence."

Failure to Record—Effect.—However, a postnuptial settlement made by a husband on his wife, of personal property derived from her father's estate, but of which he retains possession, not having been properly recorded, is void as against the creditors of the husband. Lewis v. Caperton, 8 Gratt. 148.

When Valid to Extent of Consideration, Though Void as to Creditors.—And although a postnuptial settlement may have been made under such circumstances as to be void as to creditors of the husband, yet if the wife relinquish her right in the property, or assumes the payment of debts of her husband, so as to make them charges on her separate estate, upon the faith of such settlement, it will be held good to the extent of a just compensation for the interest which she may have parted with, or of the debts which she has assumed to pay. Flynn v. Jackson, 93 Va. 341, 25 S. E. Rep. 1. These facts, however, are essential to the validity of the deed.

Thus in Beecher v. Wilson, 84 Va. 813, 6 S. E. Rep. 209, a husband who was heavily indebted conveyed his land to his wife's separate use, reciting the settlement to be in consideration of his indebtedness to her on account of her money used by him in paying for said land and otherwise. There was at the time of its use no distinct promise, written or parol, that the money should be applied to the deferred payments of the lands, which was conveyed to himself, and afterwards treated as his own property, or that the use of the said money should be regarded as a debt from him to her. The court declared that such postnuptial settlement must be annulled as fraudulent as to his creditors.

(*d*) **Gifts.**—See monographic *note* on "Gifts."

1. PERSONALTY.

In General.—By the Acts 1858, to prevent fraudulent gifts of slaves, though the parol gift of slaves may be given in evidence to show the character of the possession held by the donee, yet the gift itself is void. Thus if a father-in-law put slaves into the possession of his son-in-law on loan, no length of possession will give the lendee title against the lender, until such possession has become adverse by demand and refusal of the possession. Cross v. Cross, 9 Leigh 245.

And a verbal gift of slaves to a *feme sole*, to whose husband, upon her subsequent marriage, they were delivered, and by him kept until his death, four years after the marriage, is within the statutes for preventing fraudulent gifts of slaves. Taylor v. Wallace, 4 Call 92.

How a Gift Is to Be Evidenced.—And a gift of slaves can only be evidenced by deed or will duly proved and recorded, or by possession passing from the donor to the donee, and remaining with him, or one claiming under him and the possession here meant, is an actual, abiding, permanent possession. If a gift is evidenced in either of these ways, it will serve to effectually vest title in the donee, certainly as against the donor. Durham v. Dunkly, 6 Rand. 135.

Thus, in Henry v. Graves, 16 Gratt. 244, a husband in the lifetime of his wife, made an absolute gift of his wife's remainder in slaves, by deed, which was recorded after her death, and he survived both the wife and the life tenant. The gift was valid and effectual against him, though before possession was obtained by the donees he dissented from it.

Effect of Reservations and Limitations.—But where any reservation or limitation is pretended to have been made of a use or property, by way of condition, reversion, remainder or otherwise, in goods and chattels, the possession whereof shall have remained in another for five years, the same, as to the creditors and purchasers of the person so remaining in possession, is, under the act to prevent frauds and perjuries, taken to be fraudulent, and the absolute property to be with the possession, unless such reservation or limitation were declared by will or by deed in writing, proved and recorded. London v. Turner, 11 Leigh 403.

Thus, in Durham v. Dunkly, 6 Rand. 135 (1828), a slave was given to an infant child, by deed, with the reservation expressed in the deed, that the donor was to keep the slave and raise it for the donee, until she arrived at the age of thirteen. The slave was delivered to the donee on the day of the execution of the deed, and on the same day, taken back by the donor. The deed never was recorded, and the donee never lived with the donor. It was held that the gift was void under the act of assembly, 1 Rev. Code, Va. 432, § 51.

So if a father delivers a slave to his infant son residing with him, and calls upon persons present to take notice that he gives the slave to the son, but says at the same time, that he claims an estate in the slave for his own life, nothing passes to the son by such parol gift. Anderson v. Thompson, 11 Leigh 439.

Property Given on Parol Trust—As to Whom Valid.—Although, where personal property is given to one upon a trust by parol for another, the declaration of trust by parol may be valid as between the donee and the *cestui que trust*, yet as between the *cestui que trust* and the creditors of the donee the case is essentially different. London v. Turner, 11 Leigh 403.

Gift from Parent to Child—Unrecorded.—So a parol gift of a slave to a child, after possession in the donee, is void, as between the donor and donee; and if the slave given be conveyed by deed (accompanied with possession in the donee) but without being recorded, it is void as to creditors and purchasers. Shirley v. Long, 6 Rand. 764.

And in Shirley v. Long, 6 Rand. 764 (1827), it was further declared, that if a father gave a slave to his child, and the donor retained possession of the slave, and exercised control over it, the gift was not the less fraudulent because the child always lived with the father, and the slave was always called the child's in the family and the neighborhood.

So a parol gift of a slave by a father to an infant

child living with him, by a declaration that the gift is made, but there is no delivery of possession, is not good against a subsequent purchaser of that slave, although such purchaser knew at the time of his purchase, that the father had so made the gift. Hunter v. Jones, 6 Rand. 540 (1828).

Same—Marriage Provision.—A verbal gift of personal property to a daughter before marriage, in consideration thereof, accompanied by delivery of possession, is (like a promise in writing to make such a gift), valid and effectual against the creditors of the father. However, such verbal gift of property, *unaccompanied* by possession before the marriage, but in consideration of which the possession is delivered after the marriage, though valid between the parties and privies to it, and against debts of the father afterwards contracted, is voluntary and void against all pre-existing creditors; and this is true though the property be delivered before any lien by execution is acquired by the creditors. Hayes v. Jones, 2 Patt. & Heath 583.

Thus, where a father who is possessed of an ample fortune sends certain of his slaves immediately after the marriage of his daughter to her husband, in whose possession they remained, without interruption or claim, until his death which happened two years and four months afterwards, it will be presumed (no proof of fraud appearing), that such slaves, being no more than a reasonable provision for the daughter at the time, were a gift in consideration of the marriage; and the right of the representatives of the husband is good against the creditors of the father. Moore v. Dawney, 3 H. & M. 127 (1808).

Likewise, in London v. Turner, 11 Leigh 403, a father, upon the marriage of his daughter, made her a gift of slaves, and the possession thereof remained in the daughter's husband five years. While the husband was in possession, the father made his will, confirming the gift, and declaring that the same was "to her in trust for the sole and only purpose of her immediate use and comfort in life, and after her decease the title and fee-simple interest to be vested forever in the children or issue lawfully begotten of her body, free from the claim, control or direction of any other person whatever." Although this will was made and recorded within five years from the time of the gift, yet the slaves were held liable to be taken in execution by the creditors of the husband. This case was distinguished from Beasley v. Owen, 3 Hen. & Munf. 449.

And in Huston v. Cantril, 11 Leigh 136 (1840), a father, who was indebted at the time made a deed of gift of personal chattels to his infant daughter, which was duly recorded; subsequent to that time the daughter married and after the father's death, a creditor filed a bill against the daughter and her husband, impeaching the deed as fraudulent, and seeking to subject the property to the payment of his demand. The court held that, whatever might have been the character of the conveyance in its origin, it was rendered good and valuable against creditors upon the marriage of the daughter, who thereupon was to be considered a purchaser by relation for valuable consideration. But see Va. Code 1887, sec. 2459, which declares that marriage shall not be deemed a sufficient consideration to support a gift, conveyance, etc., against existing creditors.

Gift from Husband to Wife—Presumption.—To rebut the presumption of a gift from a wife to her husband, where with her knowledge and consent he has at different times received, and she has delivered to him, the proceeds of the sale of her realty, no receipt of written obligation being given to repay, and the same is mingled with his funds, the proof must be clear, full and above suspicion. See Fitzhugh v. Anderson, 2 H. & M. 289.

Thus in Kanawha Val. Bk. v. Atkinson, 32 W. Va. 203, 9 S. E. Rep. 175, a husband, with the knowledge and consent of his wife, at different times, received, or she delivered to him, the proceeds of the sale of her realty; he gave her no note or other written obligation to repay it; and he mingled it with his means; used it in his business for years; kept no written account of such moneys (nor did she); then became insolvent, and some eight or ten years after his receipt of the money, purchased real estate in the name of his wife, and it was alleged by him and her that it was paid for with the money so received; and several years afterwards he and she united in a deed of trust to secure a very considerable debt on said real estate, such debt being a loan to the husband, and before such purchase a judgment was rendered against him for a debt. The lot was held liable to the judgment. And it was further declared that, if, when such purchase was made, any claim which she may have had on him for such proceeds of her real estate was barred by limitation, that circumstances tended strongly to repel the wife's claim to exempt the land against creditors. See, in this general connection, Fones v. Rice, 9 Gratt. 568; Miller v. Cox, 38 W. Va. 747, 18 S. E. Rep. 960. See *post*, "Evidence."

(*e*) **Realty.**—Under the state of the law existing previous to the Acts of the Assembly, Va. Code 1887, abolishing the common-law right of the husband to the wife's personalty in possession at or during coverture, if property were bequeathed to a wife and her children jointly, the husband became invested with her interest *jure mariti*, so that, as to her, any conveyance made in consideration of the receipt of such property was voluntary as to her. But as to the children, the conveyance was based on valuable consideration, and stood as security to them. Rixey v. Deitrick, 85 Va. 42, 6 S. E. Rep. 615.

And a deed made by a husband embarrassed at the time, by which he conveys the proceeds of his wife's land which had been sold, and the note for the purchase money made to him, in trust for himself and his wife for their lives and the life of the survivor, and during his life to be under his control and management, is voluntary and fraudulent as to creditors. Lewis v. Caperton, 8 Gratt. 148; Clarke v. King, 34 W. Va. 631, 12 S. E. Rep. 775.

But a voluntary transfer of property from husband to wife is not, simply because voluntary, void as to subsequent creditors of the husband. McClaugherty v. Morgan, 36 W. Va. 191, 14 S. E. Rep. 992.

Nevertheless, a court of equity will declare a voluntary conveyance fraudulent as to subsequent creditors, if from the circumstances and other evidence the court is convinced, that the deed was made with the intent to defraud such creditors. The conveyance being voluntary, it is immaterial, whether or not the grantee had notice of such fraud. Duncan v. Custard, 24 W. Va. 730; Mayhew v. Clark, 33 W. Va. 387, 10 S. E. Rep. 785.

Thus, if a man largely indebted at the time voluntarily and without consideration deemed valuable in law, incumbers all of his lands and invests the proceeds of the incumbrance debt in making valuable improvements upon his wife's separate real estate, and then becomes insolvent, and the incumbrance remains unsatisfied, such incum-

brance debt will, in a court of equity, be regarded as a gift to the wife, and fraudulent as to his creditors, whose debts existed at the time the incumbrance was created, and the real estate of the wife in her possession, as well as the land incumbered, will be held liable for the payment of her husband, which existed at the time the incumbrance was created. Kan. Val. Bank v. Wilson, 25 W. Va. 242.

And if a deed which is alleged to be voluntary and fraudulent, forms a part of the plaintiff's claim of title, in an action of ejectment, it is the province of the jury to determine, under a proper instruction from the court, whether the deed is voluntary and fraudulent or not. Taylor v. Mallory, 96 Va. 18, 30 S. E. Rep. 472. However, as elsewhere stated, if the deed is merely voluntary, it is, nevertheless, valid as between the parties, and void only as to existing creditors. Chamberlayne v. Temple, 2 Rand. 384 (for fuller explanation of the principles expounded in this case, see *ante*, "Void Transfers," sub-head 2); Clarke v. King, 34 W. Va. 631, 12 S. E. Rep. 775. See in support of general principles, Stokes v. Oliver, 76 Va. 72; Burkholder v. Ludlam, 30 Gratt. 255; Harvey v. Steptoe, 17 Gratt. 289.

b. Fraud Presumed from Inadequacy of Consideration.

Transfers from Husband to Wife.—Transfers of property, either directly or indirectly, by an insolvent husband to his wife during coverture are justly regarded with suspicion, and unless it clearly appears, that the consideration was paid from the separate estate of the wife or by some one for her out of means not derived either directly or remotely from the husband, such transfers will be held fraudulent and void as to the creditors of the husband. Core v. Cunningham, 27 W. Va. 206. See also, Davis v. Davis, 25 Gratt. 587.

Thus, a conveyance of real estate, made directly or indirectly, by a husband to his wife, in consideration of a valid debt due from the husband to the wife, is fraudulent and void, as to the existing creditors of the husband, when it is shown that said consideration is much less than the value placed upon the property by both the husband and the wife, and they attempt to make out a consideration equal to or in excess of the value of the property by adding to said valid debt other indebtedness of the husband to the wife which had no existence in fact. Webb v. Ingham, 29 W. Va. 389, 1 S. E. Rep. 816.

Conveyance by Wife to Husband.—So, if a married woman directly or indirectly convey her separate real property to her husband upon a consideration not deemed valuable in law, this is void as to her creditors whose debts shall have been contracted at the time it was made, if such creditors had the right, while the land was hers, to subject it or its rents and profits to the payment of their debts; as against existing creditors such voluntary conveyance is conclusively presumed to be fraudulent in law. Wick v. Dawson, 42 W. Va. 43, 24 S. E. Rep. 587.

Transfer from Father to Son.—Likewise, a conveyance of all his property by a father, who is greatly in debt and apprehensive of a heavy liability by the decision of a suit against him for damages for breach of warranty of title to land sold by him, to his son, for an improbable cash payment, and deferred payments without interest, extending through a period of fifteen years, upon an agreement on the son's part to provide maintenance for his father and mother during their lives, presents a case, which, without full examination, is indicative of fraudulent intent, especially where the son, who might afford the necessary explanation, if there was any, is not examined as a witness in the suit to set aside the conveyance for fraud. Click v. Green, 77 Va. 827.

Conveyance from Debtor to Creditor.—And if an insolvent grantor justly indebted to one of his creditors in a comparatively small amount, convey to him all his property, or the greater portion thereof, in satisfaction of his debt, for a nominal consideration, falsely recited in the deed, and claimed by the grantee to have been in hand paid, equal in value to that of the property conveyed but largely in excess of the debt actually due such creditor, and he accepts the same, such deed, as to the other creditors of the grantor, will be held to be fraudulent and void; as the necessary effect of such deed is to hinder, delay and defraud such other creditors; and the grantor and grantee in such deed will be held to have intended the necessary result of their wrongful act. Knight v. Capito, 23 W. Va. 639.

Purchase.—In Moore v. Triplett (Va. 1895), 23 S. E. Rep. 69, the court held that, the fact that the consideration paid on property worth $26,000 was $2,872 less than that amount, does not show such an inadequacy of consideration as to justify a cancellation of the conveyance, as in fraud of the grantor's creditors. See also, Sutherlin v. March, 75 Va. 223.

c. When, and as to Whom Unrecorded Transfers Are Void.

Statutory Provisions.—If, before the time limited by law for recording a deed has expired, a bill be filed to impugn it as fraudulent, the court cannot afterwards declare it void, as against the complainant, on the grounds of its not having been duly recorded. Gibson v. Randolph, 2 Munf. 310.

And by Va. Code 1887, § 2465, Pollards' Supp. Code, § 2465, a deed is void as against creditors, "until and except from the time it is duly admitted to record." See Slater v. Moore, 86 Va. 26, 9 S. E. Rep. 419. As to the time within which deeds must be recorded after their date of acknowledgment, in order that they may relate back and be valid as of the date of acknowledgment, see Va. Code 1887, § 2467, and amendment, Acts 1895-6, p. 285; Pollards' Supp. Code, § 2467. See, in this connection, Ogg v. Randolph, 4 H. & M. 445.

Thus, in Cocke v. Haxall, 2 Rob. 470 (1843), JUDGE ALLEN, delivering the opinion of the court, said, "That it was the intention of the legislature, in the act of 1792, regulating conveyances, 1 R. C., ch. 99, p. 362, sec. 2; p. 365, sec. 13; Va. Code 1849, ch. 118, sec. 4; Va. Code 1887, sec. 2464-65, to require a deed of trust or mortgage of personal estate to be recorded in the general court, or in the court of the district, county or corporation in which the grantor resided. Therefore, where a deed of trust of personalty, dated the 15th of July, 1812, stated the grantor to be of Henrico county, and the trustee and *cestui que trust* to be of the town of Petersburg, and the deed was never recorded in Henrico but only in Petersburg, and there was no evidence to show that either at the date of the deed, or of its recordation in Petersburg, the grantor resided in that town, the deed so recorded is void as to the grantor's creditors." However, a voluntary conveyance of personal property, by a party not indebted at the time, is good against subsequent creditors, if the deed be duly recorded or the possession remain solely *bona fide* with the donee. Otherwise it is void by the statute of frauds. Davis v. Payne, 4 Rand. 332.

Marriage Settlement.—And in Thomas v. Gaines, 1 Gratt. 347 (1845), the court declared that a deed of marriage settlement made before the marriage

conveying the property of the wife, and in which the intended husband joined, is fraudulent and void against subsequent purchasers from the husband, without notice, unless duly recorded. By this decision the case of Pierce v. Turner, 5 Cranch 162, and the opinions of JUDGES CARR, COALTER and BROOKE, in Land v. Jeffries, 5 Rand. 211, were overruled. The facts in Land v. Jeffries were as follows: A woman who was about to be married made a personal conveyance of her property to a third person with the privity and approbation of her intended husband; the marriage took place a few minutes after the conveyance and the husband took possession of the property after the marriage; the property thus conveyed was held not to be subject to the husband's creditors, as his possession after marriage was not that of his wife (she not being *sui juris*), and her short possession between the time of the conveyance and that of the marriage, not being sufficient, or of the nature to render the deed fraudulent.

Contract for Sale of Land.—So where a contract in writing which is executed for the sale of land, before judgments are obtained against the vendor, and the deed is executed in pursuance of such contract, but is not recorded until after the judgments are duly docketed, and the contract is never recorded, the contract and deed are void as to the creditors; and the land so contracted to be sold, and so conveyed is subject to the satisfaction of the judgments. Anderson v. Nagle, 12 W. Va. 98.

Loan of Chattel.—So if no writing declaring a loan be recorded, or no demand be made by the lender, and pursued by course of law, for more than five years after possession commenced, the loan is void as to the loanee's creditors, whose rights cannot be affected by the lender's subsequent resumption of possession. But the creditors meant are those whose debts were contracted before the resumption of possession, or conveyance of the chattels, by the lender—they having given credit to the loanee on the apparent ownership of property. Scott v. Jones, 76 Va. 233.

d. Effect of Retention of Possession by Vendor.—It is a settled rule that an absolute deed of personal property is fraudulent *per se* as to creditors of the vendor when the possession remains with the vendor. Alexander v. Deneale, 2 Munf. 341; Claytor v. Anthony, 6 Rand. 285; Shields v. Anderson, 3 Leigh 729; Davis v. Turner, 4 Gratt. 422; Robertson v. Ewell, 3 Munf. 1; Williamson v. Farley, Gil. 15; Land v. Jeffries, 5 Rand. 211. But according to Sydnor v. Gee, 4 Leigh 535, it seems, that, in the case of an absolute sale and delivery of chattels, and an immediate redelivery thereof by the vendee to the vendor, upon bailment, for a limited time, on valuable consideration, both transactions being in fact fair, such bailment of vendee to the vendor is not inconsistent with the sale, so as to make the sale fraudulent *per se*, within the rule of Alexander v. Deneale, 2 Munf. 341.

Thus, in Lewis v. Adams, 6 Leigh 320, a vendor for full value paid him, sold certain slaves to a vendee in December 1821, and the property was delivered to the vendee; on the same day, the vendee hired the same slaves to the vendor till January 1823, and took his bond for the hire; in November, 1822, the vendee, by deed duly recorded, conveyed the slaves to a trustee for the use of his daughter, who was the vendor's wife, and her children. Upon these facts the court declared that the exercise of full ownership by the vendee, by the execution of such deed of trust, was equivalent to an actual resumption of the possession at the date of the deed, consequently, whether the sale from the vendor to vendee was originally accompanied and followed by possession or not, it was valid as against any creditors of the vendor whose rights attached after the date of the deed of trust.

However, it is not conclusive evidence of fraud, but is open to explanation. Land v. Jeffries, 5 Rand. 211.

Thus, as held in Benjamin v. Madden, 94 Va. 66, 26 S. E. Rep. 392, the retention of the possession of personal property by the vendor after an absolute sale is *prima facie* fraudulent against creditors of the vendor, though not as against a subsequent purchaser for value, without notice of the prior sale, but this presumption may be rebutted by proof. In the case at bar there was a *bona fide* sale for value of a stock of goods, and delivery of possession, and the facts that the vendor did not transfer his license to the vendee before levy on the stock; that the name of the vendor upon the window shades, which had constituted his only sign remained as before; and that the vendor and his former clerk remained in the store and sold goods, do not, in view of other evidence in the cause, establish a case of fraud upon creditors of the vendor. Nor, under the admitted fact, does section 287 of the Virginia Code apply.

But in Mason v. Bond, 9 Leigh 181, the court declared that while it is a general rule, that an absolute sale of chattels not accompanied and followed with transfer of possession to the vendee, is *per se* fraudulent and void as against creditors of the vendor; and though there are exceptions to the rule, yet it is no ground of exception, that the possession at the time of the sale was in a third person, if, notwithstanding such possession, the vendor had a right, and it was in his power, to take the possession and deliver it to the vendee. Mason v. Bond, 9 Leigh 181.

Nevertheless, in the absence of a fraudulent intent, it is not fraudulent *per se* as to creditors, in one, who has assumed an indebtedness of a firm, in consideration of a sale of specified merchandise, to allow such merchandise to remain in said firm's possession to be disposed of in the usual course of trade. King v. Levy (Va. 1895), 22 S. E. Rep. 492.

But a bill of sale of chattels, which is absolute in form, executed by a debtor,—but which is in fact a mortgage to secure a debt, is fraudulent and void, as it tends to deceive and injure others. Shields v. Anderson, 3 Leigh 729; Clark v. Hardiman, 2 Leigh 347.

And if personal property is mortgaged, and is afterwards sold absolutely to the mortgagee but the bill of sale is not recorded, it is fraudulent as against a subsequent purchaser. And a court of equity will (under the particular circumstances), entertain a bill to recover the property as against the fraudulent vendee who has clandestinely gotten possession of the property. Such fraudulent vendee, cannot prevent a recovery, by showing that the plaintiff did not take possession at the instant of the purchase; because such an omission as this cannot make a fraudulent sale good. Glasscock v. Batton, 6 Rand. 78.

So if there is an absolute bill of sale of slaves, by an executor, and he is permitted to retain the possession thereof, it is fraudulent and void, as to legatees, as well as creditors and purchasers. Robertson v. Ewell, 3 Munf. 1.

But where a purchaser of property leaves it in the possession of the original owner, but the possession thereof is taken by the administrator of the purchaser before creditors have acquired a specific lien thereon, by judgment and execution, it is not liable to the creditors of the original owner. Carr v. Glasscock, 3 Gratt. 343 (1846).

Similarly, if there is a sale of personal property under an execution, by a sheriff, and it is *bona fide*, though irregular, the sale is valid, even though the purchaser leaves the property with the debtor in the execution; moreover, the property is not liable to the creditors of the debtor in execution. Carr v. Glasscock, 3 Gratt. 343 (1846).

And where an owner of personal property has bailed it out to a third party, and then gives an absolute bill of sale to a vendee, and the vendee at the expiration of the time for which it is bailed out, applies to the bailee to deliver the property to him, and the bailee tells him that he may have possession, but he does not take actual possession, but leaves the property in the hands of the bailee, the bill of sale is good against the creditors of the vendor. Kroesen v. Seevers, 5 Leigh 472.

e. Possession Retained by Donor.—In Charlton v. Gardner, 11 Leigh 281, the father in consideration of natural love and affection, made a deed, which was duly recorded, conveying slaves and other property to three infant children, upon the condition understood and reserved, that the slaves were to remain in the donor's possession, during his life, and if his wife should survive him, that she should have the use of one-third of the slaves and their increase, during her life. At the time of executing the deed, the father was indebted by two bonds, on which judgments were afterwards obtained, and the executions returned satisfied. Subsequent to the deed, the father became appearance bail, and a judgment was obtained against him as such, and the execution thereon was levied upon the slaves so conveyed, which were still in his possession and they were sold by the sheriff. After the father's death an action of detinue was brought against the purchaser by the widow and children jointly, and another action was brought by the children alone; in each of which cases there was a special verdict, finding the facts as above mentioned. Upon these facts, the court held, that the action in which the widow was joined could not be maintained, but that the action by the children alone was well brought; and further, the facts found did not constitute fraud *per se*; and so far as the fraud was a matter of fact, the jury not having found fraud, the court could not as a matter of law infer it.

B. CONDITIONAL TRANSFERS.

1. LOANS.

Loans, and Reservations of a Use or Property, to Be Recorded.—Where any loan of goods or chattels is pretended to have been made to any person with whom, or those claiming under him, possession shall have remained five years without demand made and pursued by due process of law on the part of the pretended lender, or where any reservation or limitation is pretended to have been made of a use or property, by way of condition, reversion, remainder or otherwise, in goods or chattels, the possession whereof shall have so remained in another as aforesaid, the absolute property shall be taken to be with the possession, and such loan, reservation, or limitation be declared by will which, or a copy of which is, by deed, or other writing, duly admitted to record within the said five years in the county or corporation in which said goods or chattels may be. Va. Code 1887, ch. 109, sec. 2461, p. 599; Taylor v. Beale, 4 Gratt. 93; Lightfoot v. Strother, 9 Leigh 451.

However, proof of notice of the loan, from the lender, recorded in the court of a county wherein neither of the parties live, is not sufficient to do away with the effect of possession in the loanee. Gay v. Moseley, 2 Munf. 543.

So a deed declaring a loan of a slave from a father to his daughter during her life (being admitted to record on proof by one witness only), is not good against her husband's creditors, or purchasers from him, without notice of such deed; possession of such slave having remained with the husband for five years without interruption. Lacy v. Wilson, 4 Munf. 313 (1814); Beasley v. Owen, 3 H. & M. 449. And in Garth v. Barksdale, 5 Munf. 101, it is held that five years' peaceable and uninterrupted possession of slaves, under a loan not evidenced by deed duly recorded, vests a title in the loanee, which inures in favor of his creditors, and cannot be divested as to them, by his returning the same to the lender, after the five years have expired. See also, Gay v. Moseley, 2 Munf. 543. So, if a debtor remains in possession of slaves for five years, under a parol loan, they are liable to satisfy his creditors, though the possession is resumed by the lender before executions are levied upon them. Beale v. Digges, 6 Gratt. 582.

But the creditors meant are those whose debts were contracted before the resumption of possession, or conveyance of the chattels by the lender—they having given credit to the loanee on the apparent ownership of the property. Scott v. Jones, 76 Va. 233.

And where possession has remained with the loanee or with those claiming under him for five years, and is then resumed by the creditor, the possession must continue with the lender the full period of five years from the time it was actually resumed, before the title will be revested in the lender as against a creditor of the loanee. Pate v. Baker, 8 Leigh 80. It is to be observed, however, that § 2461, Va. Code 1887, does not apply to the case of property remaining in possession of a debtor for more than five years, on hire. Therefore, slaves remaining in possession of one person on hire for more than five years, are not subject to be taken in execution for his debts. McKenzie v. Macon, 5 Gratt. 379 (1849).

Yet, a loan of slaves, though not declared by deed in writing duly recorded, and therefore void as to creditors, the loanee having continued in possession for five years without such demand, as would bar their right, is nevertheless effectual between the parties and their representatives. If, therefore, the loanee died in possession of such slaves, they are not to be considered assets belonging to his estate, nor can be recovered as such; being liable to his creditors so far as their claims remain unsatisfied by their assets in the hands of his executor or administrator, but no farther. Boyd v. Stainback, 5 Munf. 305; Scott v. Jones, 76 Va. 233.

Likewise, if a father-in-law puts slaves into the possession of his son-in-law on loan, no length of possession will give the lendee title against the lender, till such possession has become adverse by demand and refusal of the possession. Cross v. Cross, 9 Leigh 245.

So, if a father sends a slave to a son upon a loan, but the agent who takes the slave to the son, neglects to inform him that the slave is a loan, the neglect of the agent does not effect the right of the father to have the slave considered as a loan. Dickinson v. Dickinson, 2 Gratt. 493 (1846).

When the Operation of the Statute Is Avoided.—Nevertheless, according to the settled construction of the clause in the statute of frauds, Va. Code 1887, § 2461, concerning loans, a resumption of possession by the lender, or the recorded deed or will granting away the property to another within five years, avoids the operation of the statute and puts an end to the loan. Collins v. Lofftus, 10 Leigh 5; Scott v. Jones, 76 Va. 233.

And, if the property be sold before possession shall have remained five years with the loanee or those claiming under him, the loan is not, under the statute, taken to be fraudulent as to the purchaser. Lightfoot v. Strother, 9 Leigh 451.

But a demand of slaves by the lender, who thereupon receives, and immediately redelivers them to the loanee to be held on the same terms, as before such demand, receipt, and redelivery being in private, is not sufficient to bar the rights of creditors, under the act to prevent fraud and perjuries. Boyd v. Stainback, 5 Munf. 305 (1817); Va. Code 1887, § 2461.

And it is to be further noted that, after a loan to a person with whom, or with those claiming under him, possession has remained five years and a deed is made by the lender, declaring the original loan and continuing it; but this deed is never admitted to record, it cannot affect the creditor of a person in possession, and the deed is not to be received as evidence against such creditor. Pate v. Baker, 8 Leigh 80.

2. DEEDS OF TRUST.

a. In General.

Deed Executed without Knowledge of Creditors—When Valid.—Though a deed of trust be executed without the knowledge of the creditors secured by it, yet if when informed of its execution they assent to it, it is valid. Cochran v. Paris, 11 Gratt. 348. See also, Dance v. Seaman, 11 Gratt. 778.

Deed Secures Debts Not Due—Trustee Is Not Authorized to Take Possession of Trust Property—Validity.—However, a deed, conveying a stock of goods and merchandise, and notes and accounts of a merchant to a trustee to secure the payment of notes not then due, which provides that said conveyance shall cover "such goods and merchandise as may be added to said stock, from time to time, by the grantor and brought into the store in course of business, or to take the place of such goods as may hereafter be sold," but does not authorize the trustee to take possession or control of said goods until the grantor has made default in the payment of one or more of said notes, and has been refused to do so by the holder or holders of such note or notes, is as against the unsecured creditors of the grantor fraudulent and void on its face, although it provides that the "trustee, by himself or by his agent or attorney, shall at once take possession" of the notes and accounts transferred by such deed, and collect the same for the benefit of the trust creditors.

Nor is such deed validated or its character affected by the fact, that subsequent to its execution and on the same day a second trust deed is made between the same grantor and grantee, conveying the same goods and merchandise, to secure other and different *cestuis que trustent*, which authorizes the trustee to take possession of said goods and merchandise at once, "and manage and control the same for the benefit and advantage of the parties secured and indemnified by the deed." Claflin v. Foley, 22 W. Va. 434.

Insolvency of the Trust—Deed Not Necessarily Void.—The fact that a trustee in a trust deed is insolvent and untrustworthy will not, of itself, make the deed void; but in such case the court may appoint a receiver, and administer the trust according to the provisions of the deed. Cohn v. Ward, 32 W. Va. 34, 9 S. E. Rep. 41.

Deeds Executed with Improper Motive—Provisions to Hinder, Delay and Defraud Creditors Not Secured.—And a creditor who takes a conveyance from his debtor, to secure his debt, and at the same time, inserts provisions in the deed, to delay, hinder, or defraud other creditors, comes within the statute of frauds, and the conveyance is void. Garland v. Rives, 4 Rand. 282.

So, likewise, if the grantee be privy to a fraudulent intent on the part of the grantor, and takes a deed to secure his own debt, with provisions to delay, hinder, or defraud other creditors, the deed will be void, although his only motive was, to secure his own debt, and the other provisions were forced upon him by the grantor, as the only means of having his own debt secured. Such a grantee will not be considered as a *bona fide* purchaser. Garland v. Rives, 4 Rand. 282.

But a deed of trust executed in part to secure fraudulent debts, and partly to secure a *bona fide* debt, the *bona fide* creditor having no notice of the dishonest purpose on the part of the grantor, is a valid security for the *bona fide* debt. Billups v. Sears, 5 Gratt. 31.

So the fact that the grantor in a trust deed made to secure, among other things, the surety on a building contract of the grantor, performed the contract, after executing the deed, so that no liability remained on the surety, does not show that the deed was executed with improper motives. Harvey v. Anderson (Va.), 24 S. E. Rep. 914. See, in general connection, Gardner v. Johnston, 9 W. Va. 403; Spence v. Bagwell, 6 Gratt. 444.

b. Provisions Which Postpone the Time for Enforcing the Deed—Effect.—Though a deed is not fraudulent by reason of a postponement of the time of sale, and the reserving the property to the grantor in the meantime, yet where the time of the sale may be postponed or hastened by the grantor, so as to enable him to defeat any creditor who should attempt to subject the interest in the property reserved to the grantor, to the payment of his debt, the deed is fraudulent. Quarles v. Kerr, 14 Gratt. 48.

But a trust deed conveying real and personal property, including a stock of store goods, is not *per se* fraudulent because it postpones the sale of real estate for six months from the date of the deed, and authorizes the trustee, after taking an inventory of the store goods, to take control of them, and sell the same at private sale, if that can be done in six months, and then sell the residue at public auction; in either case the sales to be in the best possible manner for the interests of the creditors of the grantor. Cohn v. Ward, 32 W. Va. 34, 9 S. E. Rep. 41. And a deed which conveys land to secure a *bona fide* debt, which is not to be enforced for two years, and only then or afterwards upon a notice of the sale for one hundred and twenty days, is valid against creditors. Such a deed is

valid though the execution of the deed is postponed for five years from the date of the conveyance; and the rents and profits of the property in the meantime, are reserved to the grantor. Lewis v. Caperton, 8 Gratt. 148. So a deed of trust which among other things conveys growing crops of wheat, rye and oats, and which is not to be enforced for two years from its date, is not necessarily fraudulent as to creditors. Cochran v. Paris, 11 Gratt. 348. Moreover, a deed which conveys without a schedule, household furniture, the various kinds of stock on a farm, bacon and lard, to secure a *bona fide* debt, but not to be enforced for eighteen months after its execution, is valid against creditors, though the deed was made without the knowledge of the creditor, and the grantor was indebted to insolvency at the time of the conveyance. Lewis v. Caperton, 8 Gratt. 148.

And a deed executed *bona fide* to secure a loan of money, not to be enforced for ten years, is a valid deed as against creditors of the grantor. Lewis v. Caperton, 8 Gratt. 148.

c. Deed Furnishing Security against Losses and Liabilities—Potential Lien.—A deed of trust, though made solely to secure one against any future loss as indorser, cannot for that reason be impeached, if made *bona fide*. Harvey v. Anderson (Va.), 24 S. E. Rep. 914.

Thus, in Alexandria Savings Inst. v. Thomas, 29 Gratt. 483, by deed which was duly recorded in January, 1856, the grantor and his wife conveyed a house and lot in trust to secure a certain beneficiary against any loss or damage which he might sustain by his acceptance of any drafts or bills which might thereafter be drawn by the grantor upon the beneficiary, which acceptance the beneficiary had agreed to make for the accommodation of the grantor. The beneficiary, accordingly, from the date of the deed to January, 1861, accepted the drafts of the grantor to a large amount, and the grantor was indebted to him for much more than the house and lot was worth. In 1871, a certain savings bank, being the holder of three of the notes of the grantor in the deed of trust, given on renewals of notes which were due before the date of the deed, filed a bill against the grantor as an absent defendant, to attach the house and lot, insisting that the deed having been given to secure future advancements, was null and void as to the creditors of the grantor. The court held that, though the beneficiary secured in the deed of trust was under no liability for the grantor when the deed was executed, it was, nevertheless, a valid security for all of his acceptances for the grantor given before some other creditor had acquired a lien on the house and lot conveyed in the deed of trust.

Moreover, a deed which conveys future rents and profits of property conveyed in other deeds, which were reserved to the grantor in the previous deeds, for the purpose of paying a *bona fide* debt, is valid against creditors of the grantor. Lewis v. Caperton, 8 Gratt. 148.

d. Reservations to the Vendor.—It is well settled that conveyances professedly to indemnify creditors, but expressly or impliedly reserving to the grantors powers inconsistent and adequate to defeat such purpose, are void as to creditors and purchasers. Wray v. Davenport, 79 Va. 19; McCormick v. Atkinson, 78 Va. 8; Saunders v. Waggoner, 82 Va. 316; Sheppards v. Turpin, 3 Gratt. 373; Lang v. Lee, 3 Rand. 410; Addington v. Etheridge, 12 Gratt. 436; Perry v. Shen. Val. Nat. Bank, 27 Gratt. 755. See also, Hughes v. Epling, 93 Va. 426, 25 S. E. Rep. 105; Norris v. Lake, 89 Va. 517, 16 S. E. Rep. 663; Harden v. Wagner, 22 W. Va. 364; Claffin v. Foley, 22 W. Va. 441. See further, in this connection, Paul v. Baugh, 85 Va. 955, 9 S. E. Rep. 329; Young v. Willis, 82 Va. 291; Kuhn v. Mack, 4 W. Va. 186; Marks v. Hill, 15 Gratt. 400. So where an insolvent debtor conveys his land even for valuable, though inadequate consideration, with a secret reservation, that he shall for the time have use of the land without payment of rent, this fact is evident, that the conveyance was made with fraudulent intent. Livesay v. Beard, 22 W. Va. 585.

And a deed of trust on lands and personal property with no definitely fixed period at which a sale could be required, and which puts it in the power of the grantor by collusion, or otherwise, to indefinitely postpone a sale thereunder, and of the live stock conveyed by the deed, and the increase thereof, and all future crops to be raised from the ground in the quiet enjoyment of the grantor, from which to support his family and pay the debts secured thereon, as he may deem most advantageous, is fraudulent on its face and void. Such deed being fraudulent on its face is void *in toto* and cannot stand as security for the debts therein attempted to be secured. Livesay v. Beard, 22 W. Va. 585.

Moreover, a deed of trust on a stock of merchandise which provides that the grantor shall be suffered to remain in the possession and enjoyment thereof until default is made in the payment of the debt secured, and request by the creditor to foreclose, and without accountability to the trustee for the proceeds of sale made by the grantor, is fraudulent *per se*. Hughes v. Epling, 93 Va. 424, 25 S. E. Rep. 105.

Nevertheless, where a deed of trust to secure certain debts, conveys certain real estate, and the grantor reserves in it, to himself and his family all exemptions and property allowed by the constitution of Virginia, and all laws passed in pursuance thereof, and in addition thereto all exemptions allowed under the bankrupt laws, such reservation is legal and valid, and does not render the deed void on the ground of any fraudulent intent on the part of the grantor. Brockenbrough v. Brockenbrough, 31 Gratt. 580 (1879).

Neither is a trust deed on a stock of goods for the security of creditors which provides that the trustees shall take immediate possession of such goods, and manage them for the benefit of the trust, fraudulent *per se*, and void as to creditors, because it contains a provision allowing the grantor, without the power of sale, to replenish such stock of goods, and extending the trust to cover the same. Baer Sons Grocer Co. v. Williams, 43 W. Va. 323, 27 S. E. Rep. 345.

So a reservation in a deed to secure creditors, of the right to manage property therein conveyed for three years before sale, the rents and profits in the meantime to belong to the creditors secured, is not such an unreasonable restraint upon the power of sale as to constitute a fraud in itself. Noyes v. Carter (Va.), 23 S. E. Rep. 1.

In Kevan v. Branch, 1 Gratt. 274, the court held that a deed of trust for the benefit of creditors was not fraudulent, which conveyed among other things, cattle, household and kitchen furniture, and debts, without specification, either in the deed, or by schedule accompanying it; and further provided that the grantor should remain in possession of the property, for six months; and that no creditors

should have the benefit of the trust, who did not release the grantor from any further liability, in three months. Phippen v. Durham, 8 Gratt. 457.

And in Baldwin v. Van Wagener, 33 W. Va. 293, 10 S. E. Rep. 716, where a piano was delivered under an agreement in writing purporting to rent the same at $10 per month, the owner agreeing that when $300, the value of the piano, was paid in such monthly payments or otherwise, the title to the piano should vest in the renter, the court held, that such writing showed a sale upon a condition precedent, and, under the provisions of sec. 3, ch. 74, W. Va. Code 1887, the reservation of the title, unless a notice thereof is duly recorded, is void as to the creditors of the purchaser.

However, where a vendor agrees to sell to the vendee personal property for a price agreed to be paid at any future time, and delivers possession, but expressly retains title until payment, it is a conditional sale, and though by parol or by an unrecorded instrument, it is, nevertheless, valid as against vendee's creditors or subsequent purchasers, with or without notice. This on the ground that such transaction, not being a chattel mortgage, but a conditional sale does not come within the scope of the Va. Code of 1873, ch. 114, § 5. McComb v. Donald, 82 Va. 903, 5 S. E. Rep. 558 (1876); O. D. Steamship Co. v. Burkhardt, 31 Gratt. 664 (1879). But see Va. Code 1887, § 2462, which provides that, every sale or contract for the sale of goods or chattels, wherein the title is reserved until the same be paid for in whole or in part, or the transfer of the title is made to depend on any condition, and possession be delivered to the vendee, shall be void as to creditors of, and purchasers for value without notice from said vendee, unless such sale or contract be evidenced by writing executed by the vendor, in which the said reservation or condition is expressed, and until and except from the time the said writing is duly admitted to record in the county or corporation in which said goods or chattels may be, etc.

e. Provisions Conferring Special Powers upon the Trustee, and Providing for His Compensation—Validity.—A discretionary power vested in a trustee to run and operate the business for a year, if he deem it wise to do so, having in view the interest of the creditors secured, does not render void *per se* a deed of conveyance of a stock of goods. Nor is such deed rendered void by the further provision empowering the trustee to replenish the stock by cash purchases of such articles as will aid in keeping up the business, and disposing of the other stock to better advantage. Hurst v. Leckie, 97 Va. 550, 34 S. E. Rep. 464. See also, Williams v. Lord, 75 Va. 390.

Thus, as held in Marks v. Hill, 15 Gratt. 400, a provision in a deed of trust to secure creditors, that the trustee may continue the business and replenish the stock, if intended merely as a means of realizing the trust fund, and with a view to winding up the business, is not fraudulent *per se*, so as to avoid the deed. And in such a case a provision in the deed that one of the grantors shall attend to the business, he being under the control of the trustee, who may at any time on his motion, and shall at the request of creditors, sell the property at auction, is not fraudulent *per se*, so as to avoid the deed. Harden v. Wagner, 22 W. Va. 356. Neither will a provision in a deed of trust authorizing the trustee to sell the property at private sales render the deed fraudulent on its face. Landeman v. Wilson, 29 W. Va. 702, 2 S. E. Rep. 203.

And a trust deed given to secure a note payable one day after date which conveys personal property and choses in action, is not fraudulent merely because it provides that the trustee shall sell the property conveyed *on demand* by the *cestuis que trust* or either of them. Harden v. Wagner, 22 W. Va. 356. So a provision in a deed of trust on a stock of goods to secure creditors, which authorizes the trustee to dispose of the stock in due course of trade, does not render the deed fraudulent on its face, nor is the deed rendered void by a failure to provide in express terms for a sale by the trustee on request of the creditors secured. Taylor v. Mahoney, 94 Va. 508, 27 S. E. Rep. 107. Similarly a conveyance to a trustee of a stock of goods to secure creditors, which authorizes the trustee to sell in the usual course of trade for a limited period, and to that end to employ clerks and salesmen, is not invalidated by the fact that the trustee employs the grantor as his chief salesman to dispose of the stock of goods. Hurst v. Leckie, 97 Va. 550, 34 S. E. Rep. 464.

Moreover, a provision in a deed of trust for 10 per cent. commissions for the trustee, though more than provided by statute, is not evidence of fraudulent intent, this not being shown to be excessive or unreasonable compensation. Harvey v. Anderson (Va.), 24 S. E. Rep. 914.

f. Special Privileges Given to Certain Creditors—When Valid.—The inclusion, in a deed of trust to secure certain creditors, of the balance due on a building contract, without regard to rights of subcontractors, has little if any weight on the question whether the deed was made with fraudulent intent. Harvey v. Anderson (Va.), 24 S. E. Rep. 914.

And where a deed of trust is made by an insolvent debtor conveying his household and kitchen furniture to secure a *bona fide* debt due from him to his mother and payable at six months, with a provision in the deed that the creditor shall retain the possession, use and enjoyment of the property, until there is a default in the payment of the debt at maturity, and the trustee be required by the debtor to sell the same, the conveyance is valid. Klee v. Reitzenberger, 23 W. Va. 749.

But where a deed of trust is made about the same time by the same debtor, conveying the store goods and merchandise in his store to secure other creditors, with provisions of a similar character, it is invalid; and what purports to be an absolute sale of the same goods made shortly afterwards by the debtor to the principal creditor secured in the deed of trust, without the consent of the trustee or the other creditors, in consideration of the debts secured in the deed, but without any actual delivery of the goods so sold, and the seller afterwards conducts the store in the name of the purchaser, will be held to be a part of the same fraudulent transaction, and under the circumstances both the trust deed and the subsequent pretended sale will be held fraudulent and void as to the creditors of the grantor. Klee v. Reitzenberger, 23 W. Va. 749.

C. CASES ILLUSTRATING CIRCUMSTANCES UNDER WHICH TRANSFERS HAVE BEEN DECLARED VALID, THOUGH ATTACKED AS FRAUDULENT.

Sale of Land by Execution Debtor.—A sale of a tract of land, by a debtor charged in execution, is not necessarily fraudulent and void as to the creditors at whose suit he is in custody, but may be supported, if made to a *bona fide* creditor, for a reasonable consideration, and without any secret agreement, or understanding between the parties, that the land is

to be holden for the use and benefits of such debtor. Bullock v. Gordon, 4 Munf. 450.

Conveyance by Wife Immediately before Marriage.—And a conveyance made by a woman immediately before her marriage is *prima facie* good, and can be impeached only by proof of fraud. Pusey v. Gardner, 21 W. Va. 469.

Thus, in Prior v. Kinney, 6 Munf. 510, an agreement was made between two unmarried sisters, that the property of the one who should die first, or be married, should, in either event, belong to the other; in consideration of which agreement, one of them, by a deed of gift executed two days before her marriage, conveyed all her slaves to her sister, who, after the marriage, lived partly with her, and partly with her brother; permitting the husband (who was in embarrassed circumstances), to have the use of the slaves; except two, whom the donee retained in her own employment, and principally to wait upon herself. This deed, though admitted to record on the oath of one of the subscribing witnesses, one swearing to the handwriting of another who was dead, was adjudged not to be fraudulent as to the creditors of the husband, notwithstanding a judgment for the debt had been rendered against him, and was unsatisfied, when it was executed, and when the marriage was solemnized. See Leonard v. Smith, 34 W. Va. 442, 12 S. E. Rep. 479.

Conveyance from Child to Parent.—So a conveyance from a child to its parent, whether with or without a valuable consideration, is presumed to be valid in the absence of any circumstances of proof tending to show fraud, misrepresentation or undue influence, on reasonable ground, from which the court may presume that the act was not entirely free and voluntary on the part of the child. Pusey v. Gardner, 21 W. Va. 469.

Conveyance by Insolvent in Consideration of an Antecedent Debt—Creditor Knows of Insolvency.—Moreover, a conveyance in consideration of an antecedent debt, from an insolvent to his creditor, without fraudulent intent in the creditor though the creditor know of his debtor's insolvency, does not alone stamp the conveyance as one fraudulent in fact and utterly void; but it stands for the benefit of all creditors, including the one thus preferred. Herold v. Barlow (W. Va.), 36 S. E. Rep. 8.

Title Bond Given in Husband's Name, but Consideration Paid Out of Wife's Separate Estate.—So in Hamilv. Steele, 22 W. Va. 348, the court declares, that if a title bond for land is executed by a vendor of the land to a husband, and the consideration is paid by the husband as the agent of his wife, directly from the proceeds of the sale of certain separate estate belonging to the wife, the husband having no estate or means of his own, and the circumstances show that the purchase is made for the wife, and the deed is subsequently made by the vendor directly to the wife, such deed is not fraudulent as against the creditors of the husband, and the land cannot be subjected to the payment of the debts of the husband's creditors.

Consideration Composed of a Promise to Pay Off Grantor's Debts and Abandon a Suit for Divorce.—And in Casto v. Fry, 33 W. Va. 449, 10 S. E. Rep. 799, a worthless husband, indebted to insolvency, in pursuance of an agreement that his wife would abandon her purpose to sue for a divorce, and that she and her sons would pay certain specified debts of the husband, which he asserted and they believed were all he owed, amounting to over $800, conveyed to a third person, who on the same day conveyed to the wife, real estate worth from $600 to $800. The wife and sons at the time assumed to pay, and afterwards, in good faith and without notice of any fraud, did pay off said debts. Upon these facts the court declared that, the conveyance was valid as against the creditors of the husband whose debts existed prior to and at the time of the conveyance, but of which the wife had no notice.

Assignment of Bond in Consideration of Maintenance—Validity as to Existing Creditors.—Likewise in Hisle v. Rudasill, 89 Va. 519, 16 S. E. Rep. 673, two maiden ladies, the one an invalid and the other fifty-five years old, without means except certain bonds of uncertain value, assigned these bonds to a certain assignee, in consideration that this assignee would support them during their lives. The assignee did not know certain prior creditors of theirs, these creditors taking no steps to enforce their claims until more than twenty years after the assignment was made. Thenceforth they both resided with the assignee; the invalid continuing with him twenty-three years, until her death, the other still continuing. There was no evidence that the transaction was voluntary or fraudulent. Neither assignor sought to annul it. The court held upon these facts that it was a contract of hazard and the bill of the prior creditor to set it aside was without merit.

Execution Creditor Purchases the Debtor's Property and Permits It to Remain in His Possession.—So in Wilson v. Butler, 3 Munf. 559, a suit on a bond was brought against the debtor in a county in which he did not reside; he confessed judgment on the return of the writ, and furnished the sheriff having the execution, with a list of slaves, and other property of his, to be advertised for sale at his house; the property (without being seen by the sheriff until the day of the sale) was advertised, and sold to the creditor, for a fair price, though no other person bid; the creditor (whose claim was proved to be just and *bona fide*), being a brother of the debtor's wife, permitted the property to remain in the debtor's possession, and within five years afterwards, conveyed the same, in trust, for the use of the wife and children of the debtor, by a deed recorded in a different county from that in which the property was. The court held that none of these circumstances were considered unfair; and the deed was adjudged to be good against others creditors.

Land Conveyed in Consideration of Stock—Effect as to Creditors.—And in Baker v. Naglee, 82 Va. 876, 1 S. E. Rep. 191, a grantor conveyed land, in exchange for stock, to an incorporated company, which conveyed it to secure bonds issued by it. The grantor's creditor subsequently filed a bill, alleging that the grantor and the company were one and the same, and that the conveyance was a contrivance to hinder, delay and defraud his creditors; and prayed that the conveyance be annulled and the issue and sale of the bonds be enjoined. The court held the conveyance valid, the stock a valuable consideration, and that there was no proof of fraud in the transaction.

Purchase under Deed of Assignment, by Mother and Aunt of Assignor—Subsequent Sale to Wives of Assignors—Business Managed by Husbands.—In Catlett v. Alsop (Va. 1901.) 7 Va. Law Reg. 625, a purchaser at a sale by the trustee under a deed of assignment made by a firm, was the mother of one of the partners and aunt of the other. She purchased the stock of goods for $1,500, to be credited

on her debt of $3,000, preferred in and secured by the assignment. She continued business in the name of the firm as her agent. Subsequently she sold the stock to the wives of the partners on their agreement to pay her the balance due from the firm. This agreement was reduced to writing a year later. On payment of such balance, she relinquished to the wives all claim to the stock of goods, and they continued the business under the management of their husbands, but in their own names. The wives had no experience in business, nor separate estates, when they contracted to purchase the goods. The Va. Code of 1887, § 2287, allows a married woman to carry on business on her own account and § 2285 provides that her own separate estate shall not be subject to the use or control of her husband, or for his debts or liabilities. The court held, that no fraud was shown sufficient to subject the profits of the business and property purchased therewith to the claims of the creditors.

III. RIGHTS AND LIABILITIES.

A. IMMEDIATE PARTIES.

1. VENDOR AND VENDEE.

a. In General.—A deed, though fraudulent and void as to creditors, is nevertheless valid and binding between the parties to the fraud, which brought it into existence. Core v. Cunningham, 27 W. Va. 207; Thomas v. Soper, 5 Munf. 28; Alexander v. Deneale, 2 Munf. 341; Gay v. Moseley, 2 Munf. 543; Robertson v. Ewell, 3 Munf. 1. And in Far. Bank v. Corder, 32 W. Va. 233, 9 S. E. Rep. 220, it is held to be error for the court to set it aside *in toto*. Linsey v. McGannon, 9 W. Va. 154; Thornburg v. Bowen, 37 W. Va. 538, 16 S. E. Rep. 825.

But a party who, to hinder and delay his creditors, fraudulently conveys his property to another, cannot, except under peculiar circumstances, maintain a bill to rescind the contract. The grantor and grantee being generally *in pari delicto*, neither is entitled to come into equity. James v. Bird, 8 Leigh 510.

And where a suit has been brought to set aside a deed as fraudulent and subject the land to the payment of a judgment, which with interest is less than $100, but the land is worth $150, the judgment debtor, and grantor, is not entitled to appeal from a decree declaring the deed fraudulent, but the grantee, whose land is subjected, the value thereof being more than $100, is entitled to an appeal. Parker v. Valentine, 27 W. Va. 677.

And where a suit has been brought to subject land to the payment of a lien, and to set aside a fraudulent conveyance, and the report of the sale has been made, and it is found that there will not be sufficient money produced by the sale to pay the lien, expense of sale and costs, there should be rendered a personal decree against all the fraudulent grantors and grantees, for whatever costs remain after providing for the payment of the liens and expenses of the sale. Hinton v. Ellis, 27 W. Va. 422.

And it is well to observe in this connection, that where property is incumbent to its full value by reason of prior liens thereon, an insolvent debtor may convey it in satisfaction of such prior liens, without rendering it subject to the provisions of section 2, ch. 74, W. Va. Code 1891; for such conveyance is not to the exclusion or prejudice of other creditors, but only amounts to the surrender of a valueless equity of redemption. Johnson v. Riley, 41 W. Va. 140, 23 S. E. Rep. 698.

b. Vendor.—Until there is a legal lien by judgment or execution fixed upon the debtor's property, he may, though insolvent or in failing circumstances, convey or transfer his estate in trust; and if it be done in good faith, he may thereby prefer one creditor to another without committing fraud, within the statute, upon the creditors who are delayed or hindered by such conveyance. Nor is it an objection that the conveyance defeats all other creditors of their legal remedies, though they be a majority in number and value. Harden v. Wagner, 22 W. Va. 356.

Claim of Homestead—Deed Annulled and Set Aside.—And where there is a fraudulent conveyance of property, which is subsequently annulled at the suit of a creditor, the grantor is not estopped as against such creditor to assert his right of homestead in the premises. Wray v. Davenport, 79 Va. 19; Marshall v. Sears, 79 Va. 49; Hatcher v. Crews, 83 Va. 371, 5 S. E. Rep. 221; Wilkinson v. Merrill, 87 Va. 513, 12 S. E. Rep. 1015; 1 Min. Inst. (4th Ed.) 910-911. See also, Mahoney v. James, 94 Va. 180, 26 S. E. Rep. 384; Shipe v. Repass, 28 Gratt. 716; Russell v. Randolph, 26 Gratt. 705; Boynton v. McNeal, 31 Gratt. 456; Calhoun v. Williams, 32 Gratt. 18; Oppenheim v. Myers (Va. 1901), 7 Va. Law Reg. 269.

In this latter case it was held, that where a bill is filed to set aside as fraudulent a deed made by a married woman, her husband having died leaving infant children dependent on their mother for a support; and the deed is set aside as fraudulent and the widow claims the homestead, that the right of the widow to claim the homestead is superior to the lien given creditors by § 2460, Va. Code 1887, relative to setting aside fraudulent conveyances, on filing their bill.

Sale Induced by Fraud—Vendor's Rights.—It may be observed in this connection that the doctrine is now well established, that if the owner is fraudulently induced to sell his goods (fraud in the inducement as distinguished from fraud *in esse contractus*), yet the sale passes the title, and that the vendor, on discovering the fraud, may disavow the sale and reclaim the goods, provided they have not passed into the hands of a *bona fide* purchaser. Oberdorfer v. Meyer, 88 Va. 384, 13 S. E. Rep. 756.

Fraudulent Vendor's Liability to a Bona Fide Purchaser.—And in Whitehorn v. Hines, 1 Munf. 557, the court declares that a *bona fide* purchaser, without notice of fraud, having received a deed from two persons (one of whom fraudulently induced the other to join therein), is not responsible in equity; but the loss ought to fall on the fraudulent vendor.

c. Married Women as Vendors.—Where it is clearly shown that a married woman holds a *bona fide* debt against her husband, she is entitled to the same legal rights as any other creditor, except as to remedy. Righter v. Riley, 42 W. Va. 633, 26 S. E. Rep. 357. And in the absence of fraud, a settlement upon a wife by her husband, will not be disturbed unless it manifestly appears to be grossly excessive. Burwell v. Lumsden, 24 Gratt. 443; Payne v. Hutcheson, 32 Gratt. 812; Kanawha Val. Bk. v. Wilson, 25 W. Va. 242. So improvements afterwards put upon the property by the husband or father cannot be subjected by creditors to the payment of their debts, unless such improvements were put upon the property with intent to hinder, delay or defraud the creditors of the husband or father. Lockhard v. Beckley, 10 W. Va. 87.

See, in this connection, Hall v. Hyer (W. Va. 1900), 37 S. E. Rep. 594, in which case a solvent husband put improvements on his wife's separate property

to the amount of $1,100; afterwards, she as surety, joined in a deed of trust on the property to secure his individual indebtedness to an amount in excess of $1,100. It was held that, former creditors of the husband could not attack such property because of the gift of the improvements by the husband to the wife, so long as such trust debt remained unpaid by the husband, and the wife was liable for the same, as such trust debt unpaid was equivalent to revocation of the debt.

As a consideration to support such settlement, dower to the extent of its value, or the wife's equity in property, is deemed a valuable consideration. Walden v. Walden, 33 Gratt. 88; Burwell v. Lumsden, 24 Gratt. 443. It is further held that, the participation of the wife in the fraud of the husband will not impair her rights, where she has given an equivalent for the property out of her dower. Blanton v. Taylor, Gilmer 209. And formerly, it was settled principle of law, as declared in Clay v. Walter & Co., 79 Va. 92, that whatever the design of the grantor, a settlement on a woman in contemplation and in consideration of marriage, was valid, unless her knowledge of his intended fraud was clearly and satisfactorily proved; and it was held that service by creditors of the grantor, of written notice on the grantee before the marriage, of the grantor's fraudulent design in making the settlement, could not affect her constructively with notice of such design, but her actual knowledge of and participation in the fraudulent design must be clearly established by proof. If valid, the wife was deemed a purchaser for value of the property settled on her, in consideration of the marriage, and was entitled to hold it against all the world. Herring v. Wickham, 29 Gratt. 628. See also, Moore v. Butler, 90 Va. 683, 19 S. E. Rep. 850; Triplett v. Romine, 33 Gratt. 651; Coutts v. Greenhow, 2 Munf. 363; Eppes v. Randolph, 2 Call 125; Shobe v. Carr, 3 Munf. 10; Huston v. Cantril, 11 Leigh 136; Bentley v. Harris, 2 Gratt. 357; Welles v. Cole, 6 Gratt. 645; Fones v. Rice, 9 Gratt. 568; 1 Min. Inst. (4th Ed.) 319; 6 Am. & Eng. Enc. Law (2d Ed.) 724. But see Va. Code 1887, sec. 2459, where it is provided that as against creditors whose debts were contracted at the time the conveyance or settlement was made, marriage shall no longer be a valid consideration. Barton's Ch. Pr. (2d Ed.) 549, 550, 561, 575, 578.

Thus, the court expresses itself in Quarles v. Lacy, 4 Munf. 251: "Although it is not competent to a husband, after his marriage, to defeat or obstruct his creditors, by selling or exchanging his property, and taking a conveyance of the money or other property received therefor, to the use, or for the benefit of his wife and family (such conveyance being deemed voluntary, and fraudulent as to creditors); yet the case may be otherwise in relation to so much of such money or other property as goes to compensate the just interest of the wife. If, therefore, the wife relinquish her right of dower in other land, in consideration of such conveyance, the value of such dower ought to be saved to her, in opposition to the claims of her husband's creditors." Johnston v. Gill, 27 Gratt. 587.

But in Harrison v. Carroll, 11 Leigh 476 (1841), a husband and wife made a parol agreement, that the husband should settle personal property to the separate use of the wife, on condition that the wife would relinquish her contingent right of dower in lands of the husband, which he proposed to convey for the benefit of creditors. The settlement upon the wife was accordingly executed. Subsequent to the execution of this deed of settlement, a creditor of the husband obtained judgments against him, and sued out a *fieri facias* thereon, and delivered it to the sheriff. Some time after this, the wife, in pursuance of her agreement, joined her husband in a deed conveying the lands. Upon these facts, the court held that the property settled on the wife was liable to the execution of the judgment creditor, and that it was not proper for a court of equity to restrain the creditor from proceeding to make his debt out of same. This on the ground that the agreement which was the ostensible consideration, in no wise bound the wife, and in respect of every legal obligation on her, or remedy on the part of the husband or his creditors, the agreement was a mere nullity. And in the case of a mere parol unexecuted contract, between husband and wife, where nothing passed from the wife, no obligation was incurred, and no remedy existed to compel her to convey anything.

Moreover, where a wife is induced to unite with her husband in conveying away her interest in his real estate, upon condition that certain and specific property shall be settled on her in consideration of her thus parting with her rights, if such settlement is set aside and annulled at the instance of the husband's creditors, she has the right to be placed in the same position, and restored to the same rights, with which she was invested by law before she united in the deed of which the specific settlement was the consideration. However, this must be without prejudice to the rights of creditors or purchasers. Davis v. Davis, 25 Gratt. 587. So if property of the wife which a court of equity would direct to be settled upon her, is conveyed by the husband to a trustee for her benefit, the court will sustain the deed against creditors of the husband. Poindexter v. Jeffries, 15 Gratt. 363. And in Bentley v. Harris, 2 Gratt. 357, it is held, that if an embarrassed debtor makes a voluntary conveyance of personal property, to an unmarried female, and afterwards, upon her marriage, the property is settled to the use of the wife for life, and at her death to her children, it is not liable for the debts of the first donor. Bentley v. Harris, 2 Gratt. 357.

But, if it appears that the wife actively participated in the attempt to sustain a conveyance by claiming that a conditional and unfounded indebtedness is a part of the consideration for the property, the conveyance will be treated as fraudulent in fact, and void *in toto* as to the creditors of the husband, and will not be permitted to stand as security to the wife for the valid portion of the consideration paid by her, as against the creditors of her husband. Webb v. Ingham, 29 W. Va. 389, 1 S. E. Rep. 816.

d. Vendee.

(a) **In General.**

If the grantee in a deed be a *bona fide* purchaser for a valuable consideration, his or her title is unassailable, whatever may have been the motives or intentions of the grantor in executing the deed. It is absolutely essential that both parties shall concur in the fraud, to invalidate the deed. Herring v. Wickham, 29 Gratt. 628.

Moreover, where there is no pretense of fraud in procuring a deed, creditors of a grantor upon debts contracted since the execution of the deed cannot subject the land to the payment of their debts. Irvine v. Greever, 32 Gratt. 411.

And to avoid a deed at the suit of a subsequent

creditor, actual fraud must be shown. Johnston v. Zane, 11 Gratt. 552.

Thus, in Fischer v. Lee, 98 Va. 159, 35 S. E. Rep. 441, the court declares, that proof of the fraud of a grantor or transferrer of property is not sufficient of itself to avoid an assignment or transfer thereof, where value has been paid, but it must also be proved that the grantee or transferee had notice of the fraud or evil design of his vendor, or of facts and circumstances naturally calculated to excite suspicion in the mind of a person of ordinary care and prudence, and which would naturally prompt him to inquire before consummating the purchase, and that such enquiry, if diligently pursued, would have led to the knowledge or notice sought to be imputed.

And the doctrine is similarly stated in Newberry v. Bank of Princeton, 98 Va. 471, 36 S. E. Rep. 515, where it is said, that if the grantee in a fraudulent deed had knowledge, at the time of the conveyance, of facts and circumstances which were naturally and justly calculated to excite suspicion in the mind of a person of ordinary care and prudence, and which would naturally prompt him to pause and inquire before consummating the transaction, and such inquiry would have necessarily led to a discovery of the fact with notice of which he is sought to be charged, he will be considered to be affected with such notice, whether he made inquiry or not. But while the fact of notice may be inferred from circumstances, as well as proved by direct evidence, yet the proof must be such as to affect the conscience of the purchaser, and must be so strong and clear as to fix upon him the imputation of *mala fides*.

But it should be noted that, if a debtor in his lifetime conveys his lands to a grantee by deed, and after the death of the debtor certain of his creditors file their bill to set aside the deed as fraudulent and to subject the lands to the payment of their debts, the grantee of such lands may contest the claims of the creditors on the ground that they are barred by the statute of limitations or otherwise. Werdenbaugh v. Reid, 20 W. Va. 588.

In a suit to set aside a fraudulent deed, where it appears that the grantee acquired notice of the fraud before he had paid bonds given for deferred payments of purchase money, and also had notice of the plaintiff's execution against his grantor, a decree should be entered against the grantee in favor of the plaintiff for the amount of such bonds and the interest thereon from maturity. Newberry v. Bank of Princeton, 98 Va. 471, 36 S. E. Rep. 515.

And if a grantor conveys a tract of land to a grantee with intent to defraud his creditors, of which the grantee has notice, and the grantee conveys the land to an innocent purchaser for value, and the first grantee receives this sum, which is proved by the evidence in the cause, and the court sets aside the deed from the first grantor to the first grantee, for fraud, and renders a personal decree for the amount with interest which the first grantee received for the land, it is no error. And there is no necessity for an account to see what the value of the land is, unless the appellant is dissatisfied with the value as fixed by the first grantee, as the first grantee is not prejudiced by being required to pay only what he received in fraud of the creditors of the first grantor. Hinton v. Ellis, 27 W. Va. 422. So there may be a money recovery against a fraudulent grantee of property who has sold such property to a *bona fide* purchaser and realized money therefrom in favor of the defrauded creditor. Ringold v. Suiter, 35 W. Va. 186, 13 S. E. Rep. 46.

In Williamson v. Goodwyn, 9 Gratt. 503, the vendor sold a number of slaves at a price much below their value, for the purpose of defrauding his creditors, and soon afterwards died. The vendee executed to him her bonds for the purchase money, and the vendor assigned the bonds to *bona fide* creditors. The vendee sold a part of the property and discharged the bond, and then conveyed the remainder of the property to the widow and child of her vendor. Upon the bill filed by the creditors of the deceased vendor to set aside these deeds as fraudulent, the court set them aside, and the property conveyed in the last of them was sold and the proceeds were applied to pay the claims of the creditors. And as all the creditors of the deceased vendor were not satisfied out of this fund, his vendee was held liable to satisfy them to the extent of the price of the property sold by her, the vendee.

Moreover, if a deed be set aside as fraudulent and void as to creditors of the grantor, because the same was made with intent to hinder, delay and defraud such creditors, and a part of the consideration of such deed was the satisfaction of a *bona fide* debt due from the grantor to the grantee, such fraudulent grantee is not entitled to charge the lands thereby attempted to be conveyed with the amount of such *bona fide* debt. Kan. Val. Bk. v. Wilson, 25 W. Va. 242.

(*b*) **Bona Fide Purchasers.**—See *post*, "Deeds of Trust."

Under ch. 74, W. Va. Code 1900, a *bona fide* purchaser for valuable consideration, who has no notice of the fraudulent intent on the part of his immediate grantor, and the fraud rendering the title of such grantor void, is protected. Root-Tea-Na-Herb Co. v. Rightmire (W. Va.), 36 S. E. Rep. 359. See Goshorn v. Snodgrass, 17 W. Va. 717; Va. Code 1887, § 2458; Garland v. Rives, 4 Rand. 282; Lockhard v. Beckley, 10 W. Va. 88.

But one, who purchases from a fraudulent grantee with notice of the fraud and of the invalidity of his title, can acquire no better right than the fraudulent grantee has. He cannot be protected as a *bona fide* purchaser, but must stand in the shoes of his grantor. Goshorn v. Snodgrass, 17 W. Va. 717; Spence v. Smith, 34 W. Va. 697, 12 S. E. Rep. 828.

Nevertheless, a *bona fide* sale, for a fair price, to an innocent purchaser, should not be set aside at the instance of the creditor of the grantor, on the grounds of alleged fraud, for the sole reason that in the opinion of sundry witnesses the property might have brought a larger price if sold on credit. Douglass v. Douglass, 41 W. Va. 13, 23 S. E. Rep. 671.

Moreover, if a person defrauds another of slaves, and afterwards makes a deed conveying them to a trustee to secure a debt, and the trustee sells the property to a *bona fide* purchaser for value and without notice, and the purchaser then conveys the property to a third person, the latter purchaser is entitled to hold the slaves against the person defrauded, whether he had notice of the fraud or not. In the former case, he holds a valid title under the purchaser; in the latter, he is himself a *bona fide* purchaser without notice of the fraud. Montgomery v. Rose, 1 P. & H. 5. And where a deed conveys and assigns property in trust, to be applied to discharging a bond executed by a wealthy and unembarrassed father to his daughter, to be paid to her on her marriage, it is valid as against creditors of the father, becoming such after the marriage of

the daughter, although at the time of the execution of the deed, the father was embarrassed to insolvency. Welles v. Cole, 6 Gratt. 645. So where a child, who is an infant, is deemed a purchaser for valuable consideration, of a slave, the circumstance that the child resides in the family of its father, and there keeps the slave, over whom it exercises every act of ownership, will not entitle the creditors of the father to disturb the possession of the child, although the father had included the slave in a mortgage, to indemnify the mortgage against certain securityships. Braxton v. Gaines, 4 H. & M. 151.

Moreover, upon a *bona fide* sale of personal property though the vendee does not take possession at the time of the sale, yet if he does get possession before an execution is issued against the vendor, his title is good as against the creditors of the vendor. So also, where a *bona fide* vendee of personal property has gotten possession of the property before the issuing of an execution against the vendor, his title is good as against the creditor of the vendor, though after such possession by the vendee, he employs the vendor as his agent to sell the property; and the vendor is in possession as the agent of the vendee at the very time that the execution issues, and is levied upon it. M'Kinley v. Ensell, 2 Gratt. 333.

And although, if a son obtain a conveyance for land purchased by his father, the conveyance may be set aside for fraud by a creditor of the father, whilst the land is in the hands of the son; yet, if the son sell and convey the land to a third person for valuable consideration, who has no notice of the fraud between father and son, such third person being a *bona fide* purchaser, will be protected in his purchase against creditors of the father from the operation of the statute of frauds, by his proviso. Coleman v. Cocke, 6 Rand. 618.

However, a widow having received her distributable share of the personal estate of her husband, is not a purchaser for value, so as to be entitled to set up the defence of purchaser for value without notice. And if in such case the husband has obtained slaves by a conveyance fraudulent as to the creditors and grantor, and one of the slaves has been allotted to the widow, a slave in her possession may be taken in execution at the suit of the creditor of the grantor, though the husband and those claiming under him have been in possession of the slave more than five years. Snoddy v. Haskins, 12 Gratt. 363.

It is to be further observed, however, that if a *bona fide* purchaser, without notice of fraud, who has received a deed from two persons (one of whom fraudulently induced the other to join therein), is not responsible in equity; but the loss ought to fall on the fraudulent vendor. Whitehorn v. Hines, 1 Munf. 557.

2. TRUSTEE AND CESTUI QUE TRUST.—In order to make void a deed of trust, notice of the grantor's fraudulent intent must in some way be brought home to the trustee, or to the creditor. Douglass, etc., Co. v. Laird, 37 W. Va. 687, 17 S. E. Rep. 188; Baer Sons, etc., v. Williams, 43 W. Va. 323, 27 S. E. Rep. 345. Thus, a deed which conveys land to secure a *bona fide* debt due to the grantee, and also a debt to the grantor's wife, which is voluntary and fraudulent as to his creditors, and the nature of which debt is known to the grantee, is null and void as a security for the first as well as the last-mentioned debt, as against subsequent incumbrancers and creditors of the grantor. Lewis v. Caperton, 8 Gratt. 148.

It is a settled principle, nevertheless, that the beneficiaries in a deed of trust are affected with notice to the trustee, although he did not know of the existence of the deed or of an intention to make it until it was recorded, and then immediately declined the trust. Merchants' Bank v. Ballou, 98 Va. 112, 32 S. E. Rep. 481.

But where a trust deed secures many debts in separate classes or to different persons, the simple fact that a part of the debts secured are shown to be invalid or voluntary will not make the deed invalid as a security for other and *bona fide* debts secured therein. Cohn v. Ward, 32 W. Va. 34, 9 S. E. Rep. 41. However, a debtor cannot convey his property to a trustee to secure creditors and reserve an interest in or control over the property inconsistent with the grant, and adequate to its defeat, but a direction of the trustee, "when so required by the creditors, to take charge of said property and sell the same at public auction" is not of itself such reservation of interest or control as to avoid the deed. Stoneburner v. Motley, 95 Va. 784, 30 S. E. Rep. 364.

It must be observed that the trustee and beneficiaries in a deed to secure *bona fide* debts, without notice, are purchasers for valuable consideration, within the meaning of the exception in the statute, Va. Code 1849, ch. 188, § 3, p. 717; Va. Code 1887, § 3601; and will be preferred to an execution creditor of the grantor in the deed, as to a chose in action thereby conveyed. Evans v. Greenhow, 15 Gratt. 153.

Still, if a sale be fraudulent (so as to render the sale void as between the purchaser, or *cestui que trust*, and the creditors of the original debtor), yet if the deed is good, it still operates to shield the property (conveyed for the benefit of the *cestui que trust*) from the execution of the creditors of the original debtor; in other words, it operates as effectually to prevent an execution from being levied on the property as if there had been no sale. Claytor v. Anthony, 6 Rand. 285.

And although a party to whom property is conveyed upon a fraudulent secret trust, may hold it as his own, against the grantor and his representatives, yet, if the grantee assents to the trust, and executes it in part, it is not competent for such of the *cestuis que trust* as may have gotten possession of the property, to set up the fraud for the purpose of defeating the claim of the other *cestuis que trustent* to their share of the property. Turner v. Campbell, 3 Gratt. 77.

3. MORTGAGOR AND MORTGAGEE.—The possession remaining with the mortgagor, for five years, without demand made and pursued by process of law on the part of the mortgagees, does not make a case in which, under the statute of frauds the property is taken to be with the possession, and liable to the creditors of the person in possession. Rose v. Burgess, 10 Leigh 186.

4. LOANER AND LOANEE.—If a debtor remains in possession of slaves for five years, under a parol loan, they are liable to satisfy his creditors, though the possession is resumed by the lender before executions are levied upon them. Beale v. Digges, 6 Gratt. 582; Va. Code 1887, § 2461.

And in Lacy v. Wilson, 4 Munf. 313 (1814), a similar provision to section 2461 of Va. Code 1887, in force in 1814, was construed. The court declared that, the loan of the slave by a father to his daughter during her life, and a gift over to her children after her

death (being admitted to record on proof by one witness only), is not good against her husband's creditors, or purchaser from him, without notice of such deed; possession of such slaves having remained with the husband for five years without interruption. See Beasley v. Owen, 3 H. & M. 449.

So in Gay v. Moseley, 2 Munf. 543, it was held that, a slave lent either before or after the act to prevent frauds and perjuries, having remained since the commencement of that act, more than five years in the loanee's possession, without any demand made on the part of the lender, must be considered the absolute property of the party so remaining in possession, as to creditors of, and purchasers under him.

A similar but more extensive doctrine was expounded in Fitzhugh v. Anderson, 2 H. & M. 289, in which case a father, anterior to our statute of frauds, having delivered certain slaves to his son, which were proved by *verbal evidence* (without any *deed of writing*), to have been *lent*, for an indefinite period, and the son having retained the uninterrupted possession for many years, used the property as his own, and acquired credit on the strength of his possession; in a controversy between the *father*, or volunteer claimants under him, and creditors of, or fair purchasers from the son, the court said that, "the father shall be deemed to have *given* him the slaves; and on *general principles* of law and equity, independently of *any statutory provision*, the title of the creditors and purchasers will be protected. The circumstance that the father, afterwards, by his last will and testament, bequeathed the slaves to the son for life, remainder to his children, makes no difference in the case."

Moreover, a demand of slaves by the lender, who thereupon receives, and immediately redelivers them to the loanee, to be held on the same terms, as before such demand, receipt and redelivery being in private, is not sufficient to bar the rights of creditors, under the act to prevent frauds and perjuries. Boyd v. Stainback, 5 Munf. 305.

And where possession has remained with the loanee, or with those claiming under him for five years, and is then assumed by the lender, the possession must continue with the lender the full period of five years from the time it was actually assumed, before the title will be revested in the lender as against the creditor of the loanee. Pate v. Baker, 8 Leigh 80.

But a loan of slaves, though not declared by deed in writing duly recorded, and therefore void as to creditors, the loanee having continued in possession five years without such demand, as would bar their right, is nevertheless effectual between the parties and their representatives. If, therefore, the loance die in possession of such slaves, they are not to be considered assets belonging to his estate, nor can they be recovered as such; but they are liable to his creditors so far as their claims remain unsatisfied by the assets in the hands of his executor or administrator, but no farther. Boyd v. Stainback, 5 Munf. 305.

And where a father sends a slave to his son upon a loan, but the agent who takes the slave to his son neglects to inform him that the slave is a loan, such neglect of the agent does not affect the right of the father to have the slave considered as a loan. Consequently, if the father dies within five years from the time when the slave so went into possession of the son, and having by his will disposed of the slave, of which the administrator of the son has notice, the slave may be recovered for the father's estate, after five years from the loan. Dickinson v. Dickinson, 2 Gratt. 493 (1846).

5. DONOR AND DONEE.—In Wilson v. Buchanan, 7 Gratt. 334, one Webb, who was largely indebted in proportion to his property, made a gift of slaves to his married daughter, and her husband remained in possession of them for eight years. Judgment having been recovered on some of these debts, and also on other debts contracted since the gift, Buchanan became the surety of Webb in the forthcoming bonds; and was compelled to pay them. Afterwards he recovered judgment against Wilson for the amount paid by him on behalf of Webb, and as all the property of Webb had been sold at that time, by the direction of Buchanan, his (Buchanan's) executions were levied on the slaves given by Webb to his daughter, and their increase. Suit was instituted by Wilson, the son-in-law, in whose possession the slaves had been, against Buchanan and the sheriff who made the levy. The court held that, the slaves were liable to satisfy the debts of Webb.

6. ASSIGNOR AND ASSIGNEE.—The assignment of a promissory note carries with it all remedies of the assignor, including the right to attack a fraudulent conveyance. Billingsley v. Clelland, 41 W. Va. 234, 23 S. E. Rep. 812.

And, although an assignee of a bond which has been taken in payment of purchase money of land, may have notice of fraud in the sale of land, yet he cannot be placed in a worse condition than his assignor, the vendor, with reference to the payment of the purchase money. Highland v. Highland, 5 W. Va. 63.

B. THIRD PERSONS.

1. CREDITORS.

a. In General.—Any creditor who has been injured by a fraudulent deed has the right to the protection of the court; and the legal rights of such creditors cannot be made to depend upon what any other creditor, or a majority of the creditors, may say or do with regard to the debtor's property after the preferred creditors have been satisfied. Landeman v. Wilson, 29 W. Va. 702, 2 S. E. Rep. 203. And a creditor at large may maintain a suit in equity to set aside as fraudulent a deed conveying real estate, made by his debtor, both the debtor and his grantee living and being out of the commonwealth. Peay v. Morrison, 10 Gratt. 149.

Moreover, if a deed of trust secures several creditors, and one or more of the debts secured is fictitious and fraudulent, that fact does not invalidate the deed as to *bona fide* creditors secured by it, not guilty of any fraud. Cohn v. Ward, 36 W. Va. 516, 15 S. E. Rep. 140.

But it should be observed, that a creditor cannot purchase the goods of his debtor at a price in excess of his debt, when he knows that the excess so paid such debtor is by the latter to be placed beyond the reach of his other creditors. Such purchaser is a participant in the fraud of his debtor, whether his purpose be to aid him or not. Hart v. Sandy, 39 W. Va. 644, 20 S. E. Rep. 665.

Yet the statute to prevent fraudulent conveyances applies to no conveyance made *bona fide* for valuable consideration, and does not prevent a debtor in failing circumstances from preferring one class of creditors to another. However, in such case, the judgment creditor has a right to an account of the trust fund, and to the payment of his debt out of the surplus, if any, after satisfying the pre-

ferred creditors and those who accede to the composition. Skipwith v. Cunningham, 8 Leigh 271.

And it is held in Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. Rep. 570, that the fact, that an insolvent husband voluntarily bestowing his labor and skill in the business of farming carried on by his wife upon land which is her separate property, will not, in the absence of fraud, render the products of the property of the husband liable for his debts. If such products, after the support of the family, leave a surplus in property attributable to his skill and labor, equity will make a just apportionment between his wife and creditors. But see W. Va. Code 1899, ch. 74, § 2; Va. Code 1887, § 2459. Also, *ante*, "Transfers Which Are Inoperative as to Certain Persons Though Not Affected with Fraud in Fact."

b. Rights and Liabilities of Creditors under Transfers Not Affected with Actual Fraud.

In General.—A voluntary conveyance which interferes with, or breaks in upon the rights of existing creditors, will not be permitted to take effect to the prejudice of their just demands, but as to such creditors is absolutely void, without regard to the amount of the debts, the extent of the property so conveyed, the motives that prompted the settlement, or the condition or circumstances of the party at the time. Lockhard v. Beckley, 10 W. Va. 87.

And if there is an absolute bill of sale of certain personal property for valuable consideration, and the vendor notwithstanding the deed retains uninterrupted possession, and dies in possession of the property, although the vendee takes possession after his death, a creditor of the vendor, who takes administration of the estate, may file a bill in equity against the vendee, and subject such property to the debt due to the administrator, as it is fraudulent and void as to the administrator, who is also a creditor of the vendor. The rights of the vendor's creditors attach on the subject immediately upon the vendor's death,—therefore before the vendee came into possession. Shields v. Anderson, 3 Leigh 729. This case supposes that the bill of sale was not recorded.

So if a man incur debts for moneys advanced or loaned to him, which with large amounts of other moneys of his own, are voluntary and without consideration deemed valuable in law, used and invested by him in making valuable improvements upon the real estate so settled upon his wife, and in consequence thereof he becomes insolvent, and the moneys so advanced or loaned to him remain unpaid, such creditors may charge the moneys upon the real estate in the possession of his wife. Kan. Val. Bk. v. Wilson, 25 W. Va. 242.

And under Va. Code 1887, § 2459, so far as the means of an insured are withdrawn from creditors to pay premiums, they are entitled out of the proceeds of the policy to have the sums so paid, applied to their claims. Stigler v. Stigler, 77 Va. 163.

This principle is illustrated, though in its application to a different set of circumstances, in Rose v. Brown, 11 W. Va. 122. In this case a husband procured a voluntary conveyance to be made to his wife, of a house and lot. At the time the conveyance was made, he was not indebted more than $218. On that day there was paid on the property $1,500, which he had before given to his wife, and within the next two years he had $3,000, which from time to time, he paid on said property, and discharged the purchase money; and debts to the amount of about $1,250 had afterwards accumulated, after such conveyance and during the time such payments were being made. Upon these facts being presented the court held that they were insufficient to make a *prima facie* case of fraudulent intent, on the part of the husband, at the time the voluntary conveyance was by him procured to be made, consequently, the conveyance was not fraudulent in fact. But, nevertheless, in fraud of his existing creditors, he did divert his means from the payment of his debts, and invest such means in the property, so voluntarily conveyed to his wife; therefore his creditors could charge the real estate for the payment thereof.

Surrender by Grantee of a Deed of Gift—Effect on Creditors of Grantee.—And in Graysons v. Richards, 10 Leigh 57, the father by deed of gift conveyed land to his son, and shortly after this conveyance, the son voluntarily surrendered the deed to the father to be canceled, with design to divest the title out of himself and restore it to the father, to the deed so canceled. The court held, upon these facts, that the son's title was not divested by the cancellation of the deed, and that the land was chargeable in equity with the debts of the son. And further, if the creditor had obtained a judgment against the son, subsequent to the cancellation of the deed, under which the son had taken the oath of insolvency, he was not only entitled to satisfaction of his judgment out of the land as still the property of the son, but he could also claim satisfaction out of it by the simple contract debt which the son owed him; and other creditors of the son, who had not recovered judgments against him, but came in at the same time, should also be entertained to claim satisfaction of the debts due them out of the same amount.

Insolvent Father Pays Part of Purchase Money and Has Land Conveyed to Son—Rights of Father's Creditors.—So in Burbridge v. Higgins, 6 Gratt. 119, a person who was largely indebted, purchased land and paid a part of the purchase money, and had the land conveyed to his son; subsequently the son conveyed it in trust to secure the balance of the purchase money. The son then sold the land to a third person at an advance upon the price given by the father. After this a decree creditor of the father filed a bill to set aside the conveyance as fraudulent against creditors; and pending this suit the balance of the original purchase money was paid by the last purchaser out of the money due from him to the son. The court held that, the deed of trust given to secure the balance of the purchase money on the first sale, being still outstanding, though satisfied after the commencement of the suit, the plaintiff was entitled to have the whole of the purchase money, after satisfying the trust, and not a moiety only, applied to the discharge of his debt.

c. Rights and Liabilities of Creditors under Transfers Fraudulent in Fact.

In General.—Where a deed is fraudulent as to any provision therein contained, it is void *in toto* as against creditors who are entitled to take advantage of the fraud. Landeman v. Wilson, 29 W. Va. 702, 2 S. E. Rep. 203.

So where it is shown, that there was fraud in the making of the deed conveying real estate, whether the actual fraudulent intent relates to existing creditors or is directed exclusively against subsequent creditors, the effect is precisely the same, and subsequent as well as existing creditors may, for such fraud successfully impeach said conveyance.

Silverman v. Greaser, 27 W. Va. 550; Lockhard v. Beckley, 10 W. Va. 88.

And a conveyance fraudulent as to existing creditors is fraudulent as to subsequent ones. Pratt v. Cox, 22 Gratt. 330; Johnson v. Wagner, 76 Va. 587; Lockhard v. Beckley, 10 W. Va. 101; Core v. Cunningham, 27 W. Va. 206.

Moreover, under a deed fraudulent on its face no valid act can be done to the prejudice of creditors not secured therein. Livesay v. Beard, 22 W. Va. 585.

Creditors' Right to Personal Decree.—And creditors who successfully assail a fraudulent conveyance made by their debtor, are entitled to a personal decree against the fraudulent alienee, when the latter has, in the meanwhile, aliened the property to a third person. The amount of such personal decree is not limited to the price paid by the fraudulent alienee, nor to the price received by him in a subsequent alienation, but by the actual value of the debtor's interest in the property, not to exceed, however, the amount of the plaintiffs' claims against him.

And in such a case, if actual fraud has been established against the alienee, he will not be permitted to set off against the value of the debtor's property received by him, a debt due to him by the debtor, even though such debt was a part of the consideration for the conveyance. Ellington v. Moore (Va. 1897), 4 Va. Law Reg. 608.

Property Conveyed on Secret Trust—Rights of Grantor's Creditors.—So where a vendor makes a fraudulent bill of sale of a female slave, absolute on its face, in order to protect the property from his creditors, but there is a secret trust that the grantee shall hold the property for the benefit of grantor's daughters, the daughters cannot establish a secret trust in equity, and have the decree for the slave as against the creditors of the grantor. Owen v. Sharp, 12 Leigh 439.

d. Compromises by Creditors.—Under the Va. Code of 1887, §§ 2856, 2857, and 2859, regarding compromises by creditors, a creditor who compromises with one of several joint obligors, and assigns his full share of the obligation, may sue the other obligors without making the released obligor a party. And by such compromise the right of contribution between the joint obligors is not, under these sections, impaired. Penn v. Bahnson, 89 Va. 253, 15 S. E. Rep. 586.

Right to Uphold Validity of Some Debts and Assail Others.—And a creditor secured by a deed of trust, while claiming under the deed, may, nevertheless, assail the validity of other debts secured in the same deed. His attitude as purchaser does not impair his right as creditor to assail such debts as fraudulent or otherwise void. Runkle v. Runkle (Va. 1900), 6 Va. Law Reg. 613.

2. STATE.—The state has the same right as one of its citizens to maintain a suit in equity to set aside a fraudulent conveyance, and subject the land of the defendant to its demands. Thus, the state can maintain a suit to set aside a fraudulent conveyance and subject the land of the defendant to the payment of a judgment for a fine recovered against the defendant for the unlawful sale of spirituous and other liquors. State v. Burkeholder, 30 W. Va. 593, 5 S. E. Rep. 439.

3. SUBSEQUENT PURCHASERS.—A purchaser with notice, who buys of a purchaser without notice, will not be affected by a deed which declares the transfer of certain chattel property to be a loan, but which is invalid as to a purchaser without notice, from the loanee, because not recorded as required by law. Lacy v. Wilson, 4 Munf. 313.

So if a purchaser with notice, buys from a *bona fide* purchaser for value, and without notice from a trustee who makes a tortious sale, he will take a valid title. This is done out of respect for the title of the *bona fide* purchaser, who otherwise would not receive the protection which his position entitles him to. Montgomery v. Rose, 1 P. & H. 5.

And as held in Coleman v. Cocke, 6 Rand. 618, although if a son obtain a conveyance for land purchased by his father, the conveyance may be set aside for fraud by a creditor of the father, whilst the land is in the hands of the son; yet, if the son sell and convey the land to a third person for valuable consideration, who has no notice of the fraud between the father and the son, such third person being a *bona fide* purchaser, he will be protected in his purchase against the creditors of the father, from the operation of the statute of frauds, by its proviso (Code 1887, § 2458). And if the deed of such *bona fide* purchaser be not duly recorded, yet he will be protected in his purchase against a creditor of the father, who obtains a decree against the father, after the *bona fide* purchase so made, because such a purchaser has a prior equity to such creditor. For, if the original vendor had never made a deed to the son, yet the purchaser, holding the equitable title transferred from the father to the son, and from the son to him, would have had a better right to call on the original vendor for the conveyance of the legal title, than any creditor of the father obtaining a judgment against him, after his transfer of the equitable right to the son.

IV. REMEDIES.

A. IN GENERAL.—Where a debtor makes divers fraudulent conveyances to different grantees, all colluding with him to defraud his creditors, the latter may proceed, by a single creditor's bill to assail them, or any one or more, of such conveyances; and, as there is no contribution among tort-feasors, the fraudulent alienees who are made parties cannot complain that others in the same category are omitted. Ellington v. Moore, 4 Va. Law Reg. 608 (Va. 1897).

And in Commonwealth v. Ricks, 1 Gratt. 416, it is held, that a court of equity will, at the suit of a creditor of an insolvent debtor, pursue property, the avails of his labor, in the hands of parties united with him, to screen the same from his creditors, or in the hands of voluntary purchasers from such parties.

But a court of equity, upon the application of the grantor, will not interfere to set aside a conveyance made to hinder, delay and defraud creditors, on the ground of the natural weakness of mind, increased by habits of intoxication, of the grantor, if he had legal capacity to contract, unless it is shown that some advantage was taken, or undue influence exerted, to procure the conveyance. Smith v. Elliott, 1 P. & H. 307.

B. EQUITY JURISDICTION.

1. IN GENERAL.—In cases of actual fraud, a court of equity has concurrent jurisdiction with a court of law, in remedying the fraud. And equity usually follows the law, and gives relief to the same extent as a court of law. And therefore, where a creditor comes into equity to set aside a conveyance tainted with actual fraud, and the grantee has notice of the

fraud, the conveyance should be set aside *in toto*. Garland v. Rives, 4 Rand. 282.

Thus, where an *elegit* is levied on land of the debtor, but the inquisition does not set out the moiety by metes and bounds, and possession is not delivered to the creditor; and the debtor makes a conveyance of the land to third persons; and afterwards the *elegit* and return are quashed, on the motion of the creditor, who then files a bill impeaching the conveyance as fraudulent, a court of equity has jurisdiction to entertain the suit. Claiborne v. Gross, 7 Leigh 331.

But in a bill in chancery, against a debtor, as an *absent debtor or defendant*, and other defendants resident, holding lands by voluntary or fraudulent conveyances from the debtor, to have a decree against the debtor for the debt, and against the home defendants to subject the lands to the debt, the bill, in order to give the court jurisdiction, under the statute concerning attachments and suits against absent defendants, 1 Rev. Code, ch. 123, must distinctly aver the nonresidence of the debtor; and, if the home defendants in their *answers* say that the debtor is a resident, though they do not plead that matter in abatement to the jurisdiction, the plaintiff, to sustain the jurisdiction, must *prove* the fact of the debtor's residence abroad; and if his nonresidence be not distinctly averred in the bill, or if so, denied by the home defendants, be not proved, the court has no jurisdiction, and a decree for the plaintiff will be reversed on that ground. Kelso v. Blackburn, 3 Leigh 299.

Likewise, to give a court in which a homestead deed, claiming goods as exempt, is attacked as in fraud of creditors, jurisdiction over the goods, there must be a valid attachment thereof, and the attachment being dismissed, the suit should also be dismissed. Simon v. Ellison (Va.), 22 S. E. Rep. 860.

Nevertheless, in a case where a court of equity has jurisdiction of the subject-matter of the suit, whatever may be the nature or amount of the demand, the parties thereto are not entitled to a trial by a jury, except where the same is prescribed by law. Broderick v. Broderick, 28 W. Va. 378.

It should be noted, however, that a transfer from one joint debtor to another will not give equity jurisdiction to entertain a suit by the creditor of the grantor, in advance of lien by judgment or otherwise, to subject the property to his debt. Such conveyance does not come within the operation of the statute (W. Va. Code 1891, § 2, ch. 133) relating to fraudulent conveyances. The mere statement in the bill that the conveyance was from one joint debtor to the other would seem to repel any imputation of fraudulent intent, and make the bill demurrable. Moreover, the deed does not remove the property out of the reach of the usual remedy. So there is no ground for chancery jurisdiction.

So where a grantee in a fraudulent conveyance has reconveyed the property to the debtor (grantor), a court of equity has no jurisdiction of a suit by the creditor to subject the property, in advance of a lien by judgment or otherwise, merely because of such fraudulent conveyance. Guggenheimer v. Lockridge, 39 W. Va. 457, 19 S. E. Rep. 874; Witz v. Lockridge, 39 W. Va. 463, 19 S. E. Rep. 876.

2. STATUTE OF LIMITATIONS AS A BAR TO INSTITUTING SUIT.

a. Voluntary Conveyances.—The limitation of a suit to avoid an absolute conveyance on the sole ground that it is voluntary is five years from the time "*the right to avoid it accrued*" (Va. Code 1887, § 2929). The provision as it originally appeared in Va. Code 1849, ch. 149, § 13, and as it now appears in W. Va. Code 1899, ch. 104, § 14, reads, "five years from the *making of the deed*," etc.; and in Reynolds v. Gawthrop, 37 W. Va. 3, 16 S. E. Rep. 364, the court so construes it, declaring that the period of limitation begins to run from "*the making*" of the deed. Humphrey v. Spencer, 36 W. Va. 11, 14 S. E. Rep. 410; McCue v. McCue, 41 W. Va. 151, 23 S. E. Rep. 689; Scraggs v. Hill, 43 W. Va. 162, 27 S. E. Rep. 310. In Bickle v. Chrisman, 76 Va. 687, the point was made by the plaintiff, that "the limitation did not begin to run, until there was a right of action." The court declared that this was undoubtedly correct with respect to almost all of our statutes of limitation, but under the provision as contained in Va. Code 1873, ch. 146, § 16 (identical with § 13, ch. 149, Va. Code 1849), the statute began to run "*from the date of the execution of the deed*," and not, as usual under our statutes, from the time the right of action accrued. This distinction is also made in Welsh v. Solenberger, 85 Va. 445, 8 S. E. Rep. 91, decided in 1888, shortly after the Code of 1887 took effect. The change as contained in the Code of 1887, providing that the statute should begin to run from the *accrual* of the *right of action*, was evidently made for the purpose of relieving creditors against the hardships of the former law. If such was the intention, it was accomplished to an extent, yet the law as it thus stood was not wholly satisfactory, as no right of action would accrue, until there was a right to recover on the claim, which might not mature for years after the making of the conveyance. This inconvenience was overcome, and remedied, by Acts 1893-94, ch. 566, pp. 614, 615, amending and re-enacting § 2460 of the Code, and providing that "a creditor, before obtaining a judgment or decree for his claim, may, whether *such claim be due and payable or not*, institute suit to avoid the gift, conveyance," etc. The above is substantially the opinion as expressed in an editorial by JUDGE BURKS, 1 Va. Law Reg. 597, before the construction of the amendment by the Virginia Court of Appeals. The learned jurist concludes as follows, "that, under the law as it now stands, inasmuch as a creditor may institute and prosecute a suit to avoid a conveyance at any time before his claim has 'become due and payable,' the five years prescribed by section 2929 must be computed from the time his right accrued to avoid the conveyance under section 2460 as amended by the Act of 1894, though his claim be not due and payable." Therefore the statute would begin to run from the time the voluntary conveyance is made, no question of fraudulent concealment being brought into the case. The above conclusion is reached in Vashon v. Barrett (Va. 1901), 7 Va. Law Reg. 36.

But by the terms of § 2467 of the Va. Code 1878, prior to the late amendment (Acts 1895-96, p. 295, prescribing "ten" instead of "twenty" days), if the conveyance is recorded within twenty days after due acknowledgment, it is as valid against creditors, as if recorded on the day of acknowledgment. And the act of limitation to suits to avoid voluntary conveyances does not cease to run simply because no settlement has been had between parties, and the exact amount due has not been ascertained. So the mere fact that a creditor does not know that the conveyance made by his debtor is without consideration, does not stop the running of the statute of limitations. To have that effect such ignorance must proceed from the fraud of the grantee, and this should be plainly charged. The burden of proving

that the transfer, alleged to be voluntary, was made more than five years before the institution of the suit to have it set aside, is on the party pleading the statute. Vashon v. Barrett (Va. 1901), 7 Va. Law Reg. 36. And the limitation applies to a marriage settlement also, attacked upon the ground of its being voluntary. McCue v. Harris, 86 Va. 687, 10 S. E. Rep. 981. See, in general connection, Snoddy v. Haskins, 12 Gratt. 363; Williams v. Blakey, 76 Va. 254.

b. Effect When Fraud Is an Element.—Under the Va. Code 1887, § 2929, limiting the period in which suits may be brought to set aside conveyances or transfers of property, on consideration not deemed valuable in law, cases of actual fraud are not included. Snoddy v. Haskins, 12 Gratt. 363; Hutchinson v. Boltz, 35 W. Va. 754, 14 S. E. Rep. 268. This for the reason that such conveyance does not come within the purview of any statutory provision now in force. Of course, the right to institute such a suit can be lost in equity by remissness and delay in its assertion. It is true that delay in assertion of a right is always discountenanced in a court of chancery; that it does not encourage stale claims, and that a party may lose his right to complain of the fraud by delay, especially where the delay is accompanied by the loss of evidence or the death of parties, or such conditions exist as to render the court unable to pass upon the questions involved without serious risk of doing injustice. As a general rule though, in the application of statutes of limitation, equity follows the law, and wherever a demand would be barred at law, an equitable demand of the like character would be barred in equity. The bar is applied by analogy. In the cases of fraud the authorities are conflicting, as to whether at law the statute begins to run from the commission of fraud or from its discovery. It seems, however, without controversy, to be the settled doctrine in courts of equity, that the statute begins to run only from the discovery of fraud. This seems to be founded on the rule in courts of equity, that the cause of action arises as soon as a party has a right to apply to the court of equity for relief, and such right arises only when the party has actual knowledge of the fraud, or when with due diligence such knowledge could be obtained. Rowe v. Bentley, 29 Gratt. 756; Shields v. Anderson, 3 Leigh 729; Massie v. Heiskell, 80 Va. 804; Cresap v. McLean, 5 Leigh 381; Bumgardner v. Harris, 92 Va. 188; 23 S. E. Rep. 229; Reynolds v. Gawthrop, 37 W. Va. 3, 16 S. E. Rep. 364. See also, McCarty v. Ball, 82 Va. 872, 1 S. E. Rep. 189; Hutcheson v. Grubbs, 80 Va. 251; Ayre v. Burke, 82 Va. 341; Switzer v. Noffsinger, 82 Va. 523; Cottrell v. Watkins, 89 Va. 810, 17 S. E. Rep. 328; Coles v. Ballard, 78 Va. 149.

3. SPECIFIC LIEN AS A CONDITION PRECEDENT TO THE INSTITUTION OF SUIT.—Prior to the Code of 1849, it was held that a creditor at large could not have the aid of a court of equity to prevent, or interfere with, in any way, the disposition which his debtor might make of his property, unless such creditor had first proceeded as far as he could at law. To subject real estate, he must have obtained a judgment at law; and to subject personal estate, he must have obtained a judgment and execution. This was held to apply to creditors attacking a voluntary conveyance as fraudulent, on the ground of its being fraudulent and void as to themselves; likewise as to those attacking conveyance as fraudulent in fact. Chamberlayne v. Temple, 2 Rand. 384 (1824); Rhodes v. Cousins, 6 Rand. 187 (1828); Cole v. M'Rae, 6 Rand. 644 (1828); Tate v. Liggat, 2 Leigh 84 (1830); Kelso v. Blackburn, 3 Leigh 299 (1831); McCullough v. Sommerville, 8 Leigh 415 (1836). The provision as contained in the Va. Code of 1849 was, that the creditor before obtaining a judgment or decree for his claim, could institute any suit which he might institute after obtaining such judgment or decree to avoid a gift, conveyance, etc., declared void by the statutes (Va. Code 1887, §§ 2458, 2459). See W. Va. Code of 1899, ch. 133, sec. 20; Wallace v. Treakle, 27 Gratt. 479; Keagy v. Trout, 85 Va. 397, 7 S. E. Rep. 329; Batchelder v. White, 80 Va. 106; Hoffman v. Fleming, 43 W. Va. 762, 28 S. E. Rep. 790; Tuft v. Pickering, 28 W. Va. 330; Watkins v. Wortman, 19 W. Va. 78. See also, Guggenheimer v. Lockridge, 39 W. Va. 457, 19 S. E. Rep. 875; Baer v. Wilkinson, 35 W. Va. 423, 14 S. E. Rep. 3; Reynolds v. Gawthrop, 37 W. Va. 4, 16 S. E. Rep. 365; Clafflin v. Foley, 22 W. Va. 443; Jackson v. Hull, 21 W. Va. 613; Clark v. Figgins, 31 W. Va. 159, 5 S. E. Rep. 645; Sweeney v. Grape Sugar Co., 30 W. Va. 456, 4 S. E. Rep. 438. Thus the old rule, that a creditor must pursue his remedy to its furthest extent at law before a court of equity would entertain jurisdiction to grant him relief, has been abrogated by the statute above alluded to, and supported by the cases construing the statute. However, under the provision as first contained in the Code of 1849, the question, whether a creditor, whose claim was not due, came within the purview of the statute, was controverted and long unsettled. In Devries v. Johnston, 27 Gratt. 805, the court divided equally upon this question, viz.: whether a creditor could maintain a suit to avoid a fraudulent conveyance by his debtor before the maturity of his debt, under this provision (now contained in the Va. Code 1887, § 2460). Four judges only were sitting at the time. Afterwards, in Batchelder v. White, 80 Va. 103, it was held that a creditor could not bring such suit before the maturity of his claim—but in this latter case no notice whatever was taken of the decision in Devries v. Johnston, 27 Gratt. 805. See however, Simon v. Ellison (Va. 1895), 22 S. E. Rep. 860, sustaining this principle. But under the Acts of 1893-94, p. 614, Pollard's Supp. (1900), § 2460, the question is now settled, as follows, viz.: that whether such claim be due and payable or not, the creditor may institute a suit to avoid the transfer or charge. The West Virginia statute, though, does not contain this clause providing for suit when the debt is not due. See Acts 1889-90, p. 73; Davis v. Bonney, 89 Va. 758, 17 S. E. Rep. 229; 1 Va. Law Reg. 294; Barton's Ch. Pr. (2d Ed.), vol. 2, p. 543 *et seq.*

Moreover, a foreign judgment is a debt; and a suit in equity can be maintained on it to avoid a fraudulent or voluntary conveyance without first obtaining a judgment at law in this state, under § 2, ch. 133, Code W. Va. 1868. Watkins v. Wortman, 19 W. Va. 78.

But as further held, in Guggenheimer v. Lockridge, 39 W. Va. 457, 19 S. E. Rep. 874, a transfer from one joint debtor to another will not give equity jurisdiction to entertain a suit by that creditor of the grantor, in advance of lien by judgment or otherwise, to subject the property to his debt. Witz v. Lockridge, 39 W. Va. 463, 19 S. E. Rep. 876.

C. PARTIES.—In a bill brought by judgment creditors to set aside as fraudulent certain deeds, the plaintiff should make formal parties to his suit, either as plaintiffs or defendants, those who have obtained judgments in the courts of record in the county in which the lands of the debtor are situated, which are sought to be subjected to the payment of the judgments, and also all creditors who have

obtained judgments in courts of record, or before justices in any part of the state, and have had them recorded in the judgment lien docket of the county. Because if in such a suit all the judgment creditors are not made parties, either formally or informally, and this fact is disclosed by the record, the appellate court will reverse any decree directing the sale of the lands or the distribution of the proceeds thereof. Pappenheimer v. Roberts, 24 W. Va. 702; Neely v. Jones, 16 W. Va. 625.

For instance in a creditors' bill to annul deeds made by a debtor, on the ground of fraud, alleging that the debtor was thereafter adjudged a bankrupt, and had never obtained a discharge, the assignee in bankruptcy is a necessary party. Tabb v. Hughes (Va.), 3 S. E. Rep. 148 (1887).

So in a suit to annul a bond and trust deed as fraudulent, it appearing that the same had been assigned to the grantor's wife, the court, before decreeing on the merits, should require her to be made a party, and the failure to do so is reversible error, though the point was not made in the lower court. Thornton v. Gaar, 87 Va. 315, 12 S. E. Rep. 753.

And where there is a bill to set aside fraudulent conveyances made by an insolvent debtor, the trustees and *cestuis que trust* in the deeds, the sheriff of the counties in which the lands lie, and the execution creditors interested in the property, should be made parties. Clough v. Thompson, 7 Gratt. 26 (1850).

Likewise, where there is a suit brought by a judgment creditor to set aside as fraudulent and void certain deeds alleged to have been made by the judgment debtor with intent to hinder, delay and defraud the plaintiff in the collection of his debt, in order to charge the lands thereby conveyed with the payment of his judgment, the alleged fraudulent alienees are necessary parties to the suit, although they may have conveyed all lands granted to them, respectively, to other persons who are defendants in the suit. Pappenheimer v. Roberts, 24 W. Va. 702.

But in a suit by creditors of a husband to subject property which he has voluntarily conveyed away to the payment of their debts, the grantee of the husband is not a necessary party; because the conveyance, notwithstanding it may be void as to creditors, will be, nevertheless, valid between the parties to it. Herzog v. Weiler, 24 W. Va. 199.

However, if a deed of trust purports to indemnify one of the parties, as to whom the deed is charged to be fraudulent, as surety of the grantor for certain debts due to specified creditors, these creditors, as well as those secured directly, and whose debts are not assailed by the bill, are necessary parties. Billups v. Sears, 5 Gratt. 31.

And in Almond v. Wilson, 75 Va. 613, it is held that, any number of alienees may be made parties defendant to a suit to set aside conveyances on the ground of fraud, although, as between the alienees themselves, no charge of combination or confederacy is made.

It must be observed, moreover, that if the want of proper parties appears on the face of the bill, such omission will be demurrable, and the defect may be taken advantage of by demurrer, or at the hearing of the cause. But where a demurrer for such cause is sustained, the plaintiff should have leave to amend his bill. Pappenheimer v. Roberts, 24 W. Va. 702.

D. PLEADING AND PRACTICE.

1. IN GENERAL.

Filing Judgment and Execution.—In McNew v. Smith, 5 Gratt. 84, the court declared that, in a suit by a judgment creditor to set aside fraudulent conveyances of property by his debtor, the judgment and execution being admitted by the pleadings, the failure to file copies of them in the cause, is not ground for reversal of the decree of the court below, setting aside the conveyances; especially if no objection was taken in that court to the failure to file them.

Consolidating Causes.—Where creditors by several judgments file separate bills in chancery, impeaching a conveyance of land by a debtor, as fraudulent; an order of consolidation of the causes by the chancellor on motion of one of the plaintiffs, is improper. Claiborne v. Gross, 7 Leigh 331.

2. BILL, COMPLAINT OR PETITION.

a. In General.

When the Aid of a Court of Equity Should Be Refused.—A court of equity ought not to give its aid to a plaintiff claiming under a deed of gift from a person who made a previous transfer of the same property to another for the purpose of defrauding creditors; the object of the bill being to enforce a secret trust between such transferrer and transferee. Roane v. Vidal, 4 Munf. 187.

What Constitutes the Point in Litigation.—And when a bill is against fraudulent alienees, the matter in litigation is a fraud charged in the management and disposition of the debtor's property, in which charge all the defendants are interested, though in different degrees and proportions. Almond v. Wilson, 75 Va. 613.

Issuance of Execution, and Return Had, Not Conditions Precedent to Sustaining a Bill.—In State v. Bowen, 38 W. Va. 91, 18 S. E. Rep. 375, JUDGE ENGLISH declares that, where a bill is filed by the state to set aside a fraudulent conveyance made by its judgment debtor, and to subject land in the hands of a fraudulent grantee to the payment of its judgment, it is not necessary that an execution should have issued on the judgment, and that a return of *nulla bona* should be had, before such bill can be sustained. Nor is it necessary to convene the creditors of such judgment debtor, or to allege and show that the rents, issues, and profits of the land sought to be subjected will not pay the debt in five years.

Circumstances Making Proper a Dismissal of the Bill.—And where the evidence shows that a creditor was without means to have loaned money, which was claimed to be due, and was, previous to the suit, living adulterously with the pretended debtor, and that the claim and suit was a collusive scheme between the husband and the pretended creditor, to defraud the wife of the pretended debtor out of property, it will be proper to dismiss the bill. Waller v. Johnson, 82 Va. 966, 7 S. E. Rep. 382.

Filing of Petition by Creditor.—A creditor may file his petition in a cause pending, which has for its object the vacation of a fraudulent conveyance, and, upon proper allegations, be made a party to the suit, and the bill, exhibits, answers, depositions, orders, and decrees, and all the proceedings in said cause, may, upon proper prayer, be read as part of his petition. Richardson v. Ralphsnyder, 40 W. Va. 15, 20 S. E. Rep. 854.

Thus, as held in Pappenheimer v. Roberts, 24 W. Va. 702, in a suit brought by judgment creditors to set aside a conveyance on the ground of fraud, any judgment creditor, who has not been made a party,

formally or informally, and who has an unsatisfied judgment against the debtor, which was recovered before the suit was brought, may at any time before a final decree file his petition in the cause setting up his judgment and praying to be made a party to the suit, and to have his rights under his judgment adjudicated; and if this right be denied him, it will be error for which the decree of the lower court, denying such right, will be reversed in the court of appeals.

b. When a Bill Is Not Multifarious.—Where a bill in equity is brought to subject to the lien of the plaintiff's judgment his debtor's estate alleged to have been fraudulently conveyed to various persons, who are charged with having combined and colluded with the debtor to defraud the plaintiff, and who are all made parties, the bill is not multifarious. Com. v. Drake, 81 Va. 305.

So if a bill in equity is brought to subject to the lien of a plaintiff's judgment his debtor's estate, which is alleged to have been fraudulently conveyed to various persons, all of whom are made defendants; but there is no charge of combination or confederacy among the alienees, the bill is not multifarious for this cause. Almond v. Wilson, 75 Va. 613.

c. Allegations and Averments Necessary to Sustain Bill.

Nonresidence.—In a bill in chancery, against a debtor as an *absent debtor or defendant*, and other defendants resident, holding lands by voluntary or fraudulent conveyances from the debtor, to have a decree against the debtor for the debt, and against the home defendants to subject the lands to the debt, the bill, in order to give the court jurisdiction, under the statute concerning attachments and suits against absent defendants (1 Rev. Code, ch. 123), must distinctly aver the nonresidence of the debtor; and, if the home defendants in their *answers* say that the debtor is a resident, though they do not plead that matter in abatement to the jurisdiction, the plaintiff, to sustain the jurisdiction, must *prove* the fact of the debtor's residence abroad; and if his nonresidence be not distinctly averred in the bill, or, if so denied by the home defendants, be not proved, the court has no jurisdiction, and a decree for the plaintiff will be reversed on that ground. Kelso v. Blackburn, 3 Leigh 299.

Fraud.—It is not sufficient to make a general charge of fraud in a bill. In addition to the general charge, the facts constituting the fraud, though not what is merely evidence, must be given. Saunders v. Parrish, 86 Va. 592, 10 S. E. Rep. 748; Zell Guano Co. v. Heatherly, 38 W. Va. 409, 18 S. E. Rep. 611; First Nat. Bank v. Bowman, 36 W. Va. 649, 14 S. E. Rep. 989; Greer v. O'Brien, 36 W. Va. 277, 15 S. E. Rep. 74; Arnold v. Slaughter, 36 W. Va. 589, 15 S. E. Rep. 250.

Generally fraud should be charged by setting forth the particular manner in which the act was done, and the end and design to be accomplished. If these show that fraud was designed and perpetrated it is not necessary to aver the legal conclusion that they constitute fraud. But the charge that a deed was made with intent to hinder, delay, and defraud creditors is not the mere statement of a legal conclusion, but a charge of a material fact. American Net & Twine Co. v. Mayo, 97 Va. 182, 33 S. E. Rep. 523.

Thus, to overthrow the title of a purchaser on the grounds of fraud, it is necessary to allege in the bill that the grantor committed the act fraudulently to defraud creditors; and the facts must be given; and, moreover, it must be alleged that the purchaser fraudulently conspired with him, or had notice of the grantor's fraudulent intent, or had notice of the fraud rendering the grantor's title void. Vance Shoe Co. v. Haught, 41 W. Va. 275, 23 S. E. Rep. 553.

But the privity of a grantee in the fraud of his grantor is sufficiently charged by charging that the deed was made not only without any consideration deemed valuable in law, but with intent to hinder, delay, and defraud the creditors of the grantor. It is not necessary to charge expressly that the grantee had notice of the fraud intended by the grantor. American Net & Twine Co. v. Mayo, 97 Va. 182, 33 S. E. Rep. 523.

Moreover, where a bill to set aside conveyances contains positive and specific allegations of fraud, such allegations are taken as true on the bill being taken as confessed. Welsh v. Solenberger, 85 Va. 441, 8 S. E. Rep. 91; Price v. Thrash, 30 Gratt. 515.

When Allegations Sufficient to Give Jurisdiction.—In Watkins v. Wortman, 19 W. Va. 78, a creditor filed a bill in chancery against a debtor and his wife and others alleging a recovery by him of a judgment in another state against the debtor; that execution issued thereon and was returned unsatisfied; that the debtor had removed to the state of West Virginia in which the court had jurisdiction, and purchased two tracts of land and paid for them; that one of the tracts he had caused to be conveyed to his wife with intent to defraud his creditors; that the other tract had been conveyed to one of the other parties defendant; that whether this was accidently so done, it was equally fraudulent as to creditors; that there was no personal property, out of which the debt was to be made; that unless both tracts of land were subjected to the payment of his debt, the debt would be lost. The defendants demurred to this bill. And the demurrer was overruled by the lower court, and the court of appeals sustained the judgment overruling such demurrer.

And it was further held that, whether the allegation of the bill as to the second contract of land was sufficient or not, yet as the allegation to the first contract was sufficient to give the court of equity jurisdiction, it was proper to include any other property of the debtor, so that it could be first made liable in protection of the alleged voluntary or fraudulent vendee.

d. Right to Sue.—See *ante*, "Rights and Liabilities."

One party guilty of fraud in a transaction can have no relief in equity against another person, though equally guilty of fraud in the same. Stout v. Philippi Manuf., etc., Co., 41 W. Va. 339, 23 S. E. Rep. 571.

And in Roberts v. Kelly, 2 P. & H. 396, it was held that an agreement, between a debtor and his surety in a forthcoming bond, to the effect that the surety should purchase slaves of the debtor, at a sale under an execution on a judgment on the bond, for the amount of the debt, which was greatly less than the value of the slaves, and, holding the legal title, permit the slaves to remain in the possession of the debtor, with liberty to redeem them, upon paying the amount advanced with interest within five years, when there is no intention to defraud creditors, is valid and would be enforced in a court of equity, by permitting the debtor to redeem on paying the amount advanced with interest.

3. PLEA, ANSWER AND SUBSEQUENT PLEADINGS.—Where a bill seeks to set aside a deed of conveyance as voluntary and fraudulent, and the grantee, in his answer, denies any knowledge of fraud in the

transaction, in the absence of any replication to the answer, such allegation will be taken to be true. Bierne v. Ray, 37 W. Va. 571, 16 S. E. Rep. 804.

And if a bill charges a postnuptial settlement to be voluntary, the answer does not shift the burden, and is not evidence for the respondents, but the offense must be proved. Perry v. Ruby, 81 Va. 317; Hatcher v. Crews, 78 Va. 460.

Where, however, in a bill to set aside as fraudulent certain deeds, the want of proper parties appears on the face of the bill, such omission will be demurrable, and the defect may be taken advantage of by demurrer or at the hearing. But if the demurrer for such cause is sustained, the plaintiff should have leave to amend his bill. Pappenheimer v. Roberts, 24 W. Va. 702.

4. VARIANCE.—Though it is true that the case stated in a bill in equity must be sustained by the evidence, this rule will not forbid relief to the plaintiff where the case proved does not materially vary from the case stated; as where two deeds are charged to be without consideration, and intended to delay and hinder the plaintiff, and the proof is that the second being a deed to a trustee for the separate use of the debtor's wife, was without valuable consideration, the decree should be for the plaintiff. Campbell v. Bowles, 30 Gratt. 652.

E. EVIDENCE.

1. PRESUMPTION AND BURDEN OF PROOF.

a. In General.

Presumptions.—The maxim, "Fraud must be proven and is never to be presumed," is true only when understood as affirming that the contract or conduct apparently honest and lawful must be regarded as such, until shown to be otherwise by evidence, either positive or circumstantial; but fraud may be inferred from facts calculated to establish it: and fraud should be so inferred when the facts and circumstances are such as to lead a reasonable man to the conclusion that the property of a debtor has been attempted to be withdrawn from the reach of his creditors, with the intent to prevent them from recovering their just debts; and if *prima facie* such fraudulent intent be thus established, it must be regarded as conclusively established, unless it is rebutted by facts and circumstances which are proven. Burt v. Timmons, 29 W. Va. 441, 2 S. E. Rep. 780; Bronson v. Vaughan, 44 W. Va. 406, 29 S. E. Rep. 1022; Sipe v. Earman, 26 Gratt. 563; Herring v. Wickham, 29 Gratt. 628; Keagy v. Trout, 85 Va. 390, 7 S. E. Rep. 329. And as held in Stonebraker v. Hicks, 94 Va. 618 27 S. E. Rep. 497, in the absence of fraud apparent on the face of the deed, or necessarily inferred from its terms, fraud will not be presumed, but must be proved with clearness and certainty.

Thus, the provisions of a mortgage or deed of trust may be of such a character as of themselves to furnish conclusive evidence of a fraudulent intent; but the presumption of law is in favor of honesty, and the court cannot presume fraud unless the terms of the instrument preclude any other inference. Williams v. Lord, 75 Va. 390.

And fraud cannot be presumed in an action to set aside a marriage settlement, but must be proved by clear and satisfactory evidence to have been concurred in by both parties. And this is so, irrespective of the amount of the husband's indebtedness, and even though his whole estate is included in the settlement. Noble v. Davies, 4 S. E. Rep. 206 (Va. 1887).

Onus Probandi.—The *onus probandi* is on him who alleges fraud, and if the fraud is not strictly and clearly proved as it is alleged, relief cannot be granted, although the party against whom relief is sought may not have been perfectly clear in his dealings. Harden v. Wagner, 22 W. Va. 356; Pusey v. Gardner, 21 W. Va. 469; Scott v. Rowland, 82 Va. 484, 4 S. E. Rep. 595; Fischer v. Lee, 98 Va. 159, 35 S. E. Rep. 441.

But while fraud must be clearly proved and the burden of proof rests on him who alleges it, it may be proved by circumstances, and when the evidence shows a *prima facie* case of fraud, the burden shifts to the upholder of the transaction to establish its fairness. Herring v. Wickham, 29 Gratt. 628; Hickman v. Trout, 83 Va. 478 3 S. E. Rep. 131; Engleby v. Harvey, 93 Va. 445, 25 S. E. Rep. 225; Sutherlin v. March, 75 Va. 236; White v. Perry, 14 W. Va. 86; Martin v. Smith, 25 W. Va. 589; Boggess v. Richards, 39 W. Va. 567, 20 S. E. Rep. 599; Paul v. Baugh, 85 Va. 955, 9 S. E. Rep. 329; American N. & T. Co. v. Mayo, 97 Va. 182, 33 S. E. Rep. 523.

But where a subsequent creditor of a grantor assails, in a chancery suit, a deed made by the grantor as voluntary and fraudulent, the recitals in the deed that the grantee had paid the grantor a valuable consideration is not evidence against the creditor of such payment; and the burden of proving that a valuable consideration was paid by the grantee to the grantor is upon the grantee, but the burden of proving that the deed was fraudulent in fact is upon the creditor. Rogers v. Verlander, 30 W. Va. 619, 5 S. E. Rep. 847.

Moreover, the *onus* is on the creditor to show that his debt was contracted before the deed was recorded, in order to render the property liable therefor. Scott v. Jones, 76 Va. 233.

b. As Affected by Consideration.—It is well settled that the consideration named in a deed may be enquired into. Summers v. Darne, 31 Gratt. 804. But he who undertakes to show a different consideration, must do it by satisfactory proof. Click v. Green, 77 Va. 827. And when the consideration is inquired into, and it is shown that the conveyance is founded upon a valuable consideration, the burden of proving that the deed is fraudulent in fact, rests upon the creditor assailing it. Cohn v. Ward, 32 W. Va. 34, 9 S. E. Rep. 41.

But where a creditor files a bill to set aside as fraudulent a deed executed by his debtor which recites the payment of a valuable consideration, and such creditor's debts are older than the deed, the burden is on the grantee to prove the payment of the purchase money, or, if the deed was executed in payment of existing debts, to prove the existence and validity of such debts. Knight v. G. & C. Capito, 23 W. Va. 639.

Moreover, when such conveyance is made in consideration of a pre-existing indebtedness, it is a badge of fraud for the grantee to retain the evidence of such indebtedness in his possession uncanceled, after the conveyance has been completed. Webb v. Ingham, 29 W. Va. 389, 1 S. E. Rep. 816.

However, mere inadequacy of consideration in the absence of fraud will not invalidate a conveyance. Tebbs v. Lee, 76 Va. 744.

But it must be observed, that board and lodging and the keep of a horse do not, as between husband and wife, parent and child, and other near relatives constitute a consideration from which the law will imply a promise of payment, and no action can be maintained therefor in the absence of an express contract or engagement to pay for them. Nor can

an express promise to pay, made after the supplies have been furnished or the services rendered, be enforced against the promisor to the prejudice of his creditors. Stoneburner v. Motley, 95 Va. 784, 30 S. E. Rep. 364.

c. As Affected by Possession.—The vendor's continuing in possession of goods and chattels after an absolute sale raises a legal presumption that the sale is fraudulent as to creditors of the vendor, which throws upon the vendee, imperatively, the burden of proving the fairness and good faith of the transaction; and this cannot be done without sufficient evidence that the sale was for a fair and valuable consideration, and that the vendor did not continue to have an interest in the property by secret understanding; and in the absence of all evidence to show such consideration, or in the absence of all evidence from which the inference can be fairly drawn, that the vendor did not continue to have an interest in the property, the legal presumption that he did, and that the sale was not for such consideration, becomes absolute and conclusive; and the same will be the conclusion, though there is some evidence on these subjects, if it is insufficient to rebut the strong legal presumption arising from the vendor's retention of possession after the sale. Curtin v. Isaacsen, 36 W. Va. 391, 15 S. E. Rep. 171; Curd v. Miller, 7 Gratt. 185; Bindley v. Martin, 28 W. Va. 773.

And the fact of possession remaining with the mortgagor five years without demand made and pursued by a process of law on the part of the mortgagees, does not make a case in which, under the statute of frauds, the property is taken to be with the possession, and liable to the creditors of the person in possession. Rose v. Burgess, 10 Leigh 186.

d. Transactions between Relatives.—And in transactions between a father and his child, husband and wife, brother and sister, between whom there exists a strong natural motive to provide for each other, at the expense of existing creditors, it requires less proof to show fraud, where they are sought to be impeached as fraudulent; and, on the other hand, when a *prima facie* case is made, it requires much stronger proof to show fair dealing than would be required if the transaction were between strangers. Livey v. Winton, 30 W. Va. 554, 4 S. E. Rep. 451; Coleman v. Cocke, 6 Rand. 618.

Likewise if a conveyance be made by a father to his son in consideration of old debts alleged to be due from the father to the son, and the same is impeached by his creditors as having been made with intent to hinder, delay and defraud them in the collection of their debts, the son will be held to stricter proof of his honesty in dealing with his father, than a stranger would be. Knight v. Capito, 23 W. Va. 639.

Similarly, where a bill is filed by a creditor alleging that a deed from a father to his son was in fact voluntary, although reciting on its face a valuable consideration, and the son in his answer denies the allegation, and claims that he paid a valuable consideration for the land, the burden of proof is on the son, to show that a valuable consideration was paid, and the recital of the deed is no evidence against the creditor. Himan v. Thorn, 32 W. Va. 507, 9 S. E. Rep. 930.

e. Transactions between Husband and Wife.—Where creditors of the husband seek to subject real estate claimed by the wife, which has been conveyed to her, either directly or indirectly from her husband, the burden of showing that it was paid for by her out of her separate estate rests upon her, and, in the absence of such proof, it would be presumed that the purchase money was furnished by her husband. Hutchinson v. Boltz, 35 W. Va. 754, 14 S. E. Rep. 267; Mayhew v. Clark, 33 W. Va. 387, 10 S. E. Rep. 785; Wood v. Harmison, 41 W. Va. 376, 23 S. E. Rep. 560; Yates v. Law, 86 Va. 117, 9 S. E. Rep. 508; Spence v. Repass, 94 Va. 716, 27 S. E. Rep. 583; Crowder v. Garber, 97 Va. 565, 34 S. E. Rep. 470; McConville v. Nat. Val. Bank, 98 Va. 9, 34 S. E. Rep. 891; Runkle v. Runkle, 98 Va. 663, 37 S. E. Rep. 279; Maxwell v. Hanshaw, 24 W. Va. 405.

Thus, in a suit by creditors to set aside a deed to secure notes executed to the grantor by his wife, the grounds for setting aside being fraud, where the wife claims that the original transaction represented a loan by her to him, the burden is on her to show that fact, and also a contemporaneous promise by him to pay the debt. Darden v. Ferguson (Va. 1897), 27 S. E. Rep. 435.

And where a husband conveys a judgment to a trustee for the benefit of his wife, or executes a deed of trust for the same purpose, the burden is thrown upon the wife to show, as against creditors attacking either for fraud, that the transaction was fair and *bona fide*, to so secure to her a subsisting and valid debt. Livey v. Winton, 30 W. Va. 554, 4 S. E. Rep. 451.

Moreover, if property is alleged to have been purchased by a wife, or a conveyance of property is made to her during coverture, the burden is upon her to prove distinctly that she paid for it with means not derived from her husband. Evidence that she made the purchase, or that the property was conveyed to her, amounts to nothing, unless it is accompanied by clear and full proof that she paid for it with her own separate estate; and in the absence of such proof the presumption is that her husband furnished the means to pay for it and it will be subject to his debts. McMasters v. Edgar, 22 W. Va. 673; Stockdale v. Harris, 23 W. Va. 499; Brooks v. Applegate, 37 W. Va. 373, 16 S. E. Rep. 585; Grant v. Sutton, 90 Va. 771, 19 S. E. Rep. 784.

So if a wife delivers money or property of her own to her husband, which he uses in his business, the presumption is that such delivery was intended as a gift; and in order to constitute such delivery a loan, as against the creditors of the husband, the wife must prove an express promise of the husband to repay, or establish by the circumstances that it was a loan, and not a gift. Zinn v. Law, 32 W. Va. 447, 9 S. E. Rep. 871.

And in Morriss v. Harveys, 75 Va. 726, the court declared that, while it is true that neither a judgment nor the substitution of other securities will prevent a court of equity, when a deed is sought to be impeached, as voluntary, from looking to the original cause of action to ascertain whether it was a subsisting debt contracted at the time the deed was made, and where the right of third persons have intervened, as in the case of a settlement upon a wife and children, it is certainly competent for them to show, if they can, that not only the judgment, but the debt upon which it is founded, has been satisfied and discharged by the substitution of a new security. The burden of proving that a transfer by the husband to his wife's brother was *bona fide* and for a valuable consideration rests upon the wife and upon the creditors. Thus, in Herzog v. Weiler, 24 W. Va. 199, an insolvent husband transferred to his wife's brother, by deed for an alleged valuable consideration, his personal property; soon thereafter the brother transferred the property in

like manner to another brother, and the latter immediately transferred it to his sister, the wife of the insolvent husband, as a gift in consideration of fraternal affection. In a controversy between the wife and the creditors of the husband as to the right to have the property subjected to the payment of debts contracted by the husband before he made the transfer, the above principle was laid down.

f. Indebtedness as an Element.—Moreover, where there is a transfer of property, either directly or indirectly, by an insolvent husband to his wife during coverture, it is justly regarded with suspicion; and unless it fairly appears that it was entirely free from any wrongful intent or purpose to withdraw the property from the husband's creditors, it will not be sustained. And in such transfer there is a presumption against the wife in favor of the husband's creditors which she must overcome by affirmative proof. Maxwell v. Hanshaw, 24 W. Va. 405.

And in Hutchison v. Kelly, 1 Rob. 123 (1842), the presumption of fraud, in respect to voluntary conveyances when there are existing debts, came before the court for consideration. The conclusion drawn from the cases by CHANCELLOR KENT in Reade v. Livingston (N. Y.), 3 Johns. Ch. Rep. 500, that if the grantor be indebted at the time of a voluntary conveyance it is presumed to be fraudulent in respect to debts then existing, and no circumstances can repel the legal presumption of fraud, was approved by JUDGE STANARD but was disapproved by JUDGE BALDWIN, who rendered the opinion of the court. The principle was declared by JUDGE BALDWIN to be, that, while the indebtedness of the grantor at the time a voluntary conveyance raises a legal presumption against its validity, yet the presumption is only *prima facie* and not conclusive. The principles laid down in this case were approved in the Bank of Alexandria v. Patton, 1 Rob. 499 (1843). For fuller discussion of principles, and collection of cases, see *ante*, "Transfers Which Are Not Affected with Fraud, but Are Inoperative as to Certain Persons."

g. Intent of Grantor.—Under W. Va. Code 1899, ch. 74, relating to fraudulent conveyances, etc., a *bona fide* purchaser for valuable consideration, who has no notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor is protected. But when the plaintiff has shown that the conveyance was made by the grantor with intent to delay, hinder, or defraud creditors, then the grantor must meet this by showing that he was a purchaser for value, and without notice of the fraudulent intent of his grantor; and the recital in the deed of the payment of the purchase money is not sufficient. Blackshire v. Pettit, 35 W. Va. 547, 14 S. E. Rep. 132.

And where the facts and circumstances connected with a fraudulent conveyance necessarily establish the complicity of the grantee in the fraudulent intent of the grantor, it is not necessary by direct proof to show notice of such intent to the grantee. Core v. Cunningham, 27 W. Va. 206.

2. ADMISSIBILITY.

a. In General.—Large latitude is always given to the admission of evidence where the charge is fraud. Piedmont Bank v. Hatcher, 94 Va. 229, 26 S. E. Rep. 505. And it seems well settled, that the rule *in pari delicto potior est conditio defendendis*, does not apply, where the policy of the law requires that a fraudulent or vicious conveyance should be enforced; and, therefore, where a debtor makes a fraudulent conveyance of his property, for the purpose of protecting it from his creditors, the fraudulent grantee may enforce such conveyance in a court of law, and the debtor will not be allowed to defeat the claim by proving fraud. Starke v. Littlepage, 4 Rand. 368.

So the maxim, "*Nemo allegans suam turpitudinem audiendus est*," if it be law, does not apply, where it is the creditors of the parties who assail the deed, and call on one of them to prove the fraud. Brown v. Molineaux, 21 Gratt. 539.

b. Evidence Inadmissible by Reason of the Incompetency of Parties.—See monographic *note* on "Witnesses."

Husband and Wife.—In William and Mary College v. Powell, 12 Gratt. 372, a postnuptial settlement was made by a husband upon his wife. The wife afterwards died; then a bill was filed by a creditor of the husband, against her children, to set aside the settlement as fraudulent as to the creditor. The court held that the husband was not a competent witness to prove the consideration upon which the settlement was made. So where husband and wife are both parties, and interested, their evidence is not admissible, because they are incompetent to testify. Perry v. Ruby, 81 Va. 317; Burton v. Mill, 78 Va. 468; Thornton v. Gaar, 87 Va. 315, 12 S. E. Rep. 753; Flynn v. Jackson, 93 Va. 341, 25 S. E. Rep. 1; De Farges v. Ryland, 87 Va. 404, 12 S. E. Rep. 805; Scott v. Rowland, 82 Va. 484, 4 S. E. Rep. 595.

c. When Evidence Is Admissible to Prove Consideration.—When the deed is assailed by third parties on the ground of fraud, it is admissible to show, in addition to the consideration expressed in the deed, that a substantial and valuable consideration was paid, or the converse. Casto v. Fry, 33 W. Va. 449, 10 S. E. Rep. 799. And this principle is extended to the introduction of parol evidence to show other valuable consideration, where a deed is made in consideration of "natural love and affection," and the further consideration of "one dollar." Harvey v. Alexander, 1 Rand. 219.

And in Eppes v. Randolph, 2 Call 125, decided in 1799, and before the provision making any gift, conveyance, etc., upon consideration of marriage, void as to existing creditors (see Va. Code 1887, § 2459), and therefore not in the light of that provision, it was held that, although a deed does not mention that it was made in consideration of a marriage contract, the party may, nevertheless, aver and prove it.

d. When and against Whom Recitals in Deeds Are Admissible as Evidence.—It is the settled law of this state that the recital in a deed of the payment of a valuable consideration for the property therein conveyed is not admissible as evidence of such payment as against a stranger or a creditor of the grantor assailing the deed as voluntary, and fraudulent as to him. Cohn v. Ward, 32 W. Va. 34, 9 S. E. Rep. 41; Childs v. Hurd, 32 W. Va. 66, 9 S. E. Rep. 362.

And under Va. Code 1887, § 2461, after a loan to a person with whom, or with those claiming under him, possession had remained five years, a deed is made by the lender, declaring the original loan and continuing it; but this deed is never admitted to record, the deed cannot affect the creditor of the person in possession and ought not to be received as evidence against such creditors. Pate v. Baker, 8 Leigh 80.

Nevertheless, the recital in a postnuptial settlement of a consideration for the deed, is evidence against persons claiming under the settler, but not against the creditors of the settler contesting the fairness or the validity of the deed. Blow v. May-

nard, 2 Leigh 29; Lawrence v. Blow, 2 Leigh 29; Perry v. Ruby, 81 Va. 317; Flynn v. Jackson, 93 Va. 341, 25 S. E. Rep. 1.

e. Prior or Subsequent Conduct of Persons Interested.—Parol declarations of a grantor previous to the execution of a deed, and at the very moment of executing it, are admissible to explain the intention with which it was made. Land v. Jeffries, 5 Rand. 211.

But it is a well-settled rule of evidence that the declarations of the grantor, made subsequent to the conveyance, are not admissible to affect the title of his grantee; and this is most certainly true if made a year subsequent. Casto v. Fry, 33 W. Va. 449, 10 S. E. Rep. 799; Claytor v. Anthony, 6 Rand. 285.

However, where fraud in the sale and purchase of property is in issue, the evidence of other frauds of like character, committed by the same party, at or about the same time, is admissible. Piedmont Bank v. Hatcher, 94 Va. 229, 26 S. E. Rep. 505.

3. WEIGHT.

a. In General.—In order to set aside a conveyance claimed to be fraudulent as to creditors, it must be shown that both grantor and grantee participated in, or had knowledge of the fraud. Mer. Bank v. Belt (Va. 1898), 30 S. E. Rep. 467. And the fraud must be clearly proved. First Nat. Bank v. Bowman, 36 W. Va. 649, 14 S. E. Rep. 989; Greer v. O'Brien, 36 W. Va. 277, 15 S. E. Rep. 74; Arnold v. Slaughter, 36 W. Va. 589, 15 S. E. Rep. 250.

However, it is not necessary to prove that the grantee had positive knowledge of such fraudulent intent. It is sufficient to prove that the grantee had knowledge of facts and circumstances which would have excited the suspicion of a man of ordinary care and prudence, and put him upon inquiry as to the *bona fides* of the transaction, which inquiry would necessarily have led to a discovery of the fraud of his grantor. American Net & Twine Co. v. Mayo, 97 Va. 182, 33 S. E. Rep. 523.

And it is not enough that the purpose of the grantor be fraudulent. Knowledge of such purpose must be clearly brought home to the alienee. Where the latter had denied such knowledge on oath, it cannot be held that his denial is overthrown by mere circumstances of suspicion adduced against him. Batchelder v. White, 80 Va. 103.

But if a husband conveys a tract of land to his wife, and the conveyance is attacked by his creditors, the deed should be set aside if the evidence is conflicting; though the preponderance is against the good faith of the transaction. Noyes v. Carter (Va.), 23 S. E. Rep. 1.

Moreover, if a deed bears upon its face such marks or badges of fraud as to clearly show that the intent of the grantor was to delay, hinder, or defraud his creditors, such deed is fraudulent on its face, and the court will so hold it on inspection. In such case the thing itself speaks, and conclusively proclaims the fraudulent intent, because the grantor is taken to intend what he does, and the natural or necessary consequences of his act. Douglass Mdse. Co. v. Laird, 37 W. Va. 687, 17 S. E. Rep. 188. And evidence will not be received to contradict such conclusion. Long v. Meriden, etc., Co., 94 Va. 594, 27 S. E. Rep. 499.

And the usual badges of fraud are: Gross inadequacy of price; no security taken for the purchase money; unusual length of credit for the bonds which have been taken at long periods; conveyance in payment of antecedent indebtedness of a father to his son when they reside together; threats and pendency of suits; concealment of the transactions which relate to the conveyances; keeping the deed unacknowledged and unrecorded for a considerable time; remaining in possession by the grantor as before the conveyance. Any of these facts may make a case of *prima facie* fraud, calling on the parties for explanation. Hickman v. Trout, 83 Va. 478, 3 S. E. Rep. 131; Todd v. Sykes, 97 Va. 143, 33 S. E. Rep. 517; Paul v. Baugh, 85 Va. 955, 9 S. E. Rep. 329; Young v. Willis, 82 Va. 291; Armstrong v. Lachman, 84 Va. 726, 6 S. E. Rep. 129; Reilly v. Barr, 34 W. Va. 95, 11 S. E. Rep. 750; Didier v. Patterson, 93 Va. 534, 25 S. E. Rep. 661. But the privilege of longer time and possession, not exceeding five years, upon paying interest, does not affect validity; nor will the fact that creditors may be hindered and delayed, in the absence of fraudulent intent. Keagy v. Trout, 85 Va. 390, 7 S. E. Rep. 329; Sipe v. Earman, 26 Gratt. 563; Young v. Willis, 82 Va. 291.

b. In Equity.—While no rule can be laid down as to the extent of evidence required to set aside a conveyance as fraudulent, it must satisfy the chancellor's conscience, and it may be, and generally must be, circumstantial. Armstrong, Cator & Co. v. Lachman, 84 Va. 726, 6 S. E. Rep. 129; Witz, Biedler & Co. v. Osburn, 83 Va. 227, 2 S. E. Rep. 33; Moore v. Ullman, 80 Va. 307.

c. Circumstantial Evidence.—While the burden of proving a deed fraudulent as to creditors is upon the creditors, positive evidence of fraudulent intent is not required, but it may be deduced from the circumstances of the transaction and the relation and situation of the parties to it and to each other. Circumstantial evidence if adequate to satisfy the court of such fraudulent intent, is sufficient, and often the only evidence attainable. Reynolds v. Gawthrop, 37 W. Va. 3, 16 S. E. Rep. 364; Moore v. Ullman, 80 Va. 307; Armstrong, Cator & Co. v. Lachman, 84 Va. 726, 6 S. E. Rep. 129; Witz, Biedler & Co. v. Osburn, 83 Va. 227, 2 S. E. Rep. 33.

Therefore, a fraudulent intent need not be established by express proof but may be shown by just legal implication from the evidence where the circumstances are such that the intent may be justly inferred. Pratt v. Cox, 22 Gratt. 330; Johnson v. Wagner, 76 Va. 591; Lockhard v. Beckley, 10 W. Va. 101.

Or, as expressed in Martin v. Rexroad, 15 W. Va. 512, fraud should be legally inferred from the facts and circumstances of the case, when the facts and circumstances are of such a character as to lead a reasonable man to the conclusion that the sale was made with the intent to hinder, delay or defraud existing or future creditors. And further, where the facts and circumstances in any case are such as to make a *prima facie* case of fraudulent intent, they are to be taken as conclusive evidence of such intent, unless rebutted by other facts and circumstances in the case. Sturm v. Chalfant, 38 W. Va. 248, 18 S. E. Rep. 451; Goshorn v. Snodgrass, 17 W. Va. 717; Hutchinson v. Boltz, 35 W. Va. 754, 14 S. E. Rep. 267; Himan v. Thorn, 32 W. Va. 507, 9 S. E. Rep. 930; Parker v. Valentine, 27 W. Va. 677; Lockhard v. Beckley, 10 W. Va. 88; Richardson v. Ralphsnyder, 40 W. Va. 15, 20 S. E. Rep. 854; Livesay v. Beard, 22 W. Va. 585; Saunders v. Parrish, 86 Va. 592, 10 S. E. Rep. 748; Paul v. Baugh, 85 Va. 955, 9 S. E. Rep. 329; Hickman v. Trout, 83 Va. 478, 3 S. E. Rep. 131; Alsop v. Catlett, 97 Va. 364, 34 S. E. Rep. 48; Reilly v. Barr, 34 W. Va. 95, 11 S. E. Rep. 750; Ferguson v. Daughtrey,

94 Va. 308, 26 S. E. Rep. 822. See Shaver v. Swartz, Va. Dec., vol. 1, p. 56.

d. Nature and Circumstances of the Transaction.

(*a*) **In General.**—While fraud must be proved, the transaction itself may furnish proof of the fraud so satisfactory and conclusive as to outweigh the answers of the defendants denying the fraud, or even the evidence of witnesses. Hazlewood v. Forrer, 94 Va. 703, 27 S. E. Rep. 507; Todd v. Sykes, 97 Va. 143, 33 S. E. Rep. 517.

Therefore, wherever there appears to be connected with the transaction circumstances indicating excessive effort to give the appearance of fairness or regularity, which are not usual attendants of such business, the courts will regard such circumstances as badges of fraud. Hart v. Sandy, 39 W. Va. 644, 20 S. E. Rep. 665.

Thus, the including in such a deed perishable property which must be consumed or become worthless before the time fixed for the sale, though it may not of itself be sufficient to set aside the deed as fraudulent, yet it is a fact indicative of a fraudulent intent. Quarles v. Kerr, 14 Gratt. 48.

So when the facts and circumstances tend to show that a gift was intended, and that the husband used and dealt with the property as his own, the mere parol testimony of the husband and wife of a private understanding between themselves that the transaction should be considered or was intended as a loan to the husband by the wife, and not a gift, will not, as against the creditors of an insolvent husband, rebut the presumption of a gift. Zinn v. Law, 32 W. Va. 447, 9 S. E. Rep. 871.

(*b*) **Conduct.**—Fraud may be deduced from deceptive assertions, and from incidents and circumstances evincing a fraudulent intent. Sturm v. Chalfant, 38 W. Va. 248, 18 S. E. Rep. 451.

Thus, in a suit, if the burden of proof as to the existence and validity of certain alleged debts, be cast upon the grantee, and the persons, to whom or by whom any of such debts were paid, as well as the subscribing witnesses to such deed, are within the power of the grantee, and instead of examining them he becomes a witness for himself in regard to such consideration, such failure to call and examine such witnesses unless satisfactorily explained will be regarded as a badge of fraud upon said conveyance. Knight v. Capito, 23 W. Va. 639.

(*c*) **Possession.**—Concurrent possession of both the grantor and grantee in an absolute deed after the conveyance is a badge of fraud. Livesay v. Beard, 22 W. Va. 585.

However, it is not an evidence of fraud, for a mortgagor, of personal property to continue in possession, if the mortgage appears to have been made upon a *bona fide* consideration, and is duly recorded. But if the mortgagor afterwards by deed releases the equity of redemption to the mortgagee (which deed is not duly recorded), and still retains the possession, such evidence is sufficient to render the deed void as against creditors. Clayborn v. Hill, 1 Wash. 177.

So when a conveyance is made in consideration of a pre-existing indebtedness, it is a badge of fraud for the grantee to retain the evidence of such indebtedness, in his possession uncancelled, after the conveyance has been completed. Webb v. Ingham, 29 W. Va. 389, 1 S. E. Rep. 816.

And in Forkner v. Stuart, 6 Gratt. 197, it was held, on a sale of slaves, if the possession of the slaves does not accompany the sale, but remains with the vendor, such retention of possession by the vendor is *prima facie* evidence of fraud, but is not conclusive; and it is liable to be repelled by satisfactory legal evidence of the fairness and good faith of the transaction.

(*d*) **Relationship.**—Transactions between a father and child, brother and sister, and many others, between whom there exists a natural and strong motive to provide for a dependent at the expense of honest creditors, if such transaction be impeached as fraudulent, may be shown to be fraudulent by less proof than would be required when different relations exist; and the party claiming the benefit of such transaction, will be held to a fuller and stricter proof of its justice; and the fairness of the transaction, after it is shown to be *prima facie* fraudulent, will require greater proof to be established than would be required if the transaction were between strangers. Burt v. Timmons, 29 W. Va. 441, 2 S. E. Rep. 780.

Therefore, where a conveyance is made to a near relative, the fact is calculated to awaken suspicion, and the transaction will be closely scrutinized, though the fact is not of itself sufficient to raise a presumption of fraud. So mere proof of inadequacy of price is insufficient to implicate the grantee in the fraudulent intent as inadequacy of price, unless extremely gross, does not *per se* prove fraud. It must appear that the price was so manifestly inadequate as to shock the moral sense, and create at once upon its being mentioned a suspicion of fraud. Bierne v. Ray, 37 W. Va. 571, 16 S. E. Rep. 804.

But while transactions between father and son are subject to critical scrutiny, yet if the circumstances show them to be fair, open, and free from fraudulent intent, the relationship of the parties will not vitiate or render them void. Douglass v. Douglass, 41 W. Va. 13, 23 S. E. Rep. 671.

Consequently the mere fact that a party conveys his property to a son or a brother is not *per se* a badge of fraud, but, when such conveyance is attacked as fraudulent, such relationship, connected with other circumstances may strengthen the presumption of fraud. Farmers' Transp. Co. v. Swaney (W. Va. 1900), 37 S. E. Rep. 592.

And the evidence to sustain an alleged parol gift by a father to his daughter on her marriage, should be clear and cogent. Collins v. Lofftus, 10 Leigh 5.

(*e*) **Husband and Wife.**—Transactions between a husband and wife, between whom there exists a natural and strong motive to provide for a dependent at the expense of honest creditors, if such transaction be impeached as fraudulent, may be shown to be fraudulent by less proof than would be required when different relations exist; and the party claiming the benefit of such transaction will be held to a fuller and stricter proof of its justice; and the fairness of the transaction, after it is shown to be *prima facie* fraudulent, will require greater proof to be established than would be required if the transaction were between strangers. Burt v. Timmons, 29 W. Va. 441, 2 S. E. Rep. 780.

And moreover, if a husband conveys a tract of land to his wife, and the conveyance is attacked as fraudulent by his creditors, the deed should be set aside if the evidence is conflicting, as the presumption is against the good faith of the transaction. Noyes v. Carter (Va.), 23 S. E. Rep. 1.

e. Insolvency.—Insolvency does not deprive the owner of property of the right to sell it, unless the sale be made with intent to hinder, delay and defraud his creditors; and even then, the title of the purchaser will not be invalidated if the sale is

for valuable consideration, and the purchaser has no notice of the fraudulent intent of the grantor. It is not necessary, however, to prove positive knowledge of the fraudulent intent of the grantor. Ferguson v. Daughtrey, 94 Va. 308, 26 S. E. Rep. 822.

And the fact that a deed of trust of all of an insolvent's property, executed to secure part of his creditors, provides for payment of the surplus to the grantor, is not of itself evidence of fraudulent intent. Harvey v. Anderson (Va.), 24 S. E. Rep. 914.

But when a debtor in failing circumstances conveys property for a grossly inadequate consideration, that is evidence of fraudulent intent. Livesay v. Beard, 22 W. Va. 585.

f. Consideration.—Where fraudulent intent against creditors is sought to be made out against a transfer of his property by a debtor on the sole ground of inadequacy of consideration, without any other element tending to show fraud, the inadequacy must be so great as fairly to induce the belief of fraudulent intent. Wood v. Harmison, 41 W. Va. 376, 23 S. E. Rep. 560.

But it is evidence of fraud for a debtor who is in failing circumstances to convey property for a grossly inadequate consideration. Livesay v. Beard, 22 W. Va. 585.

g. Bill Pro Confesso.—And in Price v. Thrash, 30 Gratt. 515, it was held that, fraud could be proven by a bill taken *pro confesso*, in which notice of the fraud is clearly charged. Welsh v. Solenberger, 85 Va. 441, 8 S. E. Rep. 91.

F. INJUNCTION.—Where a deed is made by a father to his son of land for one-half of its value with the fraudulent intent of hindering, delaying and defrauding his creditors, and the deed of trust is executed at the same time to secure the payment of the bond for the purchase money, which bond is assigned to a third person, and the trustee in the deed of trust advertises the land for sale, and the creditor of the father at the time of the conveyance to the son obtains an injunction to prohibit the sale of the land by the trustee, the injunction ought not on motion to be dissolved whether the third person to whom the bond was assigned, was or was not a party to the fraud. Beall v. Shaull, 18 W. Va. 258.

And in Terrell v. Imboden, 10 Leigh 321, an obligee in a bond secured by a deed of trust, made a deed transferring the bond and deed of trust for the benefit of his creditors. Afterwards, at the request of the obligor, the obligee signed a receipt, stating, that on the day of the date thereof he received the amount of the bond. The bond was in fact executed without consideration, and the receipt was in fact given without any payment. The creditors for whose benefit the bond was assigned had no notice of its being without consideration until after the assignment: but the obligor knew of the assignment when he took the receipt. In a suit between the obligor and those claiming under the assignment, an injunction awarded to restrain the sale of the property conveyed to secure the bond, was dissolved; and the court of appeals affirmed the order of dissolution. See monographic *note* on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518.

G. TRIAL.

Directing an Issue—When Proper.—Where a charge of fraud is made in the bill, but denied in the answer, and the testimony is such as to leave it doubtful, a court of equity ought to direct an issue to ascertain it. Bullock v. Gordon, 4 Munf. 450; Marshall v. Thompson, 2 Munf. 412.

When New Trial Proper.—If the jury find a sale to be *bona fide* and valid, the court ought not to set aside the verdict and award a new trial, unless the evidence is plainly insufficient to warrant the jury in concluding, that despite the fact that the vendor continued in possession of the property after the sale and the strong legal presumption thence arising, that the sale is not for a fair and valuable consideration, and that the vendor retained an interest in the property after the sale, and that such sale is fraudulent and void, the consideration is fair, and no interest in the property is retained by the vendor after the sale, and it is otherwise untainted with fraud. Bindley v. Martin, 28 W. Va. 773.

In another case the owner of a slave, residing in Tennessee, delivered a slave to his son-in-law, who was about to remove to Virginia, and took from him a deed, specifying that the slave was lent to his son-in-law who was to take good care of her and deliver her back to him when he should demand her; the owner told the subscribing witness, that the deed was taken to show that the slave was his property, in case she should be taken by his son-in-law's creditors while the slave remained in Tennessee, but that "he intended to give her to his son-in-law anyhow." The son-in-law removed with the slave to Virginia. In a contest between the owner and the son-in-law's mortgagees of the slave, who had possession, the jury found a verdict for the owner, and the court refused to grant another trial; upon appeal it was held that a new trial was properly refused. Mahon v. Johnston, 7 Leigh 317.

H. DECREE.

1. INTERLOCUTORY DECREE—AS A BAR TO ANOTHER SUIT.—In Quarles v. Kerr, 14 Gratt. 48, a trustee filed a bill to enforce the trust deed, and the court decreed the sale and distribution of the trust subject among the creditors provided for, except one, who was excluded under the provisions of the deed, because he sued out an execution on his judgment. The creditor who was excluded then filed a bill to set aside the trust deed, on the ground that it was fraudulent on its face. The court held that the question whether the deed was fraudulent was not put in issue in the first case, and therefore could not be decided; and that as the decree in the first case was interlocutory merely, it could be no bar to the second suit.

2. WHEN DECREE IS FINAL.—Where a decree annuls a conveyance for fraud and directs a commissioner to ascertain the location and value of the lands and the liens thereon, it is not a final decree in the sense that an answer may not be filed thereafter. Welsh v. Solenberger, 85 Va. 441, 8 S. E. Rep. 91; Va. Code 1887, § 3275.

3. WHEN DECREE IS ERRONEOUS.—If there be several parties who claim to be paid their debts, and to be indemnified for securityship out of the debtor's lands and chattels conveyed by a third party, and there be an adversary creditor by judgment, who claims to have the deed set aside for fraud, and the property sold to pay his judgment debt, an interlocutory decree, which, without deciding on the validity of the deeds or the extent to which, and in what order the said several debts are chargeable on the property, yet directs that the lands conveyed shall be sold for cash, and the proceeds to be paid into bank to the credit of the cause, is premature and erroneous, and has a tendency to sacrifice the property, by discouraging the creditors from bidding as they probably would, if their right

to satisfaction of their debts, etc., had been previously ascertained.

Such a decree, however, may be proper as it regards the sale of chattels, because they are perishable, liable to be wasted, and no sacrifice need be apprehended, because they may be sold in detail. As to the lands, they should in such case, be put into the hands of the receiver, to be rented out, until the rights of the parties, in respect to the subject, are determined, having a due regard to the rights of the widow of the debtor. Cole v. McRae, 6 Rand. 644 (1828).

And in a suit by a judgment creditor to set aside a deed as fraudulent, it is error to set the deed aside *in toto*, as it is valid and binding between the parties to the fraud, and only void as to creditors. Love v. Tinsley, 32 W. Va. 25, 9 S. E. Rep. 44; Duncan v. Custard, 24 W. Va. 730.

Moreover, if a court, by its decree, has cancelled and set aside a fraudulent deed and charged the lands thereby attempted to be conveyed with the amount of the debt due to the fraudulent grantee, such decree is erroneous and will be for that cause reversed. Kan. Val. Bk. v. Wilson, 25 W. Va. 242.

4. WHEN IMPROPER FOR A COURT TO DECREE AS TO THE SUFFICIENCY OF PROPERTY TO PAY DEBTS.—Where a deed of trust to secure creditors has been assailed by an unsecured creditor, and one of the secured debts has been stricken out by the appellate court as fraudulent, that court will not, upon mere estimates of the value of the property conveyed, declare that it is not more than sufficient to pay to the other secured creditors whose debts are not disputed. Stoneburner v. Motley, 95 Va. 784, 30 S. E. Rep. 364.

5. WHEN VENDOR OF LAND AND ASSIGNEE OF DEBT NOT ENTITLED TO A DECREE.—Although a contract for the sale of a tract of land be made with a husband, yet if it is understood between the parties at the time the contract is made that the purchase money is to be paid by the wife out of her separate estate, and the deed is made by the vendor to the husband, and a vendor's lien retained to secure the purchase money, yet if the vendor knowingly receives the purchase money from the wife, in accordance with the original understanding, and such land is conveyed by the husband to the wife, in consideration of her payment of the purchase money, said vendor cannot attack such conveyance as fraudulent to a debt due from the husband as purchase money for a mule, of which the wife had no notice; neither can the assignee of such debt so attack such conveyance. Prim v. McIntosh, 43 W. Va. 790, 28 S. E. Rep. 742.

6. DECREE WHEN RELIEF IN GENERAL PRAYED FOR.—If in a bill by creditors to set aside a deed of trust for payment of debts, on the ground that it is fraudulent on its face, the bill does not ask for an account, but there is a prayer for general relief, and the deed is sustained as valid, the plaintiffs are entitled to an account. And in such case, the court below having dismissed the bill generally, and it not appearing that the plaintiffs asked for an account or that the court considered the question, the appellate court will affirm the decree sustaining the deed, and reverse it as to the account; but with costs to the appellee. Marks v. Hill, 15 Gratt. 400.

And in Beall v. Silver, 2 Rand. 401, a creditor obtained judgment against his debtor, without running interest, and his execution was obstructed by a fraudulent conveyance made by the debtor, of his property. Subsequently a suit in chancery was brought to remove the obstruction of the conveyance, and for relief generally. The court declared that it was proper for the chancellor to decree the interest, as well as to set aside the conveyance: the prayer for general relief being sufficient to cover the demand for interest.

Moreover, in Austin v. Winston, 1 H. & M. 33, the court declared, that where a transaction between a debtor and certain of his creditors, is intended by them both to defraud the other creditors of the debtor, but the latter, under all the circumstances of the case, is not so culpable as the former, it would seem that the court of equity ought not, altogether, to refuse relief to the debtor, but should apportion the relief granted to the decree of criminality in both parties, so as, on the one hand, to avoid the encouragement of fraud, and on the other, to prevent extortion and oppression.

7. DECREE SETTING ASIDE A CONVEYANCE.—It is error to decree a conveyance void, *in toto*, and to set it aside absolutely, when it is void only as to creditors, whose debts were contracted before the time of making the conveyance; but such error is not sufficient to reverse the decree, but may be corrected and the decree affirmed as corrected. Linsey v. McGannon, 9 W. Va. 154.

But when, in a suit to set aside a deed of conveyance as fraudulent and void as to plaintiff's debt, and to sell the real estate therefor, the court ascertains and decrees that it is so fraudulent and void, it is error not to decree further, and set aside said deed and provide for the sale of the property conveyed to pay the debt. Chrislip v. Teter, 43 W. Va. 356, 27 S. E. Rep. 288. See in general connection, Cronie v. Hart, 18 Gratt. 739.

However, if the value of property settled, exceeds the value of the dower relinquished, the deed should be set aside as to the excess, and supported as to the residue. Taylor v. Moore, 2 Rand. 563.

And in Beall v. Silver, 2 Rand. 401, a creditor obtained judgment against his debtor, without running interest, and his execution was obstructed by a fraudulent conveyance made by the debtor, of his property. Subsequently a suit in chancery was brought to remove the obstruction of the conveyance, and for relief generally. The court declared that it was proper for the chancellor to decree the interest, as well as to set aside the conveyance; the prayer for general relief being sufficient to cover the demand for interest.

Sale—Fraudulent Representations.—If a person purchases goods on credit by means of fraudulent representations, or was under age at the time, it is no ground for annulling a sale of the goods made to secure a debt for borrowed money, due a person ignorant of such means, there being no collusion with the buyer to defraud other creditors. Jones v. Christian, 86 Va. 1017, 11 S. E. Rep. 984.

Deed of Trust—Trustee Not a Party to the Fraud.—And although a deed of trust to secure a creditor be made with intent to defraud other creditors of the grantor, it will not be set aside in the absence of proof that either the trustee or the creditor secured was a party to the fraud. Alsop v. Catlett, 97 Va. 364, 34 S. E. Rep. 48; Oberdorfer v. Meyer, 88 Va. 384, 13 S. E. Rep. 756; Paul v. Baugh, 85 Va. 955, 9 S. E. Rep. 329; Penn v. Penn, 88 Va. 361, 13 S. E. Rep. 707.

Antenuptial Settlement—Wife Connives at Fraud.—An antenuptial deed of marriage settlement will not be set aside at the instance of the husband's creditors, on the ground that the wife connived at

the fraud, when the entire testimony shows that the wife, before marriage, had no knowledge of any fraud in the settlement. Noble v. Davies (Va. 1887), 4 S. E. Rep. 206.

8. DECREE ORDERING SALE.

Necessity of Convening Creditors, Reporting Debts, Ascertaining Rents and Profits.—In a suit brought to have an alleged fraudulent conveyance set aside, and to subject the property to the payment of the creditor's claim, it is not required by statute, or by the general law on this subject, that all the creditors shall be convened, and their debts reported, or that it should be ascertained whether the rents will pay off his debts in five years, or in a reasonable time, before there can be a decree of sale. Core v. Cunningham, 27 W. Va. 206; Burt v. Timmons, 29 W. Va. 441, 2 S. E. Rep. 780; State v. Bowen, 38 W. Va. 91, 18 S. E. Rep. 375.

But the Code of Virginia 1860, ch. 186, § 9, requires that the lien of a judgment may be enforced in equity, but forbids a decree of sale unless it appears that the rents and profits of the land subject to the lien will not satisfy the judgment in five years. Under this statute it was held in Cronie v. Hart, 18 Gratt. 739 (1868), that, before setting aside a deed as fraudulent towards its creditors, the court should direct an inquiry as to whether plaintiff's debts could not be paid out of the rents and profits of the property conveyed in five years.

Propriety of Decree for Sale When Trustee Is a Non-resident.—In a suit by judgment creditors against their debtors and others to set aside a deed of trust and to subject the land to the payment of their debts, it appeared that the trustee living out of the state, was not a party to the suit, and had not signed the deed; but it did not appear that he had accepted or acted under it. It was held, that the court might properly decree a sale of land, and appoint a commissioner to make the sale. Barger v. Buckland, 28 Gratt. 850.

When Deed Declared Void, It Should Be Set Aside and Provision Made for Sale.—When, in a suit to set aside a deed of conveyance as fraudulent and void as to the plaintiff's debt, and to sell the real estate therefor, the court ascertains and decrees that it is so fraudulent and void, it is error not to decree further, and set aside said deed and provide for the sale of the property conveyed to pay the debt. Chrislip v. Teter, 43 W. Va. 356, 27 S. E. Rep. 288; Coleman v. Cocke, 6 Rand. 618.

And if the sale or conveyance is fraudulent, and gives unlawful preferences, then such sale or conveyance will be set aside, and a resale be made, so far as may be necessary to pay the honest claims against such insolvent fraudulent debtor. First Nat. Bank of Cumberland v. Parsons, 42 W. Va. 137, 24 S. E. Rep. 554.

A Moiety of the Land, Only Decreed to Be Sold.—Moreover, if a judgment debtor has conveyed away lands fraudulently, and retained other lands, the court on setting aside the conveyance at the suit of a judgment creditor, should direct a sale of a moiety of the whole, embracing in the moiety decreed to be sold, the land not conveyed by the debtor, and taking only so much of the land conveyed as will, with the land retained by the debtor, constitute a moiety of the aggregate of the whole. This was the rule, as declared in McNew v. Smith, 5 Gratt. 84 (1848), decided prior to the Va. Code 1849.

9. DECREE FOR SALE OF PROPERTY OTHER THAN THAT CONVEYED.—And where a deed void as to creditors, is valid as between the parties, in a suit by the grantor's creditors to subject the lands to payment of their claims, other property of the grantor in the hands of parties to the suit will be so applied to the payment of the claims. Fones v. Rice, 9 Gratt. 568.

So, on a bill against fraudulent donees of a deceased person and his heir to subject the lands conveyed and those descended, the whole may be decreed to be sold to satisfy the plaintiff's debt. Blow v. Maynard, 2 Leigh 29.

10. PERSONAL DECREE.—And in a suit to subject lands to the payment of a lien and to set aside fraudulent conveyances, the report of sale having been made, and it being found that the sale will not produce sufficient money to pay the lien, expense of sale, and costs, a personal decree should be rendered against all the fraudulent grantors and grantees for any costs remaining after providing for the payment of the liens and expenses of sale. Hinton v. Ellis, 27 W. Va. 422.

However, where the property is still in possession of the fraudulent purchaser, the creditor cannot take a personal, money decree for his debt, or the value of the property, against the purchaser, but must subject the property itself: however, if the fraudulent purchaser has sold the property to a *bona fide* purchaser, so that it cannot be reached, the creditor may have a money decree against the fraudulent purchaser for the amount he received for the property, or, if that be less than its actual value, then for such value; if the *bona fide* purchaser yet owes for the property, the money in his hands may be followed and subjected in his hands. Vance Shoe Co. v. Haught, 41 W. Va. 275, 23 S. E. Rep. 553.

And a creditor cannot have a judgment for the recovery of money against the grantee of a debtor on mere proof that the conveyance was fraudulent. Ringold v. Suiter, 35 W. Va. 186, 13 S. E. Rep. 46.

But in a creditors' suit in chancery to avoid divers fraudulent conveyances made by the common debtor to different colluding grantees, all or an intermediate number of whom are made parties, the plaintiffs may elect to proceed wholly against any one of such grantees. And where such grantee, against whom plaintiffs elect to proceed, has, in the meanwhile, aliened the property received by him, and a personal decree is entered against him for the full amount of the plaintiffs' claims (not exceeding the value of the debtor's interest in the property so received by him), such grantee is not entitled to a decree over against his codefendants for contribution. Ellington v. Moore, 4 Va. Law Reg. 608.

In Greer v. Wright, 6 Gratt. 154, a defendant, to evade the payment of an anticipated judgment, transferred to his brother two bonds, executed by two obligors, and also his interest in the real estate of his deceased father. Judgment was rendered against him, and he took the oath of an insolvent debtor and surrendered nothing. The plaintiff then filed a bill against the defendant and his brother, and one of the obligors and the sheriff, and obtained a decree setting aside the transfers. It was held that, in the first instance, it was erroneous to make a joint and personal decree against the defendant and his brother, but it should have been against the two obligors for the amount they respectively owed.

11. OPERATION AND EFFECT OF DECREE.—Where in a bill by a creditor against the trustee and executor of his debtor to have payment of his debt, and charging, deed fraudulent, and voluntary in part, the court makes a decree directing a commissioner,

among other things, to take an account of debts of the testator, the statute of limitations ceases to run against creditors from the date of that decree. Harvey v. Steptoe, 17 Gratt. 289.

J. LIEN OF ATTACKING CREDITOR.

1. LIEN OF PLAINTIFF.

When Lien Begins.—In Wallace v. Treakle (1876), 27 Gratt. 479, sec. 2, ch. 179, Code 1849 (Va. Code 1860, ch. 179, sec. 2), came before the court for the first time for its true construction. CHRISTIAN, J., delivering the opinion of the court, said: "I think there could be no doubt that it was the intention of the legislature to declare that a party creditor who filed his bill to avoid a fraudulent conveyance acquired a lien upon the property conveyed in such void conveyance, if he obtained a decree setting it aside, and in that event the lien attaches *from the day the bill is filed.*"

This rule was also followed by the West Virginia court in Sweeney v. Grape Sugar Co., 30 W. Va. 443, 4 S. E. Rep. 431 (1887), where it was held, that general creditors who, by bill, answer, or petition, assail a deed of their debtor conveying lands as fraudulent, and succeed, have a lien on the land for their respective debts from the filing of such bill, answer, or petition. Hughes v. Hamilton, 19 W. Va. 366 (1882); Guggenheimer v. Lockridge, 39 W. Va. 457, 19 S. E. Rep. 874; Witz v. Lockridge, 39 W. Va. 463, 19 S. E. Rep. 876.

But subsequent to this time in the First National Bank of Cumberland v. Parsons, 42 W. Va. 137, 24 S. E. Rep. 554 (1896), and after the W. Va. Acts of 1891, p. 353, ch. 123 (W. Va. Code 1899, ch. 74, sec. 3), relating to acts void as to creditors and purchasers, the court held, that, in view of this statutory provision, "The former rule in equity of rewarding the diligence of the creditor who first assailed the fraudulent deed of an insolvent debtor with a preference over the other creditors must give way to the statute as inconsistent therewith upon this statute as thus amended. This equitable rule of rewarding the diligence of the first assailant of the fraudulent deed of an insolvent debtor sometimes led to such hardship, especially where the deed had to be held to be fraudulent on its face, that the preference given the vigilant assailant was sometimes worse than fraud."

However, by the Va. Code 1887, sec. 2460, it is expressly declared that when in such case a creditor institutes a suit to avoid a gift, conveyance, etc., on the grounds of its being void as to creditors and purchasers, such creditors shall have a lien *from the time of bringing his suit.* Craig v. Hoge, 95 Va. 276, 28 S. E. Rep. 317. And this advantage is not lost to a creditor secured by the deed of trust which is attacked as fraudulent, as he may, while claiming under the deed, assail the validity of other debts secured in the same deed. His attitude as purchaser does not impair his right as creditor to assail such debts as fraudulent or otherwise void. Runkle v. Runkle, 98 Va. 663, 37 S. E. Rep. 279. However, it was held in Craig v. Hoge, 95 Va. 275, 28 S. E. Rep. 317, that, if a creditor plaintiff succeeds in his attack upon a particular preferred debt secured in the deed, the debt being fraudulent, such debt will be eliminated from the security, but the creditor will not be substituted to the priority of the eliminated debt; the deed will stand just as it was, with the exception of the fraudulent debt, which will be excluded. See Runkle v. Runkle, 98 Va. 663, 37 S. E. Rep. 279. See Cohn v. Ward, 36 W. Va. 516, 15 S. E. Rep. 140. This lien, however, is conditional. As against creditors, with or without notice, and purchasers for value without notice, the lien is valid only from the time that the plaintiff creditor files his memorandum of *lis pendens*, as provided by Va. Code 1887, sec. 2460; Acts 1893-94, p. 614. Davis v. Bonney, 89 Va. 755, 17 S. E. Rep. 229. Moreover, this lien fastens only upon the property conveyed, and not, like the lien of a judgment on all of the debtor's estate. Davis v. Bonney, 89 Va. 755, 17 S. E. Rep. 229. Here, also, should be noted, the case of Oppenheim v. Myers (Va. 1901), 39 S. E. Rep. 218, in which an action was brought by defendants as creditors to set aside a voluntary conveyance by plaintiffs, and the conveyance was set aside. Afterwards the plaintiff's husband died and she petitioned to have the property set aside as her homestead. It was held that the petition should be granted under Va. Code 1887, sec. 3642, providing that the homestead may be set apart at any time before it is subjected to sale, notwithstanding sec. 2460 providing that the creditor causing such conveyance to be set aside shall have a lien on the property from the commencement of the action. See generally, Wright v. Hencock, 3 Munf. 521.

Furthermore, a creditor who joins in a suit to set aside a fraudulent conveyance some time after the filing of the bill is entitled to a lien prior to that of the creditor commencing the suit where the former filed such memorandum and the latter did not. Davis v. Bonney, 89 Va. 755, 17 S. E. Rep. 229.

Nevertheless, the priority of a creditor's lien obtained by first filing a memorandum concerning a creditors' suit to set aside a fraudulent conveyance as required by Va. Code 1887, sec. 2460, is not affected by the fact that the lien attached after the rendition of a decree in favor of such creditor and of another creditor who commenced the suit. Davis v. Bonney, 89 Va. 755, 17 S. E. Rep. 229.

2. PETITIONING CREDITOR'S LIEN.

When Lien Begins.—And it is further provided by Va. Code 1887, sec. 2460, that when a creditor comes into a suit which is brought by another creditor, to assail a fraudulent or voluntary conveyance, he shall have a lien from the *time of filing his petition.* This section was amended by Acts 1893-94, ch. 556, pp. 614, 615, so as to allow the petition to be filed in the clerk's office at rules. 2 Va. Law Reg. 433. Such lien is conditional, and subject to the principles governing plaintiff's lien, explained *ante*, "Lien of Plaintiff."

K. DISPOSITION OF THE PROPERTY.

1. IN GENERAL.

Placing Lands in Hands of a Receiver.—If there be several parties who claim to be paid their debts, and to be indemnified for securityship out of a debtor's land and chattels conveyed by deeds, and there be an adversary creditor by judgment, who claims the right to have the deeds set aside for fraud, and the property sold to pay his judgment debt, an interlocutory decree, which, without deciding on the validity of the said several debts, yet directs that the land conveyed shall be sold for cash, and the proceeds to be paid into bank to the credit of the cause, is premature and erroneous, because it has a tendency to sacrifice the property, by discouraging the creditors from bidding, as that probably would, if their right to satisfaction of their debts had been previously ascertained.

Such a decree may be proper as it regards the sale of chattels, because they are perishable, liable to be wasted, and no sacrifice need be apprehended, because they may be sold in detail.

As to the lands, they should in such case, be put into the hands of a receiver, to be rented out, until the rights of the parties, in respect to that subject, are determined, having a due regard to the rights of the widow of the debtor. Cole v. M'Rae, 6 Rand. 644.

Directing an Account.—And in McNew v. Smith, 5 Gratt. 84, it was held to be a correct practice, for a court, at the suit of judgment creditor, upon setting aside a sale of personal property by the debtor, as fraudulent and void, and directing the purchaser to deliver the property to a commissioner who was directed to sell it, to direct an account of its value in order to subject the purchaser for the amount, upon his failure to so deliver the property to the commissioner as directed.

2. SUBJECTING LAND TO CLAIMS OF CREDITORS.—Where a deed is proven to have been made on a secret trust in fraud of the grantor's creditors, it will be set aside; and the land subjected to the payment of the debts due the creditors. And a co-surety who has paid the debt by reason of the principal's insolvency, and has been subrogated to the lien of the judgment paid, may have the land conveyed subjected to the payment of his claim. Hawker v. Moore, 40 W. Va. 49, 20 S. E. Rep. 848.

And though a trust deed is held to be valid in a suit by a judgment creditor to set it aside the creditor is entitled to the surplus after paying the debt secured. Sipe v. Earman, 26 Gratt. 563.

3. COSTS AND ATTORNEY'S FEES.—In a suit to subject land to the payment of a judgment lien and to set aside deeds for fraud against the plaintiff, it is proper to decree that the costs of the suit shall be first paid out of the proceeds of sale of the land. Hinton v. Ellis, 27 W. Va. 422.

Moreover, in a suit by certain creditors to set aside a deed of trust because they were postponed to other creditors of the insolvent grantor, where the trustee was interested to a certain extent in one of the preferred claims, and, together with others, defended the suit, on a decree for plaintiffs, the court properly refused to allow the trustee attorney's fees out of the fund. Darby v. Gilligan, 37 W. Va. 59, 16 S. E. Rep. 507. See monographic *note* on "Costs in Civil Cases."

4. PRIORITIES OF CREDITORS.—It is unnecessary to ascertain the liens existing upon the land before making a distribution of the proceeds of the sale of the land, and the party filing the bill and setting aside the conveyance is entitled to be first satisfied out of such proceeds, unless there are prior liens. State v. Bowen, 38 W. Va. 91, 18 S. E. Rep. 375.

And where a deed of personal property, giving preference to creditors accepting its terms, was sought to be enforced in equity by creditors who had accepted its terms, and other creditors filed answers attacking it for fraud, such answers may be regarded as cross bills; and where such defendants were defeated in the court below and they alone appealed, and procured a reversal of the decree, and the deed was declared void, they have priority, there being no liens before their answers were filed, and are entitled to be first paid out of the fund. Clark v. Figgins, 31 W. Va. 156, 5 S. E. Rep. 643; First Nat. Bank v. Parsons, 42 W. Va. 137, 24 S. E. Rep. 554.

Moreover, where a grantor executes successive deeds of the same property to secure different debts, none of them being given subject to those previously executed, if any of the deeds are subsequently declared void as in fraud of creditors, the proceeds of the property must be applied to the payment of the remaining valid incumbrances in the order of their priorities, before any claims of unsecured creditors of the grantor can be paid. Lewis v. Caperton, 8 Gratt. 148.

In this connection, it was declared in Farmers' Bank v. Corder, 32 W. Va. 233, 9 S. E. Rep. 220, that, although where a deed was made directly from a husband to his wife, and as part of the consideration she agreed to pay one joint creditor of her husband $300, and another $100, with interest on the amount, which debt the husband owed to these parties, and to secure which amount the vendor's lien was reserved, the deed might be set aside as to general creditors as fraudulent, yet the liens thus reserved must be respected as liens on the equitable title conveyed as of the date of the record of said deed, if said claims were valid in other respects.

Nevertheless, creditors not secured in a deed of trust, who sue to overthrow it on the ground that the debts secured and preferred are fraudulent, and succeed in overthrowing some only of the debts secured, are not advanced in priority so as to take the rank of the debts overthrown, and get payment out of the property conveyed in preference to *bona fide* creditors preferred by the deed, but the whole property remains to answer the demands of the *bona fide* preferred creditors, according to the deed. Cohn v. Ward, 36 W. Va. 516, 15 S. E. Rep. 140. See *ante*, "Lien of Creditor."

L. REVIEW.

1. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

When Objection Should Be Made in Lower Court.

Charge of Fraud.—Where it is not charged in the court below that a conveyance is fraudulent, such charge cannot, for the first time, be made in the appellate court. Pracht v. Lange, 81 Va. 711.

Excessive Judgment.—Moreover, it is too late for a grantor in a fraudulent deed to urge in appellate court that the judgment is excessive in a suit to annul that deed and subject the property to that judgment. Wray v. Davenport, 79 Va. 19.

Omission by Court to Make Such Direction That a Complete Decree Can Be Rendered—Cause for Reversal.—However, where it appears, in a suit to set aside a bond and trust deed as fraudulent towards creditors, that they have been assigned, the failure of the court, before entering a decree on the merits, to direct the assignee to be made a party, so that a complete decree, binding on all persons interested, may be rendered, is cause for reversal on appeal, though no objection for want of parties was taken in the trial court. Thornton v. Gaar, 87 Va. 315, 12 S. E. Rep. 753.

Failure to File Copy of Execution and Judgment—No Ground for Reversal.—But in a suit in equity by a judgment creditor to set aside fraudulent conveyances of property by his debtor, where the judgment and execution are admitted by the pleadings, the failure to file a copy of them in the cause is not a ground of reversal of the decree of the court below setting aside the conveyances, especially if no objection is taken in that court to the failure to file them. McNew v. Smith, 5 Gratt. 84.

Defendants Are Not Summoned to Answer Petition—Question Cannot Be Raised in Appellate Court.—And in a suit to set aside an alleged fraudulent conveyance, other creditors filed their petitions setting up their debts, asked to be made parties plaintiff, and prayed certain relief, but did not ask for process

against defendants. An account was directed to ascertain the priority of the claims, of which defendants had full notice, and on the coming in of the commissioner's report the grantee filed exceptions. It was held, that the objection that the defendants were not summoned to answer the petitions could not be raised for the first time on appeal. Flynn v. Jackson, 93 Va. 341, 25 S. E. Rep. 1.

2. WHAT PARTIES ARE ENTITLED TO ALLEGE ERROR.—And in a suit to set aside a fraudulent conveyance from a husband to his wife, it was declared that depositions taken after notice given the wife may be read against her; but, when read against her husband also, the wife, who alone appeals from a decree setting aside her deed, is not entitled to a reversal of the decree because of a want of notice to her husband of the taking of the depositions. Silverman v. Greaser, 27 W. Va. 550.

Moreover, in a suit to set aside a fraudulent conveyance, the judgment debtor cannot question the fraud on appeal, where the alienees do not appeal. Price v. Thrash, 30 Gratt. 515.

3. REVERSAL DEPENDENT UPON A QUESTION OF FACT.—And in a suit to set aside a deed from a man to his intended wife given, prior to 1887, in consideration of marriage, it was shown that, when the deed was given, he was insolvent, and had recently purchased a good deal of property on credit, and that the deed would leave the creditors unpaid. Prior to the marriage a notice was served on the wife in which such suspicious circumstances were set forth. Upon these facts, it was held that the commissioner who heard and saw the witnesses, having held that there was no proof of fraudulent participation on the part of the grantee, and his report having been confirmed by the circuit court the deed would not be set aside. Moore v. Butler, 90 Va. 683, 19 S. E. Rep. 850.

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364 *Crawford's Ex'or v. Patterson.

July Term, 1854, Lewisburg.

Wills—Conditional Legacies—Case at Bar.—Testator by his will gave to his wife a plantation, slaves, stock, &c., for life. And he then added, "It is understood that my wife is to keep my children and raise them and give them sufficient schooling." HELD:

1. **Same—Same—Effect of Acceptance.**—The widow takes the bequest *cum onere*, and is bound to provide for the support and education of the children in a manner suited to her circumstances.

2. **Same—Same—Performance of Condition Excused—Case at Bar.**—But if one of the children accepts the invitation of a relation to visit her, and remains with her for years, the widow of the testator being willing to keep the child with her and provide for her, the widow is not liable for the expenses of the child for board, clothing or education; and this though the relation with whom the child lives is a married woman, and her husband at the end of the time claims compensation.

3. **Same—Same—Same—Same.**—The executors of the testator having paid the accounts out of the estate of the child in their hands and upon her marriage her husband having given a receipt to the executors for the amount, he and his wife cannot recover the amount from the widow.

4. **Commissioner's Report—Exceptions—Laches.***—A bill is filed by the husband and his wife against the executors and widow for a settlement of their administration accounts, and to recover from the widow the amount of these expenses; the account is ordered, and the commissioner allows the executors a credit for the amount they had paid for the wife, and reports a small balance in their favor. This report is returned in March 1824, and not excepted to; and the case lies from that time until June 1847, when the executors and widow are dead. It is too late for the plaintiff to revive the suit, and ask to have the report recommitted and reformed.

In the year 1810 Robert Crawford of Augusta county, departed this life, having first made his will, which was duly admitted to probat; and John and William Poage qualified as his executors. By his will he gave to his wife the negroes and all other property which had been hers before
365 their marriage; and he *gave to her during her life, the plantation whereon he lived, two negroes, stock, plantation utensils and household furniture: And then added, "It is understood that my wife is to keep my children and raise them, and give them sufficient schooling." The balance of his estate he directed to be sold and divided among eight of his children.

At the time of Crawford's death, one of his children had received his share of his father's estate, and another was married; and the other seven lived at home, their ages ranging from four to seventeen years. The property thus left to Mrs. Crawford, it was estimated, would have rented for between three and four hundred dollars.

About the year 1813 Jane, one of the children of Robert Crawford by a former wife, being about thirteen years old, went on a visit to the house of James Bell, whose wife was her aunt; and she remained there three years. She then lived with her uncle James Craig for a year; and then married John C. Patterson. For her expenses of clothing and schooling, and some advancements of money, James Bell presented to the executors of Robert Crawford an account for one hundred and fifty-one pounds nine shillings and a penny, which was paid by the executors; and after her marriage, Patterson in August 1818 executed to them a receipt for this sum as in part of her proportion of her father's estate. In September of the same year the executors paid him in money one thousand one hundred and forty-six dollars and fifty cents, on account of her interest in said estate.

In September 1821 John C. Patterson and his wife instituted a suit in the late Staunton chancery court against the executors, Mrs. Crawford and the other residuary leg-

*Chancery Practice—Laches.—See principal case cited in Foster v. Rison, 17 Gratt. 348; James River, etc., Co. v. Littlejohn, 18 Gratt. 80; Nelson v. Kownslar, 79 Va. 491; Hodgson v. Perkins, 84 Va. 712, 5 S. E. Rep. 710. See also, on this subject, *foot-note* to Tazewell v. Whittle, 13 Gratt. 330; *foot-note* to Doggett v Helm, 17 Gratt. 96; *foot-note* to Bargamin v. Clarke, 20 Gratt. 544.

atees; and in their bill, after setting out the provisions of the will of Robert Crawford, they charged that the executors
366 had received into their *hands a considerable estate which they had sold; and that they had made no settlement of their account or distribution of the estate which had come to their hands. They further charged that the female plaintiff had lived with her step mother only a part of the time between her father's death and her own marriage, and had not received that support and education provided for by the will. On the contrary, the executor John Poage had raised an account against her of one hundred and fifty-one pounds nine shillings and a penny, embracing nothing but those expenditures which her step mother was bound by the will to have defrayed, and that shortly after her marriage he had presented the account to Patterson and obtained his receipt therefor as a part of the estate to which she was entitled under the will of her father. And they file the account marked B. They allege that they were then ignorant of the propriety of these charges; but had since been advised that they were not bound to pay the account; the whole of it being justly chargeable to the widow. The prayer of the bill is for a settlement of the accounts of the executors; that the receipt aforesaid may be canceled and recalled, or that the widow may be compelled to pay the amount thereof with interest to the plaintiffs; that they may have a decree for so much of said estate as they are entitled to; and for general relief.

The executors answered the bill, admitting the sale of the property by them, stating that John Poage was the acting executor, and that he had paid out from time to time, to such of the devisees as were of age, as much as he conceived it would be prudent to pay until a settlement of the estate could be had. That they were always willing to make this settlement, but it was not until about the commencement of this suit that guardians had been appointed for all the infants; and that they were then willing to settle their accounts.

367 *John Poage stated that he advanced the money charged in the account exhibited with the bill, under the belief that it was in discharge of the interest of the female plaintiff in her father's estate; and under this belief he required and obtained the receipt from her husband.

Mrs. Crawford alleged that she had strictly complied with the provisions of the will in favor of the female plaintiff as long as she lived with her, which was until she was between fourteen and fifteen years of age. That she then left the defendant's house, and went to live with her aunt Mrs. Bell, at Mrs. Bell's solicitation, who proposed to take her, as defendant believed through friendship, to do more for her than the defendant would have in her power to do. That defendant consented, believing it would be of advantage to the plaintiff, and not from any unwillingness in herself to comply with the provisions of the will aforesaid. And she insisted that the moneys expended whilst at Mrs. Bell's could not be considered as embraced by the provisions of the will; but was properly chargeable against plaintiff's interest in the estate.

In June 1823 the death of the plaintiff John C. Patterson was suggested, and on the motion of the surviving plaintiff, it was ordered that the executors of Robert Crawford do render an account of their administration before a commissioner of the court. In March 1824 this commissioner filed his report, in which he credited the executors in their account with the plaintiff, with the amount they had paid; and she was brought in debt thirty-eight dollars and thirty cents. Some of the other children were over paid, and there were balances due to others.

After the return of this report the cause slept, without a step being taken therein, until June 1847, when the death of John Poage and Sarah Crawford were suggested,
and it was ordered to be revived in
368 the *names of Poage's executors and of Silas Henton as executor of Sarah Crawford. The death of several of the legatees of Robert Crawford was also suggested, and the suit was revived in the names of their personal representatives; and then the record states that by consent it is ordered that the report of Commissioner Clarke theretofore made in the cause be recommitted to Commissioner Hendren, who is required to consider and modify the same, and to report specially to the court any matter, &c.

In October following Commissioner Hendren returned his report, in which he disallowed the credits to the executors for moneys paid to Bell, to the amount of one hundred and thirteen pounds eleven shillings, on the ground that it was money expended for necessaries during her infancy, and therefore properly chargeable to the widow. And he reported a balance due to the plaintiff of four hundred and fifty-five dollars and ninety-nine cents, with interest from June the 30th, 1821. This was the only account stated by the commissioner. The cause came on to be heard upon this report in August 1848, when the court made a decree directing Henton, the executor of Mrs. Crawford, to pay to the plaintiff, out of the assets of his testatrix, the amount reported by the commissioner; with liberty to the plaintiff, if this decree should be unavailing, to apply for a decree against the executors of Robert Crawford.

Soon after this decree was pronounced Henton presented a petition to the court, in which he stated that the cause had been revived without his knowledge or consent, and that the decree had been made without his having had an opportunity to make his defence; and he verily believed he should be able to show that it was erroneous. The court accordingly set aside the decree; and the cause was recommitted to Commissioner

Hendren, who was directed to state
369 the accounts *between the parties according to his own view of what was equitable: And Henton was allowed to file his answer. In his answer, after stating the proceedings in the cause up to the report of Commissioner Clarke, he alleged that Chancellor Taylor considered the cause, and filed a memorandum in his own handwriting, among the papers, in the following words: "The report not being excepted to, is affirmed, and a decree to be entered in pursuance thereof;" but that no decree was entered on the order book. That thus the cause rested for more than twenty years, until John Poage the principal acting executor, who was cognizant of all the facts of the case, and Sarah Crawford the widow, had gone down to their graves in the firm conviction that this stale demand had been finally adjusted. He insisted upon the objections taken by the original defendants; upon the staleness of the demand, and upon the statute of limitations; upon the report of Clarke made when all the parties were alive, and on the acquiescence by the plaintiff for twenty-five years in that report; on the subsequent death of all the parties who were personally cognizant of the transactions; and upon the manifest injustice of compelling him, ignorant of all the matters, to enter into a controversy which seemed to have been carefully kept out of view during the time of his testatrix.

In September 1849 Commissioner Hendren made his second report, in which he charged Mrs. Crawford with the annual sum of forty dollars for five years, with interest commencing with the year 1814, and coming down to 1818; and making the balance due upon the account on the 1st of November 1849, six hundred and six dollars and sixty-six cents, of which two hundred and twenty-four dollars and sixty-nine cents was principal. The plaintiff excepted to the report, because it reduced the charges below the amount paid by the executors to Bell.

370 *The cause came on to be finally heard in November 1849, when the court overruled the plaintiff's exceptions and confirmed the report; and decreed that Henton the executor of Mrs. Crawford should, out of the assets of his testatrix in his hands, pay to the plaintiff the amount reported by the commisisoner, with interest on the principal sum due, from the 1st of November 1849 until paid, and her costs. And liberty was reserved to the plaintiff to apply for a decree against the executors, if this decree should be unproductive. From this decree Mrs. Crawford's executor applied to this court for an appeal, which was allowed.

Stuart, for the appellant.
Michie, for the appellee.

MONCURE, J. The will of Robert Crawford imposed a charge on the estate given to his wife for the keeping, raising and schooling of his children. The estate was of the annual value of three or four hundred dollars; and seems to have been not more than adequate to the support of the family in a plain and comfortable manner. At the testator's death the family consisted, besides the widow, of seven children, ranging from four to seventeen years of age. The widow having accepted the estate, took it of course cum onere; and was bound to keep and raise the children, and give them sufficient schooling. Had she turned the appellee away from home when of tender years, and unable to provide for herself, and failed to provide her with necessary board, clothes and schooling, she would have been liable, in equity at least, if not at law, for the value of such necessaries to any person who might furnish or pay for them. But she did not turn the appellee away. She kept her until she was thirteen years of age, when the appellee went to live with her aunt Mrs. Bell, by the
371 *latter's invitation, and continued to live there for three or four years, and she then lived with her aunt Mrs. Craig for a year or more until her marriage. The widow, as she alleges in her answer, would have continued to keep the appellee according to the terms of the will; but she believed, and was well warranted in believing, that it would be for the advantage of the appellee to live with her aunt; and that she would be better provided for there than at home, and free of charge. The account which was the cause of this suit, being exhibit B filed with the bill, is for cash paid by the executor John Poage to and for the appellee while she lived with Mrs. Bell and Mrs. Craig; a large part of it having been paid to James Bell the husband of the former. It was not created at the instance of the widow, or on her credit, and she never assumed its payment. It does not appear to have been ever demanded of her, or that she was ever informed of its existence, until the institution of this suit. She was therefore never liable for the amount of the account or any part of it, at law or in equity, either by reason of the charge created by the will of her husband, or by any contract, express or implied. The case, in principle, is very much like that of Urmston v. Newcomen, 4 Adol. & Ell. 899, 31 Eng. C. L. R. 222. There, a grand mother offered to a father to take care of his child without putting him to any expense; upon which he gave up the child to her. Afterwards the grand mother gave up the child to the mother, who was living apart from the father; and afterwards the child, to escape cruel treatment, returned to the grand mother, who maintained it thenceforward. In the argument of the case, (which was an action of assumpsit brought by the grand mother against the father to recover the expense of maintenance after the return of the child,) the general question was raised, Whether a father, if he desert his child, be not
372 liable in assumpsit *to any one who provides food and clothing for it? The judges declined giving an opinion upon the general question, thinking that

it did not arise in the case. But they all concurred in deciding that the father, who had no notice of the child's quitting the grand mother at all, or of the cruelty, was not liable to her for the maintenance, in as much as the facts did not show any desertion of the child by the father, and negatived a contract between him and the grand mother. They also decided that it made no difference that the grand mother, when she made the original undertaking, was a married woman; the ground of the decision being not that she had made a valid contract, but that the circumstances negatived desertion; and that therefore the question as to the implied liability did not arise.

The widow, in this case, not being liable originally for the account or any part of it, cannot be rendered liable to the executor John Poage in consequence of its payment by him; nor to the appellee in consequence of its payment by her husband to the said executor; neither of such payments having been made at the request of the widow, express or implied.

But even if she were ever liable for this account, or any part of it, or any of the expenses of the appellee while she lived with her aunts, such liability had ceased to exist in June 1847, when the suit was revived against the appellant as executor. The widow answered the bill in June 1822, stating the facts, and denying her liability. In June 1823 an order was made for the settlement of the account of the executors of Robert Crawford. In March 1824 the commissioner's report was returned, showing a balance due by the plaintiffs Patterson and wife to the executors on the 30th of June 1821, of thirty-eight dollars and thirty and seven-eighth cents, after charging the former with the amount of the said account marked exhibit B, which charge the
373 commissioner stated that *he conceived to be justified by the answers of the executors and of the widow. There was no exception to this report. In May 1824, the cause was set for hearing: And no further order was taken in it until June 1847; when the widow, the acting executor, and several of the other parties having died, the cause was revived and proceeded in to a final decree, which was rendered in November 1849. I think that the bill should have been dismissed as to the appellant, not only on the grounds of defence relied on in the answer of the widow, but also on the additional grounds relied on in the answer of the appellant her executor, filed in December 1848, to wit, the staleness of the demand and the statute of limitations, and the acquiescence of the appellee in the report of the commissioner for more than twenty years, and until after the death of all the parties who were personally cognizant of the transactions. The death of the plaintiff John C. Patterson was suggested in June 1823, and the suit was thereafter prosecuted in the name of his surviving wife the appellee, who has ever since been free from legal disability. Her extraordinary laches in the prosecution of the suit has not been sufficiently accounted for. The only excuse relied on is furnished by a statement made in the answer of the appellant, that in consequence of a paralysis with which Chancellor Brown was afflicted about the time the commissioner made his report, and which in a great measure disabled him from attending to business, no action was taken by the court on the report; and that Chancellor Taylor, who succeeded Chancellor Brown in 1826, was for some years before his transfer to the Botetourt circuit, almost incapable, from indisposition, of attending to his official duties. But this excuse accounts for comparatively a small portion of the long lapse of time between the return of the report and the revival of the suit, and is wholly insufficient.
374 *The fair presumption from the record is that all the parties acquiesced in the report, and did not choose to prosecute the case any farther; especially the appellee, who appeared by the report to be a debtor. This presumption is confirmed by the fact, also stated in the answer of the appellant and admitted to be true by the counsel for the appellee, that after Chancellor Taylor came into office, but at what precise period does not appear, he filed in the papers a memorandum in the following words: "The report not being excepted to is affirmed, and a decree to be entered in pursuance thereof." Though such a decree was never actually entered, yet the rights of the parties seem to have been considered as settled by the report, sanctioned as it was by the chancellor. The further prosecution of the suit having been delayed for twenty-three years, and until after the death of the widow and of the acting executor, who were acquainted with the transactions, it was too late then to revive it against their representatives, who were ignorant of them, and had not the means of making a proper defence. The case falls within the principle of the cases of Hercy v. Dinwoody, 2 Ves. jr. 87, and Hayes v. Goode, 7 Leigh 452; that in a court of equity it is not only required that claims should be brought forward in a reasonable time, but also that they shall be prosecuted with reasonable diligence.

I think the bill should have been dismissed, not only as to the appellant, but as to the other defendants also; and on the principle of the cases just cited. The executors of Robert Crawford had certainly no right as such to make the payments charged in exhibit B; and John C. Patterson was not bound to have given them credit for the amount in the settlement of his wife's portion of their testator's estate. He did, however, give them a receipt therefor as so much of the said portion. Whether the receipt was given under
375 *such mistake of law or fact, or whether the relations between them were such as to have entitled him to set aside the transaction if due diligence had been used in the prosecution of the suit,

are questions which it is unnecessary to decide.

That the suit was not prosecuted with due diligence, has already been sufficiently shown. It may be said that none of the defendants have appealed from the decree except the appellant. But I think his appeal brings up the whole case; on the ground that the reversal of the decree and dismission of the bill as to him would, directly or incidentally, disturb the rights of the other defendants as settled by the decree. See Dickenson v. Davis, 2 Leigh 401, and the opinion of Stanard, J., in Powell's ex'ors v. White, 11 Leigh 309, 317. The decree was, primarily, against the appellant; but liberty was reserved to the appellee, if the decree against the appellant should prove unavailing, to apply for further relief against the executors of Robert Crawford, or any other person liable in the premises, either primarily or eventually. The executors, if they could appeal from such a decree, may not have thought it necessary to do so; as it was primarily against the appellant, and would probably have been effectual but for his appeal. The reversal of the decree, and dismission of the bill as to him, therefore, would materially disturb their rights as settled by the decree, if in fact it settled anything as to them. But the reservation is a mere incident of the decree, and the reversal of the decree would leave nothing to sustain the incidental reservation. The same may be said of the liberty reserved to the other residuary legatees of Robert Crawford to apply for decrees upon the report, although the court was of opinion, and rightly so, that they had been satisfied. Patterson and wife were the only plaintiffs in the suit, and it is obvious they never would have brought it but for the purpose
376 *of recovering the amount of the account for which he had given a receipt to the executors. None of the other residuary legatees have ever complained of the executors, or asked for any decree against them. The report of the commissioner returned in 1824, showed that payments had been made by the executors to all of them, in regard to some exceeding, and to others falling short of, their respective portions of the estate. After the return of that report the executors proceeded to settle with the legatees accordingly; and receipts in full of several of the balances have actually been filed in the papers of the suit. In consideration of all the circumstances, and especially of the great lapse of time, I think no such reservation should have been made in favor of the other residuary legatees.

I am therefore of opinion that the decree should be reversed, and the bill dismissed; with costs to the appellant, both in this court and the Circuit court.

The other judges concurred in the opinion of Moncure, J.

Decree reversed.

377 *McDowell's Ex'or v. Crawford.

July Term, 1854, Lewisburg.

1. **Debt on Bond—Plea of Non Est Factum—Evidence—Case at Bar.***—In an action of debt upon a bond for two thousand dollars, purporting to be for money loaned, the issue is made up upon the plea of *non est factum*. On the trial the plaintiff introduces ten intelligent and credible witnesses, well acquainted with the handwriting of the obligor, all of whom express a confident opinion that the signature to the bond is his. The defendant, to support his plea, introduces evidence of the circumstances of the obligor, the relations and conduct of the parties, and the ability of the plaintiff to lend the money. To rebut the evidence on the last ground the plaintiff who was a merchant, introduced a witness C, who had been his book keeper, who professed to speak from memoranda taken by him on a recent examination of the plaintiff's books; and he stated that the plaintiff had a large amount of cash-notes and accounts not known to the defendant's witnesses, and that he had the control of a large estate of S, of which he was the executor. When the cross examination of this witness, and the examination of witnesses to rebut his testimony, was ended, which was late in the evening, the defendant's counsel announced that they had no other witnesses to examine, but would on the next day introduce some documentary testimony. On the next day they offered in evidence the settled accounts of the plaintiff as executor of S, to show that he could not have from that source united with his own means, sufficient to enable him to make the loan. To this evidence the plaintiff objected, and the court excluded it; and in doing so, remarked that the evidence previously introduced by the defendant without objection, as well as that than offered, was too vague, remote and indefinite in its character, to sustain the plea of *non est factum* against such evidence of *factum* as the plaintiff had introduced; and would have been excluded if objected to. The defendant then asked that the witness C might be recalled, and that they might be permitted to re-examine him, and test the accuracy of his statements, by requiring the production of the books, which were near and might be obtained in a few minutes. But the court refused to permit the witness to be recalled, or to require the books to be produced; because the evidence was irrelevant, and because the defendants had announced on the day before, that they had concluded the examination of witnesses. HELD:

378 *1. **Same—Same—Same—Same.**—The settlements of the plaintiff as executor of S were competent and relevant testimony, and should have been admitted.

2. **Weight of Evidence—Opinion of Court.**†—That the comment of the court upon the evidence of the

*__Debt on Bond.__—See generally, monographic *note* on "The Action of Debt" appended to Davis v. Mead, 13 Gratt. 118.

†__Weight of Parol Evidence—Opinion by the Court.__—As to the right of the court to express his opinion to the jury in regard to the weight of parol evidence, see *foot-note* to Davis v. Miller, 14 Gratt. 3. The principal case is cited and approved as to the proposition laid down in said *foot-note* in Comett v. Rhudy, 80 Va. 716; Richmond, etc., R. Co. v. Noell, 86 Va. 24, 9 S. E. Rep. 473; Tyler v. C. & O. R. Co., 88 Va. 394, 13 S. E. Rep. 975; Newlin v. Beard, 6 W. Va. 125, 126; State

defendant, when excluding the settlements, was the expression of an opinion upon the weight of evidence calculated to mislead the jury, for which the verdict and judgment should be set aside, and a new trial awarded.

3. **Recalling Witnesses—Case at Bar.**‡—That the defendant should have been permitted under the circumstances, to recall the witness C; and to have the plaintiff's books produced.

2. **Evidence—Inadmissible—Case at Bar.**—A note of the defendant to the plaintiff, written and delivered some days before the trial, authorizing the plaintiff to introduce his books in evidence, if he will allow them to be examined by defendant's counsel previous to the trial, is not admissible evidence for any purpose.

This was an action of debt in the Circuit court of Augusta county, brought by Hugh John Crawford against the executor of John McDowell deceased. The action was founded upon a bond; and the plea was non est factum, upon which the issue was made up.

Upon the trial the plaintiff introduced in evidence a bond in the following terms:

"$2000. One day after date, I promise to pay or cause to be paid unto Hugh J. Crawford or order, two thousand dollars, for borrowed money, with legal interest from date; to which payment well and truly to be made, I bind myself, my heirs, administrators, executors, &c. Witness my hand and seal this the 18th day of March 1846.

"In consequence of not giving to said Crawford, at this time, a trust deed to secure the above two thousand dollars, which would give publicity to this debt, and be prejudicial to my interest, I agree to execute to him a valid deed of trust upon all my real estate in Staunton, at the expiration of three years from date, for which time I am to have the use of the money, if I should fail to pay him, his heirs, &c., the above sum within thirty days after payment is demanded.

John McDowell. [Seal.]"

379 *This bond was wholly in the handwriting of the plaintiff, except the signature; and there were two endorsements upon it, also in the handwriting of the plaintiff, of the receipt of the interest for 1847 and 1848. The plaintiff then introduced ten witnesses of intelligence, good character, and unquestioned and unques-

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v. Hurst, 11 W. Va. 77; Winkler v. C. & O. R. Co., 12 W. Va. 710; Nicholas v. Kershner, 20 W. Va. 263; State v. Thompson, 21 W. Va. 756; State v. Lowe, 21 W. Va. 794; State v. Heaton, 23 W. Va. 793; Storrs v. Feick, 24 W. Va. 613; Gwynn v. Schwartz, 32 W. Va. 494, 9 S. E. Rep. 883; State v. Musgrave, 43 W. Va. 678, 28 S. E. Rep. 816; State v. Staley, 45 W. Va. 804, 32 S. E. Rep. 202. See, in accord, Ross v. Gill, 1 Wash. 87; McKinley v. Ensell, 2 Gratt. 333; Blincoe v. Berkeley, 1 Call 405; Whitelaw v. Whitelaw, 83 Va. 43, 1 S. E. Rep. 407; Crabtree v. Horton, 4 Munf. 59; Bogle v. Sullivant, 1 Call 561.

"The opinion of the court as to the weight, effect or sufficiency of the evidence submitted to the jury is a good ground for reversal of a judgment, according to all the authorities. Such an opinion is certainly calculated to mislead them, whether it be communicated to them in the form of a construction, or be merely expressed by the court in their presence in the progress of the trial. In either case they are authentically informed of the opinion, and it must have an influence upon their judgment,—probably as much in the one case as in the other; but whether the same, or more, or less, the principle involved is not affected." Neill v. Rogers, etc., Co., 38 W. Va. 231, 18 S. E. Rep. 564, quoting from the principal case. See also, cases cited above.

See generally, monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192; monographic *note* on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

‡**Admitting Evidence after Argument—Discretion of Trial Court.**—On trials before a jury, when the evidence has been closed on both sides and the argument of the cause has commenced, as a general rule, no further evidence should be received from either party; but the judge presiding at the trial, in the exercise of a sound discretion, may relax the rule under peculiar circumstances, and receive additional evidence, if the nature of the case and the ends of justice require it. But if the introduction of such additional evidence takes the adverse party by surprise, he should be allowed time and opportunity, if desired, to meet it with further evidence on his side. George v. Pilcher, 28 Gratt. 310, citing the principal case. See principal case also cited in Schonberger v. Com., 86 Va. 492, 10 S. E. Rep. 713. See, in accord, Perdue v. Caswell, etc., Co., 40 W. Va. 372, 21 S. E. Rep. 870; *foot-note* to George v. Pilcher, 28 Gratt. 301. On this subject, the judge, before whom the case is tried, must necessarily have large room for discretion, and the appellate court should seldom interfere with its exercise. Hunter v. Snyder, 11 W. Va. 212, quoting with approval from the principal case.

So, in its discretion, the court may allow other changes in the regular order of introducing evidence. Brooks v. Wilcox, 11 Gratt. 411, and *foot-note*.

Instructions—Should Be Given if Correct and Relevant.—In Harman v. Cundiff, 82 Va. 246, it is said: "It is well settled, says LEWIS, P., in Central Lunatic Asylum v. Flanagan, 80 Va. 110, that when instructions are given which cover the entire case, and which properly submit the case to the jury, it is not error to refuse to give others, even though in point of law they are correct. Citing Laber v. Cooper, 7 Wall. 565. It is safest, however, for the court to give instructions asked for when they correctly expound the law, and are relevant to any evidence in the case. Citing Hopkins v. Richardson, 9 Gratt. (485); 4 Min. Inst. p. 747. See also, R. R. Co. v. Horst, 93 U. S. 291; Mills v. Smith, 8 Wall. 27; Cornett v. Rhudy, 80 Va. 710, and cases cited; 1 Rob. Pr. 338; *McDowell v. Crawford, 11 Gratt. 377;* Barton's L. Pr. 214, and cases there cited."

The principal case was also cited in Rosenbaums v. Weeden, 18 Gratt. 800. See also, monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192.

Exceptions—Exclusion of Evidence—What Bill Must Show.—On this subject, see *foot-note* to Johnson v. Jennings, 10 Gratt. 1, citing many cases, among others the principal case. The principal case was also cited in Valley, etc., Asso. v. Teewalt, 79 Va. 425; Union, etc., Ins. Co. v. Pollard, 94 Va. 157, 26 S. E. Rep. 421.

tionable credibility, consisting of clerks, lawyers, magistrates, merchants, a commissioner in chancery, and the family physician of the obligor, all of them familiar and well acquainted with the handwriting of the obligor, and whose acquaintance and intimacy varied with the different witnesses from twenty-five to forty years. These ten witnesses with one accord testified that they had been long and familiarly acquainted with the handwriting of John McDowell, from having seen him write, and from correspondence and business transactions with him. That they had carefully examined the signature to the bond in question, and they believed it to be the true and genuine signature of John McDowell. Several of these witnesses stated that the signature is written "with a lighter pen" than the common signature of John McDowell, but that in the general character of the writing, and in the formation of the letters, it has every appearance of being genuine. The plaintiff also introduced two receipts in his own handwriting, corresponding with the endorsements on the bond, for the interest for the years 1847 and 1848, and also introduced the deposition of a sister of McDowell, who was one of his heirs at law and a legatee in his will, and the evidence of another witness, showing how and when the receipts were found in the house in which McDowell had lived and where he died.

The defendant, to support the issue on his part, without offering any opposing testimony as to the genuineness of the signature to the bond, proceeded, by cross examination of the plaintiff's wit-
380 nesses, and *by witnesses on his own part, to offer evidence tending to show:

1. That the existence of the bond in controversy had been concealed, during the life time of John McDowell, in a manner and under circumstances in themselves unnatural, and wholly inconsistent with the habits of McDowell, and with the interest of the plaintiff.

2. That the plaintiff had not the pecuniary ability to make a loan of the amount and character evidenced by the bond in controversy, and that he could not at the date of the bond have had such an amount of money for any purpose.

3. That from the social and business relations of the plaintiff and John McDowell, it was altogether improbable that such a transaction could have taken place between them.

4. That from the pecuniary circumstances and standing of John McDowell at the date of the bond, it is altogether improbable that any one would have loaned him such a sum of money without security.

5. That the transaction, as appearing on the face of the bond, was altogether inconsistent with the known circumstances, habits and character of the parties at the date of the bond; and that the subsequent conduct of both was inconsistent with the idea that such a contract had ever been made. That therefore, it was not the act and deed of John McDowell, either because it was not his genuine signature, notwithstanding the plaintiff's evidence of handwriting; or if genuine, it was obtained surreptitiously, fraudulently or otherwise, in such an illegal manner as to render the bond not his act and deed.

The evidence introduced by the defendant to sustain the foregoing conclusions is set out in the record, but need not be stated here.

To rebut the evidence of the de-
381 fendant as to the *pecuniary condition of the plaintiff at the date of the bond, he introduced a witness, William B. Crawford, who testified that he was, up to the —— day of November 1845, book keeper for the plaintiff in his mercantile establishment; and that at that time plaintiff was in possession of a large amount of cash-notes and accounts, of his own property, which had not been known to any of the witnesses who testified as to his circumstances; and also that the plaintiff had the control of a large estate of John C. Sowers deceased, of which he was the executor. The witness professed to speak from memoranda taken upon a recent examination of the books kept by him in 1845.

To meet this new evidence of the plaintiff, the defendant offered evidence of book keepers expert in the business, to show that the books described by the witness could not have enabled him to state such results with any certainty.

It being late in the evening when this evidence was given and finished, defendant's counsel announced that they had no other witnesses to examine, but that next morning they would probably offer documentary evidence; and the court adjourned with the announcement that any such evidence, provided it could be shown to be relevant to the issue, would be received.

On the next day the defendant offered to introduce the settlements made by the plaintiff, of his accounts as executor of John C. Sowers deceased, to show that at the date of the bond in controversy, the plaintiff could not have had funds of that estate in his hands sufficient of themselves or with his own means, to have enabled him to make such a loan as that shown by the bond; and also to show that the plaintiff, as legatee and devisee of that estate, and deriving his whole property from that source, could not possibly have had the amount of available funds stated by his witness William B. Crawford. To the
382 introduction of *these settlements as evidence, the plaintiff's counsel objected as irrelevant to the issue in the cause; and the court sustaining the objection, refused to permit them to go to the jury.

In delivering the opinion excluding the evidence, the court stated that upon the issue in this cause, the plaintiff having introduced ten witnesses, all of whom swore positively to the genuineness of the signature to the bond, it was sufficient evidence, the bond being found in possession of the

plaintiff, from which the jury should presume sealing and delivery, and due execution thereof, unless met and overthrown by opposing testimony on the part of the defendant; and that as the defendant had failed to introduce any opposing proof as to the genuineness of the signature, all the other testimony introduced by him, without objection, as well as that now objected to, was too vague, remote and indefinite in its character to sustain the plea of non est factum against such evidence of factum as the plaintiff had introduced, and would have been excluded if objected to; but as it was not, all the court could do was to exclude that now objected to.

Upon this statement of the court the counsel for the plaintiff remarked that they had considered the whole of the defendant's evidence illegal, but had not objected to it because they wished to permit the fullest investigation. The counsel for the defendant then suggested to the court and the counsel for the plaintiff, that if the evidence should then be excluded in accordance with the opinion of the court, the defendant would at once except and submit to a verdict; but plaintiff's counsel refused to make a motion to exclude any part of defendant's evidence which had already gone to the jury, only objecting to the further introduction of illegal evidence by the defendant. The court stated its inability to exclude without such a motion, and declined to instruct the jury in conformity
383 with the *opinion stated; but upon the motion of the defendant, before the jury retired to consider of their verdict, instructed the jury as follows:

1. "The jury are bound to weigh and consider all testimony introduced by either party without objection, unless upon a motion made to the court, such evidence is excluded."

2. "That upon the issue in this cause it is competent for the defendant to show by evidence as to the circumstances, relations and business of the parties, and by their whole conduct in connection with the bond in controversy, that it is either impossible or improbable that the bond sued upon is the act and deed of the defendant's testator: Remarking that the instructions were clearly correct as abstract propositions of law, and that it might be safely left to the jury to determine how far they were applicable to the facts and evidence in the cause." To which action of the court excluding the testimony offered, and the opinion of the court pronounced concerning the evidence already introduced by the defendant, he excepted.

Immediately after the court had excluded the evidence as before stated, the defendant's counsel asked that William B. Crawford, the plaintiff's witness, might be recalled, and that they might be permitted to re-examine him, and test the accuracy of his statements as to the facts appearing upon the books of the plaintiff, by requiring the production of the books which were near and might be obtained in a few minutes. But the court refused to permit the witness to be recalled, or to require the books to be produced, for two reasons: 1. Because the evidence would not be relevant to the issue. 2. That the defendant's counsel had, on the evening before, announced that they had concluded the examination of witnesses, as before stated. And the defendant again excepted.

Pending the trial the defendant
384 offered in evidence *a paper signed by himself, in which he expressed his consent to the production and use as evidence, on the trial, of the mercantile books of the plaintiff, provided they were at once put into the hands of his counsel for examination: And he proposed to show, that during the then term of the court, and some four days before the trial commenced, that paper had been presented by the defendant in open court, and filed in the cause; and that the plaintiff had refused or failed to avail himself of the privilege therein offered him; but at the same time had notified the defendant that if he really wished the production of the plaintiff's books, to say so distinctly, and they should be forthcoming without even requiring of the defendant the regular written notice, verified by affidavit. But the court excluded the paper and the evidence; and the defendant again excepted.

The jury found a verdict in favor of the plaintiff for the amount of the bond with interest; and the court rendered a judgment thereon. Whereupon the defendant applied to this court for a supersedeas, which was awarded.

Baldwin and Michie, for the appellant, referred to Sides v. Schnebly, 3 Har. & McH. 243; Rowt's adm'x v. Kile's adm'r, 1 Leigh 216; West's ex'or v. Logwood, 6 Munf. 491; Bogle, &c. v. Sullivant, 1 Call 561.

Fultz, for the appellee, referred to Dale v. Roosevelt, 9 Cow. R. 307; 3 Philips' Evi. 612; Boyt v. Cooper, 2 Murph. R. 286; Tomlinson v. Mason, 6 Rand. 169; Gardner v. Gardner, 10 John. R. 47.

SAMUELS, J. In my opinion it appears with sufficient clearness that the account of Crawford's administration on the estate of John C. Sowers, and the books of Crawford, respectively, afforded evidence rele-
385 vant *to the issue, and were therefore improperly excluded from the jury. I deem it unnecessary, in this case, and therefore improper, to express an opinion whether a judgment in any case should be reversed unless error appears in the proceedings; or whether a judgment should be reversed because the record leaves it doubtful whether the court below did or did not err. With this explanation, I concur with Judge Moncure in reversing the judgment; agreeing fully with him in regard to the other questions.

LEE, J. I agree that upon the issue joined in this cause enquiry into the pecun-

iary circumstances and condition of the defendant in error at the date of the paper writing in question, was strictly relevant and germain; and if the rejection of the settlements said to have been made by Crawford as executor of Sowers, as evidence in this case, was only to be justified by holding that such enquiry was impertinent or irrelevant, or if the action of the court as disclosed by the first bill of exceptions, is properly to be regarded as an instruction to the jury to that effect, I should have little difficulty in holding that error had been committed for which the judgment should be reversed. But there is a distinct ground upon which, as I understand the rule, to be deduced from the later cases on the subject, the rejection of these settlements must be sustained in this court. The witness William B. Crawford, in testifying as to the sources from which, as he supposed, the defendant in error might have derived the means to make the supposed loan, professed to speak from memoranda taken upon a recent examination of books kept by him in the year 1845. This applies, as I understand the statement, as well to what he testified in reference to the estate of Sowers as to what he stated in regard to the other resources which Crawford had at command. Now, oral evidence of the
386 *contents of the books referred to was clearly inadmissible without the production of the books themselves; nor could the witness be permitted to speak as to the facts noted upon them unless he had a knowledge or recollection of them as distinct from the entries; though he might refer to the latter for the purpose of reviving his knowledge or refreshing his recollection. 1 Starkie Ev. 390; Ibid. 128; Doe ex dem. Church v. Perkins, 3 T. R. 749; Henry v. Lee, 2 Chitty's R. 124, 18 Eng. C. L. R. 273. Thus, all the evidence as to Sowers' estate, derived from the books referred to, might have been readily excluded, if the plaintiff in error had made this objection; and if the settlements of the accounts of that estate would have been otherwise irrelevant, they cannot be admitted in evidence, if objected to, because improper evidence had been given without objection on the part of the plaintiff in error or with his consent. For one party's consenting to the admission of incompetent testimony for his adversary, is no reason for admitting other incompetent testimony in favor of the party so consenting, where objected to on the other side, even although the latter might serve to explain or contradict the former. Wilkinson v. Jett, 7 Leigh 115; Unis v. Charlton, 4 Gratt. 58; Stringer v. Young's lessee, 3 Peters' R. 320.

But supposing no question could have been made as to the competency of the evidence in relation to Sowers' estate, or that the witness gave other testimony independently of the books, tending to show that the defendant in error might have had means at his command derived from Sowers' estate, this would not necessarily render the settlements of the accounts of that estate admissible in evidence. Their admissibility would depend upon their relevancy; and this of course refers to the nature and character of their contents. When examined, these might be
387 found to be *relevant or wholly irrelevant. They might tend to meet the testimony of the witness Crawford, by showing that he could not have the control of funds to any large amount from that source, or they might fail to shed any light whatever upon the question of the means he had at command. But what state of facts they would disclose, we are not informed. They are not made a part of the bill of exceptions, so that the court can inspect them and judge whether they would be relevant or otherwise; nor does the bill of exceptions state their purport or what they would prove if received in evidence. Now it cannot be sufficient ground for reversing a judgment that evidence was excluded which might or might not have been relevant to the issue. On the contrary, it has been expressly decided by this court that when it is alleged error has been committed in excluding proper and relevant testimony from the jury, it is incumbent on the party seeking to reverse a judgment for this cause, to show that error has been committed: And to this end the evidence offered and rejected must appear to have been relevant from the statement of the evidence alone; or if the relevancy of the evidence depends on other facts, the party alleging the error must present such a case on the record as shows its relevancy. And if the testimony does not appear of itself or upon the facts stated in the record, to have been relevant, it will be held in the appellate court to have been properly excluded. Rowt's adm'x v. Kile's adm'r, 1 Leigh 216; Carpenter v. Utz, 4 Gratt. 270; Johnson's ex'x v. Jennings' adm'r, 10 Gratt. 1.

I am aware there are certain cases from which it might seem to be deducible that the practice in such a case, where the bill of exceptions fails to show the relevancy of the evidence rejected, is to reverse the judgment and remand the cause for a new trial. Fowler v. Lee, 4 Munf. 373;
388 Hairston v. Cole, 1 Rand. *461. I conceive, however, the later cases above referred to establish a different rule, one more conformable to general principle, and in more strict analogy to the settled practice of the court in the case of a motion for a new trial where the bill of exceptions sets out the evidence instead of the facts proved in the cause. Bennett v. Hardaway, 6 Munf. 125; Deems v. Quarrier, 3 Rand. 475; Carrington v. Bennett, 1 Leigh 340; Ewing v. Ewing, 2 Leigh 337.

Without, therefore, entering into the reasons which may have weighed with the court in rejecting these settlements, I think it a sufficient answer to the objection to say, that enough is not shown by the bill of exceptions to enable this court to see that they furnished relevant testimony,

and to say that the Circuit court erred in pronouncing them irrelevant.

Nor do I think the action of the court, as disclosed by the bill of exceptions, or the opinions which it expressed, should be regarded as an instruction to the jury that enquiry into the pecuniary circumstances of Crawford was not germain to the matter upon which they were called to pronounce. It is true, in delivering its opinions excluding the settlements of Sowers' estate, the court said that the evidence offered by the defendant was "too vague, remote and indefinite" in its character to sustain the plea of non est factum against such positive e ence of the genuineness of the signa- t to the bond. But this remark was not a essed to or intended for the jury. It w made upon a point which had been expressly withdrawn from their consideration, and submitted to the judgment of the court. It was intended to explain to the counsel the reasons of the court for rejecting the testimony. It may not necessarily have been heard by the jury or all of them. The presence of the jury is not necessary during the discussion and decision of a question of law arising incidentally before the
389 court *during a trial, and advantage is frequently taken, in practice, of the occurrence of such a question to permit jurors to withdraw; and sometimes the discussion and decision take place before the jury are called to take their seats after a recess of the court.

But even if this remark is to be regarded as having been heard by the jury, and if, standing alone and unexplained, it might have had an improper influence upon their minds, enough occurred immediately afterwards and in the same connection, to prevent any such consequence. For the court formally and expressly declined to give an instruction in conformity with the opinion thus expressed: and this refusal to give such an instruction must be supposed to have engaged the attention of the jury equally with the opinion itself so incidentally expressed; and it served to admonish them that the opinion of the court upon the point of the exclusion of testimony was not to influence them in their deliberations upon the question of fact submitted to their decision. Surely it cannot be imputing too high a degree of intelligence to the jury to suppose that when the court formally declined to declare to them, as a matter for their guidance, what it had previously intimated, though incidentally, in giving an opinion excluding testimony, they would at once see that that opinion was not intended for them, and was to have no weight in their consideration of the case. Moreover, the court formally instructed the jury that they were bound to weigh and consider all testimony introduced by either party; and that it was competent for the defendant to show, by evidence as to the circumstances, relations and business of the parties, and by their whole conduct in connection with the bond in controversy, that it was either impossible or improbable that it was the act and deed of the defendant's testator. So far, therefore, from the instruction given by the court amounting to a ruling which excluded
390 *enquiry into the pecuniary circumstances of Crawford, it directly and in terms authorized the jury to make such enquiry.

It cannot be important to the ends of justice, nor will it tend to promote its due administration, but rather to obstruct it, to hold that an opinion expressed by a judge on the trial of a cause, perhaps not well considered, or touching a matter upon which it is the province of the jury to pass, but upon an incidental question arising in its progress, and not intended for or addressed to the jury, should be deemed to have the force and sanction of an express instruction, and to require a reversal of the judgment; especially, too, where enough occurred at the time and in the same connection to guard against the consequences of the inadvertence, and to leave the jury to form their own judgment. Such, I think, may fairly be considered the character of the present case, and in this respect it very much resembles the case of Brooks v. Calloway, 12 Leigh 466. That was an action of slander. During the trial the court had ruled that the plaintiff might read the bill and answer in a cause in which his deposition (the truth of which had been impugned by the words imputed to the defendant), had been taken, for the purpose of showing the materiality of the deposition to the matters in issue. The defendant insisted that not the bill and answer only, but the whole record should be read. The court permitted the bill and answer to be read alone; and the judge said that if the whole record should be introduced, it would prove that the defendant was a slanderous man, from the efforts made in that cause without success, to impeach the character of so many witnesses who had testified against him: but he at the same time told the jury, that the statement so made by him touching the contents of the record, had nothing to do with the case, and should not be regarded by them in their deci-
391 sion. *In delivering his opinion, in which the other judges concurred, Judge Allen said, "The expression used by the judge in excluding these depositions, was not intended for the jury. So he informed them, and that it should not be regarded by them as anything in the decision of the cause. Nothing is more common than an instruction to the jury to disregard evidence improperly admitted. The jury are presumed to possess ordinary intelligence, and to be able to discriminate between what is proper for them to consider in forming their conclusions, and what, though occurring in their hearing, is no part of the case. Here the court did all it could to correct the inadvertence into which it had fallen." In this case the court did not in so many words tell the jury that the remarks which had fallen from it were not intended for their consideration, and

should be disregarded by them, but taking all that was said and done by the court at the time together, I think it was about equivalent.

But it is urged that the remark of the court accompanying the instructions to the jury was improper and objectionable, because it trenched upon the proper province of the jury, and might have had an improper influence upon them.

To say of instructions asked for by counsel, that they were "clearly correct as abstract propositions," might, perhaps, convey by implication, to the mind of a lawyer, though probably not to that of a jury, the idea that there was no evidence which could give the principles of law, thus propounded, any application to the case. But if we are even to suppose that the jury would necessarily understand that such was the opinion of the court, still the court did not act upon that opinion, by refusing to give the instructions, but expressly gave them as propounding the law correctly; and adding, "that it might be safely left to the jury to determine how far they were
392 applicable to the facts *and evidence in the cause." Giving to the language of the court, then, its fullest import, it would seem to amount to no more than this, that although the court might perhaps in strictness refuse to give the instructions, yet as they propounded the law correctly, they could do no injury, and it might be safely left to the jury to say how far the facts and evidence in the cause called for their application. Thus interpreted, the remark of the court cannot afford any serious cause of complaint, though it was perhaps unnecessary, and might well have been omitted.

Another ground of error assigned is the refusal of the court to permit the recall of the witness W. B. Crawford, and the renewal of his cross examination, and to require the production of the plaintiff's books, for the purpose of testing the accuracy of his statements. The witness had been cross examined on the day before, and the counsel had announced that they had concluded the examination of witnesses, but might on the following day offer some documentary testimony. Now, after a witness has been examined and dismissed, whether he may be recalled and re-examined is a matter within the sound discretion of the court; and this court cannot so well apprehend and appreciate all the circumstances which should weigh in the exercise of that discretion as the Circuit court might; and unless, therefore, it be plainly shown to have been unduly and improperly exercised, this court should not interfere. Nothing of the kind is shown here. No reason was assigned why the examination of the witness had not been completed before he had been dismissed; no mistake, or oversight or after discovery suggested; but the recall appears to have been claimed as a matter of right, to enable the party to test the accuracy of his statements by reference to the plaintiff's books. No notice or rule had been given for the production of these,
393 nor had they been produced, *though it is stated they were within one hundred yards of the court-house; and it may be inferred their production was only then desired in case the party could be permitted to recall the witness. I think, therefore, whether the evidence that might have been educed by the recall of the witness and the production of the books, would be relevant or otherwise, this court cannot undertake to say that the Circuit court improperly exercised its discretion in refusing to recall the witness, or erred in failing to require the production of the books in that connection.

The paper referred to in the third bill of exceptions was, I think, very properly rejected by the court. It was a tender of his consent by the defendant to the production and use of the plaintiff's books as evidence on the trial, upon certain conditions therein stated, accompanied by the reasons which he thought proper to assign for making the offer. If he desired to have those books on the trial, the law pointed out the mode in which their production could be enforced; this proposal to the plaintiff to produce and use them on the condition named, was entirely gratuitous, and the plaintiff had a perfect right to accept or decline it, as he might think proper. Nor was any presumption to be raised against him in any sense or for any purpose, if he chose the latter alternative. The offer having been made but declined by the plaintiff, there I think was the end of the matter, and the offer and nonacceptance, either with or without the reasons which the party chose to assign for making the offer, could not be made legitimate evidence in the cause for any purpose whatever.

I am of opinion to affirm the judgment.

MONCURE, J. This action was brought upon an instrument purporting to be the bond of John McDowell to Hugh J. Crawford, in the sum of "two thousand
394 *dollars, for borrowed money;" the whole of which, with the endorsements of credits thereon, except the signature of the obligor, was admitted on the trial to be in the handwriting of the obligee. The bond was unattested by any subscribing witness. The only issue in the case was on the plea of non est factum. The obligee, to sustain the issue on his part, introduced a number of witnesses, who testified that they were well acquainted with the handwriting of the said McDowell, and believed the signature to the bond to be his true and genuine signature. He also introduced two receipts, in his own handwriting, purporting to be receipts for interest on the bond; and introduced testimony to show that they were found in the house, and among the papers, of said McDowell, after his death. And here the obligee closed his evidence in chief. The executor of McDowell, to support the issue on his part, without offering any opposing testimony as to the genuineness of the signature

to the bond, introduced evidence as to the circumstances, relations and business of the parties, and their conduct in connection with the bond in controversy, tending, in the opinion of his counsel, to show that it was not the act and deed of said McDowell, either because the signature thereto was not genuine, or if genuine, the bond was obtained fraudulently or otherwise, in such an illegal manner as to render it not his act and deed. In the evidence so introduced by McDowell's executor, there was evidence tending to show that the obligee had not the pecuniary ability to make a loan of the amount and character evidenced by the bond in controversy, and that he could not, at the date of the bond, have had such an amount of money for any purpose. To rebut the evidence of the defendant as to the pecuniary condition of the plaintiff at the date of the bond, the plaintiff introduced a witness, who testified, among other things, that the plain-
395 tiff had the *control of a large estate of John C. Sowers, of whom he was executor. To meet this evidence, the defendant offered to introduce the settlements made by the plaintiff of his accounts as executor of John C. Sowers, to show that at the date of the bond in controversy, the plaintiff could not have had funds of that estate in his hands, sufficient of themselves, or with his own means, to have enabled him to make such a loan as that shown by the bond; and also to show that the plaintiff, as legatee and devisee of that estate, and deriving his whole property from that source, could not possibly have had the amount of available funds stated by his said witness. To the introduction of these settlements, as evidence, the plaintiff's counsel objected, as irrelevant to the issue; and the court, sustaining the objection, refused to permit them to go to the jury. The defendant excepted; and this exception presents the first question which we have to decide in this case.

It is true, that the plea of non est factum to an action of debt upon a bond, puts in issue only the validity of the bond; and no evidence is relevant to the issue, or admissible, that does not tend to prove or disprove that the bond is the act and deed of the alleged obligor. If the defendant wishes to rely for his defense on any want or failure of consideration, or fraud, (unless it relates to the execution of the instrument; as if it be misread to the party, or he did not intend to sign such an instrument,) he must plead the matter specially, or apply for relief to an equitable forum. The evidence introduced by the defendant as to the circumstances, &c., of the parties, was introduced not to show any want or failure of consideration, or any fraud on the part of the plaintiff antecedent to, or independent of the execution of the bond, but to show that the supposed bond was not the act and deed of the defendant's testator: And if
396 it tended in any degree to show *that fact, it was relevant and admissible evidence to be weighed by the jury. I think the evidence did tend to show that fact, and that it was therefore relevant and admissible. If authority were necessary to show the relevancy of such evidence, the cases of Sides v. Schnebly, 3 Harr. & McH. 243, and Rowt's adm'r v. Kile's adm'r, Gilm. 202, cited by the counsel for McDowell's executor, would, I think, be sufficient for the purpose. But the Circuit court in this case conceded the relevancy of the evidence in the instructions given to the jury, which will be hereafter noticed. This evidence of the defendant being admissible, and the plaintiff, to rebut it, having introduced testimony tending to show that he derived the means of making the loan for which the bond purports to have been given, or part of it, from the estate of Sowers, of whom he was executor; the question is, whether the settlements of his accounts as such executor, which the defendant offered to introduce to meet the said testimony of the plaintiff, were not admissible for that purpose? I am of opinion that they were, and therefore, that the court erred in excluding them. It may be said that the evidence being documentary, should have been inserted in the bill of exceptions, according to the case of Hairston v. Cole, 1 Rand. 461. But the only reason for inserting the document in the bill of exceptions is to enable the appellate court to see whether it is relevant evidence. If its relevancy otherwise sufficiently appears upon the record, its insertion in the bill of exceptions is not necessary. Archer v. Archer's adm'r, 8 Gratt. 539. In this case I think the relevancy of the evidence which was excluded is sufficiently apparent on the record. The question upon which it was offered was whether the plaintiff could have derived from the estate of Sowers, of whom he was executor, and also a devisee and legatee, the sum of two thousand dol-
397 lars, *or any part of it, alleged to have been loaned by him to the defendant's testator on the 18th of March 1846? Upon this question, it seems to me, the settlements of the accounts of the plaintiff as executor of Sowers must necessarily shed some light. Indeed, the Circuit court seems not to have excluded these settlements because they did not shed light upon that question, but because it considered all the testimony of the defendant "too vague, remote and indefinite in its character, to sustain the plea of non est factum, against such evidence of factum, as the plaintiff had introduced;" and the court would have excluded all of the said testimony if it had been objected to; but as it was not, the court only excluded the settlements aforesaid which were objected to. No matter how favorable they may have been to the defendant's side of the question, in regard to which they were offered, the court considered them inadmissible, and therefore excluded them: and this accounts for the failure of the court to insert them in the bill of exceptions. In Hairston v. Cole, supra, the document offered was a copy; and it did not appear from the bill of excep-

tions that the copy was duly authenticated. In this case the settlements themselves, and not a copy, appear to have been offered as evidence. The settlements had probably been made in the Circuit court; or if in the County court, the originals may have been offered.

But even if the admissibility of these settlements as evidence, be not sufficiently apparent on the record, and they should therefore have been inserted in the bill of exceptions, I think the Circuit court erred in not inserting them; and the judgment must, on that ground, be reversed, according to numerous and uniform decisions of this court, of which that in Hairston v. Cole is directly in point. The principle of these decisions is, that when an opin-
398 ion of an inferior court *admitting or excluding evidence, or giving or refusing an instruction, is excepted to, the court must take care so to state the case in the bill of exceptions as that the appellate court may supervise the opinion, and determine whether it is right or wrong: otherwise, the judgment must be reversed in order that the case may be correctly stated. Therefore, the judgment must always be reversed where the bill of exceptions to an opinion of the court, admitting or excluding evidence, is defective in not setting out the evidence admitted or excluded. The cases of Fowler v. Lee, 4 Munf. 373; Hairston v. Cole, 1 Rand. 461; Raines v. Philips' ex'or, 1 Leigh 483; Bowyer v. Chestnut, 4 Leigh 1, are cases in which exceptions were taken to the admission or exclusion of evidence. Barrett & Co. v. Tazewell, 1 Call 215; Beattie v. Tabb's adm'rs, 2 Munf. 254; Brooke v. Young, 3 Rand. 106, are cases in which exceptions were taken to instructions given or refused by the court. In all these cases the judgments were reversed on the ground that the statement of facts in the bill of exceptions was too imperfect to enable the appellate court to determine the question. The same course was pursued in Thompson v. Cumming, 2 Leigh 321, where the instruction excepted to was so ambiguously and imperfectly expressed, that the appellate court could not collect the import and bearing of the opinion complained of.

I know of no case in this court which is inconsistent with this uniform course of decision. There may be one or two apparently so, but when strictly scanned they will be found to be otherwise. The case of Rowt's adm'x v. Kile's adm'r, 1 Leigh 216, is one of this class. That was a suit upon a bond, and the issue was on the plea of non est factum. An exception was taken to the exclusion of the evidence of a remark of Richard Rowt (no party) that his pen had not forgot to write. There was no ground laid connecting this with the issue, no
399 *conversation stated, which led to or followed the remark; nothing to show how it could possibly bear on the case: And Judge Carr said, "I cannot think that so light and trivial and unconnected a remark should induce us to send back a case, where there have been two trials, in both of which the jury have found the same way." He had previously, it is true, made the general remark, that "when we are called on to reverse the decision of a judge, it is incumbent on the party seeking this, to show that there is error; and to this end he ought to present to us such a case as shows the relevancy of the evidence rejected." But that remark must be referred to the case under consideration; in which it did not appear that the facts were imperfectly stated in the bill of exceptions. Non constat that there was any evidence which connected the "light and trivial" words of Richard Rowt with the case. The conjecture that there might have been such evidence, was not a sufficient reason for reversing the judgment, and sending the case back for a third trial. If there was such evidence, the party seeking the reversal of the judgment ought to have presented such a case as to have shown it. In that case, as before remarked, the bill of exceptions is perfect on its face. In this case defect, if any is apparent on the face of the bill of exceptions, consists in not setting out the settlements therein stated to have been offered as evidence. Judge Carr certainly did not intend, by anything which he said in that case, to controvert the principle of the decisions to which I have referred; for he had expressly admitted that principle, and followed the authority of the earlier decisions in the case of Brooke v. Young, 3 Rand. 106. The case of Carpenter & wife v. Utz, 4 Gratt. 270, is another of the class before referred to. There the judgment was affirmed, because the evidence stated in the bill of exceptions as having been excluded by the court
400 below, *was, standing by itself, clearly irrelevant and inadmissible; and there was nothing to show that it had any connection with the case. It presented precisely the same question which was presented by the case of Rowt's adm'x v. Kile's adm'r: and Judge Allen, in delivering the opinion of the court, uses substantially the same general remark which was used by Judge Carr, as before stated, "that where it is alleged that error has been committed in excluding proper and relevant testimony from the jury, it is incumbent on the party seeking to reverse a judgment for this cause, to show that error has been committed." But, as in that case, this remark must be referred to the case under consideration; and then it will be consistent with all the other decisions on the subject. That it was intended to be so referred, plainly appears by what immediately follows in the same sentence, viz: "and to this end the evidence offered and rejected must appear to have been relevant from the statement of the evidence alone; or if the relevancy or irrelevancy of the evidence offered depends upon other facts in the cause, the party alleging the error should present such a case on the record as shows the relevancy of the evidence rejected." The court ought not to reverse a judgment upon a mere conjecture that there may have

been other evidence showing the relevancy of that stated in the bill of exceptions. The difference between the two cases is like the difference between a defective case, and a case defectively stated. In the one case the appellate court, so far as appears from the record, has the same question before it which was passed upon by the court below, and may therefore revise the decision of that court. In the other, the appellate court has not the question passed upon by the court below fairly before it, and must therefore remand the case, that a more perfect statement may be made. The cases in
401 which exceptions have been *taken to opinions of the court overruling motio to set aside verdicts on the ground that the were contrary to evidence, form a pec ar class, resting on peculiar reasons, and are not in conflict with the principle before stated. Such opinions may, in Virginia, be revised by an appellate court; but, generally, only where the facts, and not the evidence, are certified by the court below: And if the evidence, instead of the facts, be certified, the appellate court will, generally, on that ground decline the supervision of the opinion, and affirm the judgment. It will not remand the case for a more perfect certificate, because non constat that such a certificate could be made. There may have been a conflict of evidence, or it may have been complicated, or come from witnesses of doubtful credibility; and the court below may have been unable or unwilling to weigh the evidence, and determine and certify the facts.

In delivering the opinion excluding the evidence before mentioned, the Circuit court stated, "that upon the issue in this cause the plaintiff having introduced ten witnesses, all of whom swore positively to the genuineness of the signature to the bond, it was sufficient evidence, the bond being found in possession of the plaintiff, from which the jury should presume sealing and delivery, and due execution thereof, unless met and overthrown by opposing testimony on the part of the defendant; and that as the defendant had failed to introduce any opposing proof as to the genuineness of the signature, all the other testimony introduced by him without objection, as well as that now objected to, was too vague, remote and indefinite in its character to sustain the plea of non est factum against such evidence of factum as the plaintiff had introduced, and would have been excluded if objected to; but as it was not, all the court could do was to exclude that
402 *now objected to." The defendant excepted to this opinion of the court pronounced concerning the evidence already introduced by him; and the question now arises, whether the court erred in giving the opinion; and if so, whether, on that ground, the judgment ought to be reversed?

It is a fundamental maxim, that the court responds to questions of law, and the jury to questions of fact. The court must decide as to the admissibility of evidence, that being a question of law; but not as to its weight after it is admitted, that being a question of fact. The cases in this court in affirmance of this position are too numerous to be cited. Most of them are collected in 1 Rob. Pr. 338–344. As the author says, they "evince a jealous care to watch over and protect the legitimate powers of the jury. They show that the court must be very careful not to overstep the line which separates law from fact. They establish the doctrine that where the evidence is parol, any opinion as to the weight, effect or sufficiency of the evidence submitted to the jury; any assumption of a fact as proved; or even an intimation that written evidence states matter which it does not state, will be an invasion of the province of the jury." Berry v. Ensall, &c., 2 Gratt. 333, is a case on the same subject, which occurred after the publication of that work. There may be others, but it is unnecessary to cite them, as they all, I believe, tend to sustain the same doctrine.

There can be no doubt, I think, but that the opinion in question is in conflict with this doctrine. The court declared that the evidence of the defendant as to the circumstances, relations and business of the parties, and their conduct in connection with the bond in controversy, which was admissible evidence, and was so considered and had been admitted by the court,
403 was *too vague, remote and indefinite in its character to sustain the plea of non est factum against such evidence of factum as the plaintiff had introduced.

The court here weighed the plaintiff's evidence of factum against the defendant's evidence of non est factum, and decided the question of preponderance in favor of the former. If the court had given this opinion to the jury in the shape of an instruction, it would clearly have been such an invasion of their province as to have required the reversal of the judgment. But had not the expression of the opinion in the course of the trial, and in the presence of the jury, the same effect? Had it not at least a strong tendency to influence the minds of the jury? I think that it certainly had. It is the duty of the jury to be governed by the opinion of the court on questions of law arising in the course of the trial; and they will naturally and properly attend to and respect every such opinion, however it may be expressed to them; whether in the form of an instruction or not. The more intelligent and upright the jury, the more apt they will be to pursue this course. They are unlearned in the law, and cannot be expected to know the precise line which divides their province from that of the court. It will not do, therefore, to say that when the court, by the expression of any opinion, crosses the line and invades their province, they may and ought to disregard the opinion and weigh the evidence for themselves. The same may be said in every case in which the court gives an opinion to the jury on the weight of evidence. In the case of Gregory v. Baugh, 2 Leigh 665, the Circuit

court, in a charge or instruction to the jury, stated matters as being a written deposition, and instructed the jury that that matter was legal evidence; but in point of fact no such matter was in the deposition: It was held that this was calculated to mislead the jury, and was error for which the ver-
404 dict should be set aside, *and the judgment reversed. The court, consisting of four judges, was unanimous in this decision. It was argued with great force that it was impossible the charge could have deceived or misled the jury: The depositions were before the jury; the cause turned chiefly on them; they were doubtless the subject of minute examination and discussion at the bar; and it was to be presumed they were carried by the jury from the bar into the jury room, read there, and considered. "It was said," answered Judge Carr to this argument, that "the jury would read" the affidavit "for themselves, and not take the court's version of it. This they might do, as in any other case where the court undertook to instruct them on the weight or effect of evidence, they might disregard such an instruction; yet it would be error in the court to give it." Judge Green said, "The instructions were calculated to mislead the jury, more or less, by inducing them to believe that the court was of opinion that such was the effect of the depositions." Judge Cabell concurred with Judge Green. And Judge Brooke said, the objection to the instruction is not "obviated (as was argued by counsel) by the circumstance that the evidence was in writing, and would be seen by the jury, who might correct the mistake of the judge." In that case the mistake of the court was as to a mere matter of fact, and could have been corrected by merely reading the deposition, which it was the duty of the jury to do, and which, therefore, they probably did; and yet, because they may have been misled by the statement of the court, the judgment was reversed. In this case the court weighed the evidence, and pronounced an opinion upon it, and the error, if any, could not be so easily corrected. It is the ordinary case of an opinion of the court as to the weight, effect, or sufficiency of evidence submitted to the jury; which is a good ground for re-
405 versal of a judgment according *to all the authorities. Such an opinion is certainly calculated to mislead them, whether it be communicated to them in the form of an instruction, or be merely expressed by the court in their presence, in the progress of the trial. In either case, they are authentically informed of the opinion, and it must have an influence upon their judgments; probably as much in the one case as the other; but whether the same, or more or less, the principle involved is not affected.

It may be said that it does not certainly appear from the record that the opinion of the court was expressed in the presence of the jury. I think the fact sufficiently appears from the record. The presumption is that the jury is present during the whole progress of the trial. It may sometimes happen that the jury may be temporarily absent during the discussion of a question of law arising in a case: But this rarely occurs; and when it does occur, the party interested in the fact should take care to have it stated on the record. In the absence of such a statement, the appellate court will presume that that occurred which generally, rather than that which very rarely, occurs. The statement in the bill of exceptions tends strongly, if not conclusively, to show that the jury were present when the opinion was expressed. The opinion was excepted to; which would not have been done, if the jury had not been present and heard the opinion; or if it had been done, the court would have certified that the jury were not present when the opinion was expressed; for that fact would have shown that the defendant was not prejudiced by the opinion. It was not intimated in the argument of the case in this court that the jury did not hear, or might not have heard the opinion. It may, therefore, be safely assumed that they did hear it.

I do not think the error of the court in giving the opinion was cured by not
406 excluding the evidence from *the jury. The court would have excluded it, if a motion had been made for that purpose; and so declared. The error consists in giving an opinion of the weight, effect, or sufficiency of evidence submitted to the jury.

Nor do I think the error was cured by the instructions which, on the motion of the defendant, were given by the court to the jury before they retired to consider of their verdict. Those instructions were:

1. That the jury are bound to weigh and consider all testimony introduced by either party without objection, unless upon a motion made to the court, such evidence is excluded.

2. That upon the issue in this cause, it is competent for the defendant to show, by evidence as to the circumstances, relations and business of the parties, and by their whole conduct in connection with the bond in controversy, that it is either impossible or improbable that the bond sued upon is the act and deed of the defendant's testator.

If the force of these instructions had been undiminished by any accompanying remark of the court, they would merely have declared to the jury their obligation to weigh the evidence before them, and the competency of the defendant, by such evidence, to maintain his plea of non est factum; and would not have obviated the effect of the opinion previously expressed as to the insufficiency of the evidence. Whenever a court gives an opinion upon the weight, effect or sufficiency of evidence submitted to the jury, it would no doubt also, if required, instruct them that it is their duty to weigh the evidence: but surely such an instruction would not remove the influence of the opinion, which would still remain

unretracted, notwithstanding the instruction.

But the court accompanied these instructions with the remark, that they were clearly correct, as abstract propositions of law, and that it might be safely left
407 to *the jury to determine how far they were applicable to the facts and evidence in the cause. The meaning of the court in this remark is perfectly intelligible, when taken in connection with the opinion previously expressed, and must have been understood by the jury. Instead of being a retraction, which might have cur[illegible] the error, it was a reaffirmance, of tha[illegible]inion. It was a strong intimation, if n[illegible]an express declaration, that the propositi[illegible]s of law embodied in the instructions were[illegible]nere abstractions, having, in the opinion of the court, no sufficient foundation in the evidence to give them practical effect. The remark that it might be safely left to the jury to determine how far they were applicable to the facts and evidence in the cause, does not mend the matter; for the jury had just in effect been informed that the instructions had no application to the facts and evidence in the cause, which in the opinion of the court were wholly insufficient to sustain the issue on the part of the defendant.

The case of Brooks v. Calloway, 12 Leigh 466, does not affect this case. There the judge made a statement in regard to the contents of a record which was not in evidence; but he at the same time told the jury that the statement had nothing to do with the case, and should not be regarded by them as anything in their decision of it. The inadvertence was corrected as soon as it was committed. The difference between the two cases is too palpable to require further remark.

In regard to the question presented by the second bill of exceptions, that is, whether the court erred in refusing to permit the plaintiff's witness William B. Crawford to be recalled, or to require the production of the plaintiff's books, which were then within one hundred yards of the court-house: Two reasons are assigned by the court for the refusal: 1. That the evidence would not be relevant to the issue; and 2. That the defendant's counsel
408 had, on the evening *before, announced that they had concluded the examination of witnesses, as stated in the first bill of exceptions.

In regard to the first reason: The plaintiff, to prove his ability to make the loan to the defendant's testator, introduced the witness above named, who testified that he was the book keeper of the plaintiff in his mercantile establishment up to November 1845; and that at the time the plaintiff was in possession of a large amount in cash-notes, and accounts, of his own property, which had not been known to any of the witnesses who had testified as to his circumstances. The witness professed to speak from memoranda taken upon a recent examination of the books kept by him in 1845. I think this statement of the case, with what has been already said in answer to the questions presented by the first bill of exceptions, is sufficient to show that the books were relevant and admissible evidence for the purpose for which they were proposed to be introduced. They were referred to by the plaintiff's witness, who spoke from memoranda taken from them; and they were the best evidence of what they contained; and were easily accessible.

In regard to the other reason assigned by the court: Although the practice of our courts has been liberal in allowing parties, after their evidence is closed, to recall witnesses for the purpose of supplying facts omitted from inadvertence; and although I think such permission should be given wherever there is no ground to suspect improper practice; the object being to elicit truth, and secure the attainment of justice; yet I am aware that the judge, before whom a case is tried, must necessarily have larger room for discretion on this subject, and I think an appellate court should seldom interfere with its exercise. In this case the judge would doubtless have permitted the witness to be recalled and have required the production of the books,
409 *if he had considered them relevant evidence. Moreover, it may be said that though the defendant's counsel had, on the evening before, announced that they had concluded the examination of witnesses, yet they also announced that they would probably, on the next day, offer documentary evidence; which they accordingly did, but it was excluded by the court. The exclusion of this evidence may have been a reason for the motion made immediately thereafter by the defendant's counsel, to have the witness recalled and the books produced; and ought, I think, to have had some effect in inducing the court to sustain the motion. I am of opinion that the court erred in overruling it.

In the cases of Stringer v. Lessee of Young, 3 Peters' R. 320; Wilkinson v. Jett, 7 Leigh 115; and Charlton v. Unis, 4 Gratt. 58, it was decided that the introduction of irrelevant or incompetent evidence by one party without being objected to by the other party, or with his assent, does not authorize the latter to introduce such evidence. This doctrine is reasonable; but does not, I think, affect the question I have just been considering. It does not appear that the memoranda taken by the witness from the plaintiff's books, were exhibited as evidence before the jury, or even that he had them before him when he gave his testimony. He professed to speak from them; and seems to have used them merely for the purpose of refreshing his recollection of facts within his personal knowledge. If they had been exhibited before the jury, they would not have been irrelevant, but merely secondary, evidence; to which the other party might have objected because secondary, and required the production of the books themselves as primary evidence: But he was not bound to make such objec-

tion; and not having made it, the evidence, which was before relevant, would then have become competent, and he might counteract its effects by the production of
410 the books or any other *legal evidence.

If the memoranda were merely referred to by the witness to refresh his memory, that fact could certainly be no good reason for refusing to require the production of the books, which were not only relevant, but primary evidence.

In regard to the question presented by the third and last bill of exceptions: I think the court properly excluded the evidence therein mentioned. If the defendant wished to use the plaintiff's books as evidence, the law provided ample means to enforce their production; and not having chosen to pursue those means, he had no right to resort to other means, and prove the plaintiff's refusal to comply with them, in order that inferences to the prejudice of the plaintiff might be drawn by the jury from the fact of such refusal.

Upon the whole, I am for reversing the judgment, setting aside the verdict, and remanding the cause for a new trial to be had therein.

DANIEL, J., concurred in the opinion of Moncure, J.

ALLEN, P., concurred in the opinion of Lee, J.

Judgment reversed.

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411 *Brooks v. Wilcox.

July Term, 1854, Lewisburg.

Absent DANIEL, J.

1. **Distress for Rent—Ascertainment of Value of Rent—Case at Bar.**—A landlord having distrained for rent in arrear reserved in salt, has the affidavit and warrant of distress returned to the Circuit court; and the defendant appears there, and a jury is impaneled to ascertain the value of the rent in arrear, which not being able to agree is discharged; and the landlord dismisses the case in that court. He may then apply to the County court to have the value of the rent ascertained, basing his application on the same affidavit and warrant of distress.*
2. **Same—Additional Levy.**—If the officer levying the distress thinks that he has not taken sufficient effects, he may make a second levy.
3. **Same—Ascertainment of Value of Rent—Oath to Jury.**—The defendant having elected to have the value of the rent reserved ascertained by a jury, it is not error to swear them to ascertain the rent *said to be due.*
4. **Evidence—Order of Introduction—Discretion of Court.**†—Whether a plaintiff shall be permitted to introduce further evidence after the defendant's evidence is introduced, is a matter within the discretion of the court trying the cause; and its exercise will rarely, if ever, be controlled by an appellate court: Clearly he is entitled to introduce evidence to rebut that of the defendant.
5. **Distress for Rent—Object of Jury.**—The only object of the proceeding before a jury in the case of a distress for rent, is to ascertain the value in money of the rent in arrear. It is not necessary for the landlord to prove to the jury that a distress warrant has been levied for rent in something other than money, and that it is due and in arrear.
6. **Same—Value of Rent Ascertained—Order of Court.**—The jury having ascertained the value of the rent in arrear, the court makes an order directing the officer to sell the property distrained as is directed by law, and after satisfying the rent due, with interest and costs, to pay over the balance to the tenant. This is substantially in accordance with the statute.
7. **Interest on Rent in Arrear—Statute.**—Under the act of March 2d, 1827, the landlord was entitled to interest on rent in arrear, from the time it was due.*

412 *At the January term 1850 of the County court of Kanawha, Luke Wilcox filed a notice, with an affidavit of its service, to James G. O. Brooks, that he would apply to said County court to ascertain the value in money of five thousand bushels of salt of first quality, &c., it being for rent in arrear, and reserved upon contract with him, and for which said Brooks' property had been distrained; and for such other and further order as the court might lawfully make in the premises. Upon this notice he founded a motion to ascertain the value of five thousand bushels of salt reserved for rent. This motion was continued until the December term of the court, when the defendant appeared and moved to quash the motion, on the ground that the plaintiff had previously made a similar motion in the Circuit court, which had been entertained in that court, and there had been a trial by a jury, which could not agree, and were discharged: And then the court on his

*See the opinion of JUDGE MONCURE for the statutes, 1 Rev. Code of 1819, ch. 113, § 12, p. 449; Sess. Acts 1827, ch. 27, § 3, p. 26.

†**Evidence—Order of Introduction—Discretion of Court.**—In the fourth headnote of the principal case it is said that, whether the plaintiff shall be permitted to introduce further evidence after the defendant's evidence is introduced, is a matter within the discretion of the court trying the cause. For the above proposition the principal case is cited and approved in the following cases: Scott v. Shelor, 28 Gratt. 895; Perdue v. Caswell Creek Coal, etc., Co., 40 W. Va. 383, 21 S. E. Rep. 873; Myers v. Trice, 86 Va. 838, 11 S. E. Rep. 428; Burke v. Shaver, 92 Va. 352, 23 S. E. Rep. 749; Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. Rep. 497; Clarke v. Ohio R. R. Co., 39 W. Va. 749, 20 S. E. Rep. 702.

See, in accord, with the principal case the following: Fant v. Miller, 17 Gratt. 187, and *note*; Bowyer v. Knapp, 15 W. Va. 277; Robinson v. Pitzer, 3 W. Va. 335; Johnson v. Burns, 39 W. Va. 658, 20 S. E. Rep. 686.

So also, the court may, in its discretion, admit evidence even after argument by counsel. See *foot-note* to McDowell v. Crawford, 11 Gratt. 377.

For the proposition that the granting of continuances is also within the discretion of the trial court, see Harman v. Howe, 27 Gratt. 676, and *note*; Hewitt v. Com., 17 Gratt. 627, and *note*.

motion, had permitted him to withdraw his notice and motion, and dismiss the same from the docket at the December term 1849. And he produced a record of the proceedings in the Circuit court, which showed that these proceedings were based upon the same affidavit of the plaintiff as to the rent due, and the same warrant of distress, on which this motion in the County court was based. And he showed that the officer had first levied the warrant on four hundred and five barrels of salt pending the proceeding in the Circuit court; and after that proceeding was dismissed, he levied on an additional two hundred and thirty-five barrels. The County court refused to quash the motion, and the defendant excepted.

The defendant then elected that the value of the salt said to be due from him to the plaintiff, should be ascertained by a jury; which was accordingly impaneled, and sworn to ascertain the value of the
413 rent in *money of the salt said to be due from the defendant to the plaintiff.

On the trial the plaintiff introduced witnesses to prove the value of salt in 1849, and then rested. Thereupon the defendant by his counsel then informed the plaintiff that if he had other evidence of the value of salt in that year, he should then introduce it, or it would be objected to if offered after the defendant had introduced his evidence on that subject. The plaintiff, however, declined to examine other witnesses; and the defendant introduced his evidence as to the value of salt in 1849, and closed. The plaintiff then introduced a witness whom he had sworn before and omitted to examine, and asked him as to the value of salt in 1849; to which evidence the defendant objected, on the ground that it was evidence in chief which the plaintiff had voluntarily omitted to introduce in the opening of the case after notification by the defendant. But the court overruled the objection; and the defendant again excepted.

After all the evidence had been introduced, the defendant moved the court to give six several instructions to the jury. These instructions were in substance, that to entitle the plaintiff to a verdict he must prove a lease by himself to the defendant, reserving a rent in some other property than money; and that the rent was in arrear, and a distress had been levied. The court refused to give the instructions; and the defendant again excepted. The jury then found a verdict by which they ascertained the value of twenty-five hundred bushels of the salt to be five hundred dollars, and the value of the other twenty-five hundred bushels to be five hundred and seventy-five dollars: And they ascertained the value of fifty barrels of salt, which had been received in part of the rent due, to be eighty-three dollars and sixty-three cents. Whereupon the court made an
414 order directing the officer who *had made the levy, to make sale of the salt mentioned in his return, as is directed by law: And out of the proceeds of such sale, if sufficient for the purpose, to pay to the plaintiff the amount ascertained by the verdict, with interest from the time it was due until paid; subject to the credit ascertained by the verdict; and also to pay the plaintiff his costs. And he was further directed to pay any balance of the proceeds of sale to the defendant.

The defendant obtained a supersedeas to this judgment from the Circuit court, where it was affirmed. Whereupon he applied to this court for a supersedeas, which was allowed.

McComas, for the appellant.
Fry, for the appellee.

MONCURE, J. This is a supersedeas to a judgment of the Circuit court affirming an order of the County court of Kanawha, directing a sale of certain property distrained for rent reserved in salt. The order was made in pursuance of 1 Rev. Code of 1819, ch. 113, § 12, p. 449, which declares, that "Whenever any distress shall be made for rent reserved in wheat, corn, or anything other than money, it shall be lawful for the landlord or lessor to apply to the court of the county or corporation, or to the Superior court of law for the county in which the leased tenement may lie, to ascertain the value in money of the rent in arrear so reserved, and to order the property so distrained, or so much thereof as may be necessary, to be sold for the satisfaction of such rent. And the court to which such application shall be made, ten days' previous notice thereof having been given to the tenant, or in case of his absence from the county, being set up at some conspicuous place on the tenement, shall proceed to ascertain the value in money of the
415 rent in arrear *so reserved, either by their own judgment, or if required by either party, by the verdict of a jury summoned and impaneled at their bar for that purpose, without the formality of pleading; and having so ascertained the value, shall order a sale of the property so distrained, and award costs to the landlord or lessor."

Various errors in the proceedings in the case were assigned by the plaintiff in error, some of them in the petition for a supersedeas, and others, for the first time, in the argument of his counsel in this court. I will notice them in the order of time in which the proceedings complained of occurred.

First. I think the court did not err in overruling the motion of the tenant, the plaintiff in error, to dismiss or quash the notice and motion of the landlord, the defendant in error. The grounds on which it was contended that the landlord's notice and motion should be quashed, were, that they were founded on the same affidavit and distress warrant, on which similar proceedings had been instituted in the Circuit court, but the jury having disagreed and been discharged, the landlord, with the leave of the court, withdrew his notice and motion in that behalf, and the case was

dismissed from the docket of the court; and also, that after such dismission, and before the institution of the proceedings in the County court, the warrant was levied on two hundred and thirty-five barrels of salt, in addition to the quantity on which it had been previously levied. The statute gave the landlord a right to make the application to the Circuit or County court at his election. He made it to the Circuit court; but having withdrawn it by the leave of that court before it was finally acted on, he had a right to make it to the County court. There was no necessity for a new affidavit and warrant to authorize the proceedings in the County court. The affidavit
416 *and warrant were not affected by the abortive proceedings in the Circuit court; and the landlord had the same right to proceed thereon in the County court, as if the proceedings in the Circuit court had not taken place. The warrant had not become functus officio when the additional levy on two hundred and thirty-five barrels of salt was made; and that levy was therefore legal. A writ of fieri facias, after being levied on property insufficient, in the opinion of the officer making the levy, to satisfy the writ, may be levied on other property at any time on or before the return day of the writ. The same principle applies to a distress warrant, except that it has no return day, and may be levied at any time; at least, if it be a reasonable time after it is placed in the officer's hands. The officer may be mistaken in the value of the property first levied on, or he may not be able to find sufficient property at first to satisfy the execution or distress warrant. And "it is for the advantage of the owner of the goods," as was said by Lord Mansfield in Hutchins v. Chambers, 1 Burr. R. 579, 589, "that this should be so: it is better for him that the officer should be at liberty to seize a second time, in case he makes an insufficient seizure the first time. Or else it might induce him to a necessity of taking effects of very great value at first; for, if he is to be precluded from thus making up the deficiency, he will certainly take care not to take too little at first."

Secondly. I think the objection made to the form of the oath administered to the jury, "to ascertain the value of the rent in money, of the salt said to be due from the" tenant to the landlord, is invalid. The statute does not prescribe the form of the oath; and its requisitions were substantially complied with in this case. The words "said to be due" obviously refer to the notice in which the kind and amount of the rent in arrear, the times when
417 payable, and the *fact that it was reserved upon contract, and had been distrained for, are minutely set forth.

Thirdly. I think the court did not err in permitting the landlord's witness to answer the question, and give testimony as to the value of salt in the year 1849, after the tenant had examined his witnesses, as stated in the second bill of exceptions. The subject of the examination of witnesses lies chiefly in the discretion of the court in which the cause is tried, and its exercise will rarely if ever be controlled by an appellate court. It does not appear to have been improperly exercised in this case, but the contrary. The testimony objected to seems to have been offered to rebut the evidence of the tenant's witnesses, and for that purpose was certainly proper.

Fourthly. I think the court did not err in refusing to give the instructions asked for by the tenant. They are based on the supposition that in such a proceeding it is necessary for the landlord to prove to the jury that a distress warrant has been levied for rent reserved in something other than money, and due and in arrear. I think that no such necessity exists. No judgment is rendered against the tenant. The only object of the proceeding is to ascertain the value in money of the rent in arrear. When that is done the landlord is placed in the same situation in which he would have stood if the rent had been reserved in money. The officer proceeds in the same way to complete the execution of his duty under the warrant: and the remedies of the tenant for a wrongful distress are the same in the one case as the other. The order of court ascertaining the value of the rent, and directing a sale of the property distrained, did not prevent the tenant from resorting to his remedy by writ of replevin, before that remedy was abolished by the Code; but he might have done so at any time before the property was actually sold. See
418 Jacob v. King, 5 Taunt. R. *451, 1 Eng. C. L. R. 154; Archbold on Landlord and Tenant 125, 53 Law Libr. 131.

In the case of Redford v. Winston, 3 Rand. 148, which was an attachment for rent before the passage of the act of March 2d, 1827, Sess. Acts, ch. 27, p. 25, it was decided that the tenant could not put in any plea or make any defence which might call in question the truth of the landlord's oath before the magistrate, or contest his claim to rent upon the merits, although two of the judges were of opinion that a writ of replevin could not be maintained in such a case; the other two giving no opinion upon the question. There is less reason for permitting the tenant to make any such defence in this proceeding, as none of his remedies for a wrongful distress are impaired or affected by it. Of course the court would not entertain an application for an enquiry as to the value of the rent, without being satisfied that rent reserved in something other than money had been distrained for: The warrant and return would be sufficient evidence of that fact. If the notice stated the fact with sufficient certainty, and the tenant did not controvert it, the court, without requiring further evidence, might properly proceed to ascertain the value of the rent, either by their own judgment, or if required by either party, by the verdict of a jury. The only function of the jury if required, is to ascertain the value of the rent mentioned in the warrant or the notice. In this case the affidavit, warrant,

return and notice were all before the County court; and the tenant elected to have the value of the rent ascertained by a jury; which was accordingly done.

Fifthly. I think that the objection to the terms in which the order of sale was made, is invalid. That objection is, that the statute directs only so much of the property distrained, as may be necessary for the satisfaction of the rent and costs, to
419 be sold, and the *residue to be returned to the owner: Whereas the order directs all the property distrained to be sold, and the overplus, after satisfying the rent, interest and costs, to be paid to the tenant. I think the order conforms to the statute, which directs the court to order a sale of "the property distrained;" not so much of it only as may be sufficient for the satisfaction of the rent and costs. It is true that the statute makes it the duty of the officer, in executing the order of sale, to sell only so much as may be sufficient for that purpose. But there is nothing in the order which is in conflict with that duty of the officer; for it expressly requires him to make sale of the property distrained, "as is directed by law." The direction to pay the overplus, if any there be, remaining from said sale, after satisfying to the landlord his rent, interest and costs, may be referred to an overplus which might exist, if the officer should conform as nearly as he could to the directions of the law; for the officer cannot know how much of the property distrained will sell for precisely the amount of the rent, interest and costs.

Sixthly and lastly. I think the landlord was entitled to interest upon the rent from the time it became due, as mentioned in the order, by virtue of the act of March 2d, 1827, before referred to; the 3d section of which provided, that interest should thereafter be allowed on rent in arrear from the period or periods at which the whole or any portion thereof should become due.

I see no error in the judgment of the Circuit court, and am therefore for affirming it.

The other judges concurred in the opinion of Moncure, J.

Judgment affirmed.

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420 *Koiner v. Rankin's Heirs.

July Term, 1854, Lewisburg.

1. **Writ of Right—Adverse Possession—What Tenant May Show.***—In a writ of right the tenant, to defend his possession under the statute of limitations, may show a possession anterior to his patent; and to show color of title may introduce the entry and survey upon which his patent issued. But as there can be no adverse possession against the commonwealth, he cannot show possession further back than the senior grant.

2. **Patent upon Inclusive Survey—Evidence by Tenants Claiming under.**—The effect of a patent issued upon an inclusive survey, and the right of the tenant claiming under it to show possession under color of title, is the same as in other grants. He may give in evidence the entries for the different tracts embraced in the inclusive survey, the order of court authorizing the survey, and the survey made in pursuance of the order: But he cannot show possession further back than the senior grant.

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*Adverse Possession—What Junior Patentee May Show.—In Cline v. Catron, 22 Gratt. 392, it is said: "It is a well-settled principle that there can be no adversary possession against the commonwealth. But a junior patentee may show that he had possession of the land in controversy prior to the emanation of his patent, under a claim of title, legal or equitable, good or bad; and also, in order to explain the character of his possession anterior to the emanation of the elder patent. But his possession cannot be adversary until the emanation of this elder patent, for it is consistent with the rights of the commonwealth, in whom the legal title resides. After the title passes from the commonwealth to the patentee it instanter becomes adverse to him. Shanks and Others v. Lancaster, 5 Gratt. 110; *Koiner v. Rankin's Heirs, 11 Gratt. 420.*"

Same—Nullum Tempus Occurrit Regi.—In Reusens v. Lawson, 91 Va. 244, 21 S. E. Rep. 347, the principal case and Shanks v. Lancaster, 5 Gratt. 110, are cited as authorizing the proposition that the statute of limitations never runs against the commonwealth unless there be an express provision in the statute to that effect.

Same—Equitable Title as Basis.—In Hale v. Marshall, 14 Gratt. 497, the court, citing the principal case and Shanks v. Lancaster, 5 Gratt. 110, to support the proposition, said that a court of law never refuses to accept an equitable title as a sufficient basis for an adversary possession on which to make out a defence under the statute of limitations.

Same—How Entry Should Be Made.—In Turpin v. Saunders, 32 Gratt. 34, it is said: "In Dawson v. Watkins, 2 Rob. R. 259–269, JUDGE ALLEN, delivering the opinion of the court, said: 'To operate a disseisin of one having right, the entry should be made under a claim of title with the intention of taking possession, and be accompanied with such visible acts of ownership as from their nature indicate a notorious claim of property in the land. To hold otherwise, would be to establish a principle by which every proprietor of vacant lands might be disseized without his knowledge, or even the possibility of protecting himself.' The same doctrine is laid down in Taylor's Devisees v. Burnsides, 1 Gratt. 165, 195; *Koiner v. Rankin's Heirs, 11 Gratt. 420;* Kincheloe v. Tracewells, Ibid. 587, 602; Ewing's Lessee v. Burnet, 11 Peters' R. 41."

Same—Essentials.—In Creekmur v. Creekmur, 75 Va. 435, it was said: "It is not necessary in the present instance to attempt any general definition of what is meant by 'adversary possession.' It is sufficient to say that, according to the best authorities, a possession to be adverse must be actual, exclusive, open and notorious. It must be accompanied with a *bona fide* claim of title against the title of all other persons, and it must be continued for the period prescribed by the statutory bar. A mere naked possession without a claim of right, no matter how long continued, never ripens into a good title, but is regarded as being held for the benefit of the true owner. In all cases, a *bona fide* claim of title is essential. When, however, the actual occupation of land, accompanied with such claim, continues

3. **Adversary Possession—Continuity of Possession Necessary.**†—To protect himself under the statute of limitations, the tenant must show continued adversary possession for the time of limitation of some part of the land in controversy. Actual possession of a part of his land outside of the boundaries of the demandant's elder patent, is not sufficient.

4. **Patented Land—Uncleared—When Subject to Adverse Possession.**‡—While patented lands remain uncleared, or in a state of nature, they are not susceptible of adversary possession against the elder patentee, unless by acts of ownership effecting a change in their condition.

5. **Writ of Right—Variance between Declaration and Verdict—Effect.**§—The quantity and boundaries of the land described in the count and in the verdict vary from each other; but the verdict finds that the land therein described is the tenement mentioned in the count. It is to be presumed that the description given in a count is a mistaken description, and that the land recovered is the land demanded.

This was a writ of right brought in July 1829 in the County court of Augusta, by Joseph Rankin against Robert Koiner, which upon the death of Rankin was revived in the name of his heirs. The count claimed twenty acres of land adjoining the lands of Joseph Rankin and Robert Koiner, beginning at two white oaks corner to James Rankin's land on the wetstone
421 *line, and then describing eight lines

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for the period prescribed by the statute, the effect is to confer title upon the occupant without reference to the original merits of the controversy, and even against the plainest and most convincing proof of a better original title. *Koiner v. Rankin's Heirs, 11 Gratt. 420, 426.*"

On the subject of adversary possession, see the principal case also cited in Oney v. Clendenin, 28 W. Va. 53; Taylor v. Town of Philippi, 35 W. Va. 560, 14 S. E. Rep. 132. See generally, monographic *note* on "Adversary Possession" appended to Nowlin v. Reynolds, 25 Gratt. 137.

Same—Interlock.—It is now also well settled, that where there is an interference of the patents, so that they lap or interlock, the occupation or residence of the junior patentee upon a part of his tract outside of the interlock does not give him possession of that part of his tract which is embraced within the limits of the elder patent, but his possession is restricted by the boundary of the elder patent. But, if he has an actual occupation and improvement of a part of the interlock, and the elder patentee has actual possession of no part of it, the actual possession of the junior patentee is co-extensive with the limits of his patent, and is exclusive and adversary, and if continued uninterruptedly for the period of limitation, defeats the elder patentee's right of entry, or his better title, as the case may be. Cline v. Catron, 22 Gratt. 393, citing the principal case; Taylor v. Burnsides, 1 Gratt. 165; Overton v. Davisson, *Id.* 211; French v. Loyal Company, 5 Leigh 627. The principal case was also cited in Garrett v. Ramsey, 26 W. Va. 354, for the first part of the proposition above laid down, and in Stull v. Rich Patch Co., 92 Va. 276, 23 S. E. Rep. 293; Garrett v. Ramsey, 26 W. Va. 356, 374, and Ilsley v. Wilson, 42 W. Va. 767, 26 S. E. Rep. 555, for the second part of the proposition above laid down.

On this subject of interlock, see the principal case also cited in Garrett v. Ramsey, 26 W. Va. 357, 362, 377; 3 Va. Law Reg. 764, 767, 845; 4 Va. Law Reg. 567; monographic *note* on "Adversary Possession" appended to Nowlin v. Reynolds, 25 Gratt. 137.

†**Same—Continuity of Possession Necessary.**—"Whenever one quits the possession, the seisin of the true owner is restored, and an entry afterwards by another wrongfully constitutes a new disseisin. The continuity of possession having been broken before the expiration of the period of time limited by the statute of limitations, an entry within the time destroys the efficacy of all prior possession, so that to gain a title under the statute, a new adverse possession for the time limited is required. The tenant cannot sustain his defence of continued adversary possession if, within the period of limitation, the premises have been abandoned by him or those under whom he claims." Hollingsworth v. Sherman, 81 Va. 674, citing among others the principal case; Taylor v. Burnsides, 1 Gratt. 208, 210; Overton v. Davisson, 1 Gratt. 223; Cline v. Catron, 22 Gratt. 378; Dawson v. Watkins, 2 Rob. 269.

‡**Patented Lands—Uncleared—When Subject to Adverse Possession.**—In Harman v. Ratliff, 93 Va. 253, 24 S. E. Rep. 1023, it is said: "While lands remain uncleared, or in a state of nature, they are not susceptible of adverse possession against the older patentee, unless by acts of ownership effecting a change in their condition, and to constitute adverse possession there must be occupancy, cultivation, improvement or other open, notorious, and habitual acts of ownership. *Koiner v. Rankin, 11 Gratt. 420;* Taylor v. Burnsides and Overton v. Davidson, *supra.*"

§**Ejectment—Variance between Declaration and Verdict.**—Benn v. Hatcher, 81 Va. 25, 30, was a case of ejectment. In the declaration, the land was described as lying north of a certain road, but in the verdict as south of that road. In all other essential particulars, the verdict minutely followed the declaration. The court, citing the principal case to warrant its decision, held that the description in the declaration must be presumed to be a mistaken one, and that the plaintiffs recovered the land demanded though by a different and corrected description.

See generally, monographic *note* on "Ejectment" appended to Tapscott v. Cobbs, 11 Gratt. 172.

Same—Verdict.—If, in an action of ejectment, the jury find for the plaintiff the land in the declaration mentioned, if the declaration sufficiently described the land to enable the officers to deliver possession, a judgment may be properly rendered on such verdict. It is not void for uncertainty; but, if the declaration had described the land so vaguely as not to enable the officer to deliver possession of the land, the verdict would have been void for uncertainty, and the court should not enter up a judgment on it, but award a *venire de novo.* Williams v. Ewart, 29 W. Va. 667, 2 S. E. Rep. 887, citing the principal case. See also, Hitchcox v. Rawson, 14 Gratt. 526, and *foot-note.* See generally, monographic *note* on "Ejectment" appended to Tapscott v. Cobbs, 11 Gratt. 172.

Verdict—Impeachment by Jurors.—To the point that the testimony of jurors is generally admissible to support, though not assail, the verdict, see the principal case cited in Bull v. Com., 14 Gratt. 631; Moses v. Cromwell, 78 Va. 676; Zickefoose v. Kuykendall, 12 W. Va. 35. See also, Bull v. Com., 14 Gratt. 613, and *foot-note* there quoted; monographic *note* on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

by course and distance, which upon being laid down on a plat did not close.

The cause was removed to the Circuit court of Augusta, and came on for trial in November 1849. The tenant claimed under a patent founded on an inclusive survey which embraced the land in controversy. He proved an entry by John McDougall for twenty acres of land on the 23d of May 1793, a survey thereon on the 18th of June in the same year, and a patent for it to McDougall dated the 12th of August 1795. He also proved the application by McDougall to the County court for an inclusive survey, which was authorized by the court; and also the survey which embraced the tract aforesaid and three others for which patents had been granted by the commonwealth in 1742, 1772 and 1778: This survey contained six hundred and eighteen acres; and a patent was issued thereon bearing date the 17th of May 1797. He further proved a regular conveyance of this tract of land through several successive conveyances to himself; and that the land in controversy was the land embraced in the patent for twenty acres, dated the 12th of August 1795; and that the true quantity was twenty-three acres one rood and twenty-six poles. The tenant also proved by a witness that he was personally acquainted with the tract of six hundred and eighteen acres, from a period between 1801 and 1804; and he was acquainted with it from information from the year 1797, when McDougall conveyed it to the witness's father. That witness's father was in possession of the land when witness became acquainted with it; and it had been held by the successive purchasers under McDougall from that time to the time of the trial. That a part of the land in controversy had been cleared in 1812 or 1813 by the purchaser from his father; and that the taxes had been regularly paid
422 upon it since 1797. *And that Joseph Rankin had never had possession of any part of the land in controversy.

The demandants, to sustain the issue on their part, introduced in evidence a patent from the commonwealth, bearing date the 21st of July 1794, by which there was granted to Joseph Rankin two hundred and ninety acres of land; which it was proved included the land in controversy: And they introduced the will of Joseph Rankin, by which he devised his property to them.

After all the evidence had been introduced, the court, upon the motion of the demandants, instructed the jury as follows:

1. If the jury believe from the evidence, that the demandants have the elder patent to the land in controversy, then the effect of the emanation of the junior inclusive patent under which the tenant claims, is no more than the effect of any other patent would be; and only operates as any other patent would do, to give the tenant color of title; which color of title can only serve him in this cause provided he shall have shown, in addition thereto, a continued, actual adversary possession in himself and those under whom he claims, of the land in controversy, for a period of at least thirty years immediately preceding the emanation of the demandant's writ in this cause.

2. That possession to avail the tenant must have been an actual adversary possession of a part or the whole of the land in controversy; and cannot be acquired by open and notorious acts of ownership short of actual occupation, use or enjoyment.

3. That while patented lands remain uncleared, or in a state of nature, they are not susceptible of adversary possession against the elder patentee, unless by acts of ownership effecting a change in their condition. No exception was taken to these instructions by the tenant.

423 *The jury found a verdict for the demandants for twenty-three acres, one rood and twenty-six poles, designating the boundaries thereof by lines, all of which varied from those described in the count: And the court rendered a judgment for the demandants according to the verdict.

After the jury had rendered their verdict, the tenant moved the court for a new trial, on the ground that the verdict was contrary to the evidence; but the court overruled the motion, stating that the only question in the cause was the statute of limitations, the demandants having clearly proved the elder title; and that upon the statute of limitations, if the jury had found for the tenant, they would have done no more than he would have done had he been sitting as a juror; but the court could not consider the verdict as involving such a manifest departure from the evidence as to justify its interference by setting aside their verdict.

At a subsequent day of the term the tenant again moved the court for a new trial, upon the grounds, first, that the jury misunderstood the instruction of the court; and he produced an affidavit of three of the jurors, in which they state that after the argument was closed they had made up their minds to find for the tenant on the statute of limitations, and would have so found but for an instruction of the court, which they understood to be substantially, "That the tenant must have proved an adversary possession of the land in dispute for thirty years prior to the suit, separate and independent from possession for that length of time of the inclusive survey which embraced within its limits the disputed land." That they were satisfied the tenant and those under whom he claimed had actual possession for more than thirty years prior to the institution of the suit of part of said inclusive survey; and if that was sufficient, they were satisfied *the jury
424 found an improper verdict; but if the law required the tenant to prove actual occupation and improvement of the land in dispute, without reference to it as a part of the inclusive survey, then they thought the verdict correct. The second ground for the new trial was that if the instruction was not misunderstood, the court had misdirected the jury as to the law: For

that possession under the inclusive survey and patent of any part of the land included therein, was in legal contemplation, possession of the twenty-three acre tract, which was the tract in controversy, although no actual occupation or possession of that tract or any part of it was proved. But the court overruled the motion; and the tenant excepted; embracing the action of the court upon both motions in his exception: And he applied to this court for a supersedeas, which was allowed.

Fultz, for the appellant.

H. W. Sheffey and Michie, for the appellees.

LEE, J. I think the first instruction given to the jury on the motion of the demandants' counsel, will not bear the construction placed upon it by the counsel for the plaintiff in error in this court. He supposes that it confined the tenant to proof of adversary possession under the grant obtained upon his inclusive survey, and deprived him of the right of going behind that patent, and for the purpose of making out his defence under the statute of limitations, of showing possession under color of title anterior to its emanation. That he had the right to do so will not be denied. For this purpose he was authorized to give in evidence the entries for the different tracts embraced in the inclusive survey; the order of court authorizing the survey, and the survey made in pursuance of the order; though as there can be no adversary
425 possession *against the commonwealth, he could not go behind the senior grant. Shanks v. Lancaster, 5 Gratt. 110. But there is nothing in the terms or in the effect of this instruction, to prevent him from availing himself of all this evidence, if he had chosen so to do. All that it purports to do is to declare the effect of the junior patent obtained upon the inclusive survey, as the foundation for the defence of adversary possession under the statute of limitations; and it informed the jury that its effect was just the same as that of any other patent, and that it only operated as any other patent would, (if the demandant had shown title under an older grant in himself,) to give the tenant a color of title under which he might, if he could, show an adversary possession sufficient to bar the action under the statute of limitations. That this is strictly correct cannot be doubted. A grant obtained upon an inclusive survey under the statute, possesses no peculiar or distinctive virtue to support a defense under the statute of limitations, not pertaining to any other grant. For this purpose any grant would equally serve by affording the necessary show or color of title to which the adversary possession might be referred. Nor is there the slightest ground for supposing that the tenant was restricted in making out his case, to this particular patent. He was at perfect liberty after showing it, to go on and show any other instruments under which he claimed title, whether the claim was a good or a bad title, a legal or an equitable title, (Shanks v. Lancaster, ubi supra,) and make out his possession if he could, under any one or all combined.

But in truth the tenant could not have been prejudiced if he had been restricted to his inclusive patent as the basis of the claim of title under which he held possession, because that patent issued in 1797, and it was not necessary, in order to complete the bar under the statute, to carry back the adversary possession
426 *further than the year 1799. So that if he could make out the necessary thirty years' adversary possession next before the emanation of the writ, it would have fallen under the date of this patent, and this would have furnished the needful color of title and made out the defense as effectually as if any number of different claims of title had been exhibited.

The instruction to the jury that the possession which would avail the tenant under the statute of limitations must be an actual and continued adversary possession of the land in controversy, or some part thereof, is, I think, strictly correct, nor do I perceive how there can be any objection to it. If the tenant had not had such possession, he could not maintain this defense. The actual adversary possession of the premises in controversy is the very essence of a defense under the statute of limitations. Its effect is to render such possession conclusive in behalf of either demandant or tenant, without reference to the original merits of the controversy, and even against the plainest and most convincing proof of better original title. To say that a party sued for land in his possession is defending himself under the statute of limitations, is exactly equivalent to saying that he is seeking to defeat the action by proving actual adversary possession of the subject in controversy in himself and those under whom he claims, for the period necessary to complete the bar. How he is to make out this possession, whether by proof of actual settlement and occupancy, or of such open, notorious and habitual acts of ownership importing the use and enjoyment of the property, and equivalent to actual occupancy, or by proof of such actual occupation and enjoyment of another portion of the tract claimed by him, of which the disputed premises is also parcel, is a totally different question. This involves other and distinct principles, and especially the enquiry in what sense the rule that
427 *possession of part is possession of the whole, is to be understood, and of what modifications it is susceptible in its application. To this precise question, as I understand the bill of exceptions, it would seem that the attention of the court was not specifically directed. But if it be susceptible of a different construction, and if we are to understand the instruction as implying that the occupancy and enjoyment by the tenant of a portion of his land other than the parcel in controversy, with whatever claim, could not constitute such a dis-

seizin of the demandant as would enable him to maintain his defense under the statute of limitations, I should still think it strictly correct. The case is one of two patents conflicting in part, occasioning what is called a "lap" or "interlock." The elder patentee under his grant acquires at once constructive seizin in deed of all the land embraced within its boundaries, although he has taken no actual possession of any part thereof. Clay v. White, 1 Munf. 162; Green v. Liter, 8 Cranch's R. 229. The junior patentee under his grant acquires similar constructive seizin in deed of all the land embraced by his boundaries, except that portion within the interlock, the seizin of which had already vested in the senior patentee. Clark's lessee v. Courtney, 5 Peters' R. 318, 354; Langdon v. Potter, 3 Mass. R. 215.

In this state of the case, if the junior patentee settle upon that portion of the land within the interlock, claiming the whole within his boundary, he thereby ousts the senior patentee of his constructive seizin, and becomes actually possessed to the extent of his grant. Calk v. Lynn's heirs, 1 A. K. Marsh. R. 346; West v. Price's heirs, 2 J. J. Marsh. R. 380; Fox v. Hinton, 4 Bibb's R. 559. Here possession of part is possession of the whole. But if his settlement be outside of the interlock, there the possession of part is to be construed in reference to the conflict of
428 boundaries, *and with whatever claim it be taken, it gives him possession of that part of the land, only, lying without the interlock. Of that within, he does not thereby acquire the possession. The constructive possession which he would have gained if there had been no conflict, does not take effect; and there is nothing which can serve to overcome the constructive seizin in deed of the elder patentee, and work an ouster. To effect this, there must be an actual invasion of the boundary of the senior patentee, by some act or acts palpable to the senses, and which would serve to admonish him that his seizin was molested. He is of course presumed to know his own boundary, and if that be invaded by plain, open, visible acts of possession on the part of the other, and he submits or fails to assert his right, an ouster will be accomplished, and he shall be said to be disseized. But if the acts be not of the character above indicated, if they amount to a mere adverse claim, however connected with possession of another part of the land, they will not have that effect. The consequence of a different rule, as justly remarked by Judge Baldwin in Taylor v. Burnsides, 1 Gratt. 165, 196, would be that a man might be disseized of his freehold not only without his knowledge but even without the possibility of his knowing it. See also Buford v. Cox, 5 J. J. Marsh. R. 589.

There is nothing in any of the cases cited by the counsel for the plaintiff, in conflict with the opinion above expressed. In the cases of Green v. Liter, 8 Cranch's R. 229; Clarke v. Courtney, 5 Peters' R. 319; Bradstreet v. Huntington, Ibid. 402; Taylor v. Burnsides, 1 Gratt. 165; and Overton v. Davisson, Ibid. 211, the possession relied on was within the limits of the opposing claim, and so the question did not and could not arise. In the case of Taylor v. Burnsides, however, Judge Baldwin, in the able and luminous opinion delivered by him, adverts to this question, and expresses
429 *views with which the opinion here advanced will be found to be strictly coincident: and it would seem to be fully supported by numerous cases. Burns v. Swift, 2 Serg. & Rawle 436; Napier's lessee v. Simpson, 1 Overton's Tenn. R. 443; Voorhies v. Bridgford, 3 A. K. Marsh. R. 27; Trimble v. Smith, 4 Bibb's R. 257; Smith v. Mitchel, 1 A. K. Marsh. R. 208; Pogue v. McKee, 3 A. K. Marsh. R. 128; Bodley v. Logan's heirs, 2 J. J. Marsh. R. 254; Fox v. Hinton, 4 Bibb's R. 559.

It is objected to the third instruction, first, that it is abstract in its character; secondly, that it is not law. That an instruction presents merely an abstract proposition, is certainly a very sufficient reason why a court may refuse to give it: but if given and it state the law correctly, I am not aware that it has ever been held a sufficient cause for reversing the judgment. And though erroneous, it would, as it seems, not be deemed sufficient to reverse. Hunter v. Jones, 6 Rand. 541. But the instruction was not of this character; for there was evidence in the case which might involve the question as to the nature of the acts which would amount to an adversary possession. And whatever doubts may formerly have been entertained as to the correctness of the doctrine which it asserts, it must now be regarded as settled in Virginia by the cases of Taylor v. Burnsides, 1 Gratt. 165, and Overton v. Davisson, Ibid. 211. The authority of these cases upon the points decided by the court, has been, I believe, universally acquiesced in by the profession, and I deem it unnecessary to do more than simply to refer to them: They will be found fully to cover the instruction in all its breadth; and indeed the language in which it is expressed would seem to have been adopted from the judgment of the court in Overton v. Davisson. If it be said that "the acts of ownership" effecting a change in their condition which shall constitute an adversary possession of lands un-
430 cleared and *in a state of nature, and the character and extent of this change are not defined or explained, the answer is that the court has conformed to the ruling of this court in the case before referred to, and was not asked to give such definition or explanation. This will perhaps constitute the subject of consideration upon some future occasion. In this case I do not deem it necessary or proper to do more than simply to allude to it.

I think the motion for a new trial was properly overruled. The contest in the case turned upon the statute of limitations: and to make out the defense it was neces-

sary for the tenant to carry back the possession of those under whom he claimed to July 1779. There was no proof of possession of any part of the lands covered by the inclusive patent prior to the year 1800; nor was there proof of any actual possession or entry upon the disputed portion prior to the year 1812. In the view I have taken of the case, there was no disseizin of the demandants' ancestor prior to the year last named. But if even the possession of part of the land without the interlock could be regarded as importing adversary possession of the portion within, and thus working a disseizin, still the evidence fails to carry it back far enough to complete the bar. From the possession in 1800 no inference can legitimately be drawn that the same party had had possession for the previous year. Nor do the circumstances referred to, the making the inclusive survey, obtaining the patent thereon, probable notice of those proceedings to the demandants' ancestor, &c., &c., constitute any proof of such possession as is necessary to work a disseizin. They tend to make out rather a case of adverse claim than one of adversary possession; and they fall within the influence of the rules in Taylor v. Burnsides and Overton v. Davisson. Nor do they raise, in connection with the possession in 1800, any necessary presumption of previous
431 possession, *because they are all entirely consistent with the hypothesis that the possession had its commencement in the year first spoken of by the witness.

As to the supposed misunderstanding of the instructions by some of the jury: I will remark that while affidavits of jurors will generally be received in support of their verdict, they will not readily be received to invalidate it. The cases in the books upon this subject are numerous; and it is true in the multitude of decisions there will appear to be some contrariety; and quite a number of cases are to be found in which such affidavits have been received for the purpose of impeaching verdicts, and new trials have been sometimes granted. But the leaning of the courts of most approved authority is against the practice of grounding such motions upon them; and a disposition has been manifested greatly to restrict the class of cases in which, upon such affidavits, new trials will be allowed. In the case of Harnsberger v. Kinney, 6 Gratt. 287, Judge Allen, delivering the opinion of the court, states strongly the reasons founded on principles of public policy for discouraging a resort to evidence of this character. It was a case in which a new trial was asked for on the ground that the instruction of the court had been misunderstood by some of the jury. The Circuit court had set aside the verdict and granted the new trial; and this court reversed the judgment of the Circuit court, and proceeded to render judgment on the verdict. I should therefore feel very reluctant to entertain a motion for a new trial, upon the ground that some of the jurors, as disclosed by their own affidavits, had misunderstood the instructions of the court in a case in which the court before which the trial was had, had refused to set aside the verdict as contrary to evidence, and in which, so far as this court could see, full justice had been done.

But in truth, were it not for the
432 statement in the *bill of exceptions, that the judge himself, if he had been a juror, would have carried the possession back to the date of the inclusive survey, and have found for the tenant, I should have thought there was no ground whatever for imputing any such mistake or misunderstanding of the instruction as is supposed. From the terms in which it is expressed, the Circuit court was of opinion the tenant must show actual possession of part at least of the land within the interlock, as contradistinguished from such possession as he would have acquired if there had been no conflict of boundaries, by taking such possession of part of the land without, and that it must have been held adversely for thirty years prior to the institution of the suit. The proof is clear that he had no actual possession by occupancy or enjoyment of any part within the interlock prior to the year 1812; and there could be no doubt, therefore, if such a possession was required to be proved, that he had failed to make out a bar under the statute. Such an interpretation might very well, I think, be given to the instructions, and they are complained of here because such was their meaning; and I feel some little difficulty in reconciling it with the statement above referred to. But however this be, the instructions, as understood by the three jurors referred to, in my view propounded the law in substance correctly; and I think there is not the slightest ground for disturbing the verdict because of any supposed mistake or misapprehension as to what was really the law of the subject.

There remains to be considered but one other question, and that is as to the effect of the imperfect description of the land in the count, and the variance between it and the verdict as to quantity and boundaries. And on my first examination, I felt some difficulty on this point. Further reflection, however, has served to remove it.
433 The form of the count in a writ *of right under the act of 1819, as prescribed in the act, requires the boundaries of the land to be stated. The count filed attempts to set them out, but those given do not make a diagram that will close, an open line or lines being left between the end of the course S. 80 W. 52 poles, and the beginning corner. But no objection was made for this defect, by demurrer or otherwise; the usual plea was filed and the issue joined on the mere right; and the jury have found a verdict precisely describing the tenement demanded by its exact quantity and specific boundaries. By this means the defect is cured. Turberville v. Long, 3 Hen. and Munf. 309; Lovell v. Arnold, 2 Munf. 167; Bolling v. Mayor of Petersburg, 3 Rand. 563. It is true the verdict describes

the land as bounded by seven lines while in the count the number of lines is eight, and no one of the lines named in the former coincides with any one of those given in the latter; and the quantity of land found by the jury is twenty-three acres, one rood and twenty-six poles, while that demanded in the count is twenty acres. But these things are only matters of description; and the jury having found the tenement described by them in their verdict, to be the same tenement mentioned in the count, we have to suppose that the description given in the count is a mistaken one; and that the demandants have recovered the precise tenement demanded in the count, though by a different and corrected description.

Upon the whole case, I am of opinion to affirm the judgment.

The other judges concurred in the opinion of Lee, J.

Judgment affirmed.

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434 *Findley's Ex'ors v. Findley.

July Term, 1854, Lewisburg.

1. **Contracts—Construction of—Words Having Legal Significance.***—If parties in making a contract use words of definite legal signification, they must be understood as using such words in their definite legal sense.

2. **Dower—Antenuptial Contract—Distributive Share of Wife.**†—By an agreement in contemplation of marriage, the intended husband bound his estate to pay to the intended wife certain sums of money, if she survived him; which were to be in bar of and in full compensation for her dower. HELD: This agreement barred her of her dower in her husband's real estate; but does not deprive her of her distributable share of his personal estate.

3. **Distributive Share of Wife—Provision by Will—Election—Effect.**—The husband by his will gave to his wife certain personal estate absolutely, and a tract of land for life; but she after his death renounced the will in the mode prescribed by the statute. HELD: She is not entitled to take under the will what is thereby given to her: But the property bequeathed to her is to be applied to compensate the legatees who are disappointed by her taking her distributable share of the personal estate.

4. **Marriage Settlements—Payment of—Case at Bar.**—The widow having received from the executors two bonds of her son by a former marriage which he had executed to her husband, in part satisfaction of the amount due to her under the marriage agreement, and having given to them a receipt for the amount, it is a valid payment to her to that extent.

The case is sufficiently stated in the opinion of Judge Samuels.

Baldwin and Stuart, for the appellants.

Michie and H. W. Sheffey, for the appellee.

SAMUELS, J. On the 12th of November 1841 Samuel Findley and Elizabeth S. Harnest entered into an agreement of that date, in writing and under seal, reciting in effect that a marriage was shortly intended to be had and solemnized, by the permission of God, between the parties; declaring, amongst other things,
435 *that it was distinctly understood and agreed, that in the event of said Samuel Findley departing this life first, or before the said Elizabeth, that said Findley bound his heirs, executors, &c., to pay to the said Elizabeth the sum of ten hundred dollars: say about one-half in cash, and the other half in property at a fair valuation price. But if said Findley should live five years or more after the date of their marriage, or the said Elizabeth have one or more children to said Findley, and living at the death of said Findley; in either or both of these last events happening, then Findley bound his heirs, executors, &c., to pay said Elizabeth the further sum of ten hundred dollars, payable as before stated, within six months after Findley's decease, in money, say about one-half, and the other half in household and other property, as it might suit equally for his estate to pay out, and her to receive; which sum or sums were to be considered as in bar of and in full compensation for said Elizabeth's dower; and that said parties agreed that Findley would only have the right to exercise authority over the rents and profits of said Elizabeth's real estate, and the same to use so long as they both lived. This agreement was duly recorded; and immediately thereafter the marriage was consummated. Findley having lived more than five years after the marriage, departed this life May 5th, 1847, leaving his wife to survive.

Findley died leaving a will, which had been written a short time before the marriage, but which contains no reference to that event. Three several codicils are annexed to the will, all written after the marriage. One of these codicils gave to the appellee the personal property she had brought to her husband at the marriage; and in case the testator and his wife should die before Margaret the daughter of the wife, then this daughter was to have and enjoy the property. Another of the codicils gave to the appellee a portion of a
436 tract *of land which testator had purchased of J. Bushong, as her dower

*Contracts—Construction of—Words Having Legal Significance.—For the proposition that, if parties in making a contract use words of definite legal signification, they must be understood as using such words in their definite legal sense, the principal case is cited and followed in Nye v. Lovitt, 92 Va. 714, 24 S. E. Rep. 345; Holston Salt, etc., Co. v. Campbell, 89 Va. 398, 16 S. E. Rep. 274. See, in accord, Wallace v. Minor, 86 Va. 550, 10 S. E. Rep. 423; Moon v. Stone, 19 Gratt. 130, and *note*; 2 Min. Inst. (4th Ed.) 1066; Bowyer v. Martin, 6 Rand. 525.

†Dower.—The principal case is cited in the following cases: Dixon v. McCue, 14 Gratt. 553, and *note*; Nelson v. Kownslar, 79 Va. 476, 479; Hinkle v. Hinkle, 34 W. Va. 154, 11 S. E. Rep. 997. See monographic *note* on "Dower" appended to Davis v. Davis, 25 Gratt. 587.

right for and during the term of her natural life. The will and the codicils annexed were admitted to probat. On the 23d of August 1849 Elizabeth S. Findley, in conformity with the terms of the statute, by deed under her hand and seal, declared that she would not take or accept the provision made for her by the will of Samuel Findley, or any part thereof, and that she did thereby renounce all benefit she might claim under said will; and that she elected to take such portion of the estate of Samuel Findley, in virtue of her right as widow and relict, as the law of the land allowed.

The appellee Elizabeth S. Findley thereafter, by bill and amended bill, convened the executors and devisees of Samuel Findley before the Circuit court of Augusta county. The bill alleged the facts above stated, and some others not material to be considered; and the prayer of the appellee is, that she may have a decree for her distributive share in the personal estate of her late husband; that she may have a day in court to elect between the provisions of the jointure settlement and her dower in the real estate of Samuel Findley; and for general relief.

The answer of the defendants admitted the marriage and other allegations of the bill, so far as they were founded on written evidence. They question the right of complainant to distribution of her husband's personal estate, alleging that upon the true construction of the marriage contract standing alone, her claim to distribution is barred; or if this be not so, yet, construing that contract by the light of surrounding circumstances, as shown by extrinsic proof, they insist her claim is barred.

The case thus presented brings before the court the questions, What rights complainant acquired under the marriage contract? What rights she gave up by
437 that *contract? What rights she took under the will of her husband? To what extent her rights under the will are affected by her renunciation of its provisions?

It was properly conceded in the argument here that parties, when about to contract the relation of husband and wife, may, by agreement, vary or wholly waive the rights of property which would otherwise result from the marriage. See Faulkner v. Faulkner's ex'ors, 3 Leigh 255; Charles v. Charles, 8 Gratt. 486; 1 Lom. Dig. 423-4.

By the terms of the marriage contract in this case, the appellee was to have one thousand dollars in the event of surviving her husband; and the like sum payable six months after Findley's death, if he should live five years or more, and then die leaving the appellee surviving. The husband lived more than five years, and at his death left the appellee surviving, who thus became entitled to the two sums of one thousand dollars each, payable at the times and in the mode provided in the agreement.

The question, what rights the appellee gave up by the contract, was argued with great earnestness by the counsel. On the part of the appellants it was insisted, that she had given up not only her right of dower, but her claim to a distributive share of the personal estate. On the part of the appellee it was insisted, that the right of dower only was intercepted, and that the claim to a distributive share remained untouched.

It may be laid down as a rule of construction established beyond question, that a written contract must be construed by the terms used therein if plain and intelligible; that extrinsic proof is not admissible for the purpose of adding to, or detracting from, or explaining, or in anywise varying the plain meaning of the instrument itself; that extrinsic proof may be heard only for the purpose of explaining a latent ambiguity or of applying ambiguous words
438 to their proper *subject matter. It may be further laid down as equally well settled, that if parties in making a contract, use words of definite legal signification, they must be understood as using such words in their definite legal sense. For these positions a large number of authorities were cited by the appellee's counsel; amongst them the cases of Tabb v. Archer, 3 Hen. & Munf. 399; Gatewood v. Burrus, 3 Call 194; McMahon v. Spangler, 4 Rand. 51; Bowyer v. Martin & al., 6 Rand. 525; Ball's devisees v. Ball's ex'ors, 3 Munf. 279. Wigram, in his treatise on the construction of wills, lays down certain rules, some of which are equally applicable to written contracts. The second of these rules is in these words: "When there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and when his words so interpreted, are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation; and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

Applying these rules to the language of the contract, "which sum or sums is to be considered as in lieu of and in full compensation for the said Elizabeth's dower," we must hold that the appellee's right of dower only, properly so called, is barred. That word means an entirely different thing from distributive share. Dower is a widow's life estate in land; a widow's distributive share is a third part of the slaves for life, and of the other personal estate absolutely. The statutes regulating these different subjects, call them by different names; and prescribe different rules and incidents
439 *about them. If we suppose for a moment, that the parties intended to bar the right of dower only, what mode of expression more appropriate for the purpose than that used by them?

Again: If we suppose that they intended

to leave her right in the personal estate untouched, the readiest mode of attaining their purpose was to say nothing about it in the contract. I am of opinion the appellee's claim to distribution is not intercepted by the antenuptial contract between herself and her late husband. See Stegall v. Stegall's adm'r, 2 Brock. R. 256; Ellmaker v. Ellmaker, 4 Watts' R. 89.

The question next in order is, What effect the will of Samuel Findley had upon the rights of the appellee his widow to distribution of the personal estate? This question has occurred in many cases under the law as it stood at the death of the testator; and in every case it has been decided that unless the widow renounce the provision made for her by the will, she could claim nothing more than was given by it. The appellee having renounced the will, is entitled to a distributive share of the personal estate of her husband; her dower in the real estate is barred by the contract entered into before the marriage.

The appellee cannot assert her paramount claim to distribution against the will, and also claim the provision, or any part of it, made for her by the will. Having made her election to take the first, she must give up the last to indemnify the parties who are disappointed by her election. Mitchells v. Johnsons, 6 Leigh 461; McReynolds v. Counts & als., 9 Gratt. 242. The appellee should account for the value of her interest under the will, in the personal estate brought by her to her husband. She should also give up her life estate in that portion of the land bought of Bushong and devised to her by her husband, and account for the rents and profits thereof, if any, re-
440 ceived by her, or *lost by her want of diligence, if any were so lost. This property and its profits should go to indemnify the legatees who are disappointed by the widow's renunciation.

An error appears on the face of the account taken in the court below for ascertaining the balance to be distributed. That balance will be what remains after paying debts and charges. The amount yet due the appellee on the marriage contract is a debt of Findley's estate, and should be paid before the balance can be properly ascertained.

Without deciding whether the appellee was bound as security for her son William M. Harnest, in the bond amounting to two hundred and fifty-three dollars and fifty-eight cents, yet as she voluntarily paid that bond as well as another bond given by William M. Harnest to Samuel Findley, amounting to fifty-eight dollars and eighty-seven cents, these sums should be charged against her in the account of money due her under the marriage contract.*

The other judges concurred in the opinion of Samuels, J.

Decree reversed.

**Note by the Reporter.*—These bonds had been executed by her son William M. Harnest to her husband, and she executed the first as his security. After the death of her husband she received these bonds from the executors in part payment of the amount due under the marriage agreement; and gave a receipt for the amount.

441 *M. Blair v. Thompson & als.

July Term, 1854, Lewisburg.

1. **Dower—Assignment—Parties—Case at Bar.***—In a bill by a widow for dower in land sold in the life time of her husband, and coming to the present owner through several intermediate conveyances, the present owner is the only necessary party defendant.

2. **Sale of Land—Failure of Vendor to Retain Lien—Effect upon Dower of Purchaser's Wife—Case at Bar.**—W bought land, and gave bond with S as security for the purchase money; and about eighteen months after he executed a deed of trust upon the land and on personal property as a further security. Afterwards he took the oath of an insolvent debtor, and his equity of redemption was sold to T and M, to whom the sheriff conveyed it. T, M and S then conveyed the land with general warranty to J, and he, T, M and the trustee united in a conveyance of the land to secure the purchase money. In a bill by the widow of W, to recover her dower, she sets out these conveyances, and makes all the parties to them defendants. J in his answer asks that if she is entitled to dower, the present value thereof may be ascertained, and that there may be a decree in plaintiff's favor for that amount against his vendors. M and S insist they are only sureties of T. HELD:

1. **Same—Same—Same.**†—W having given bond and security for the purchase money, the vendor's lien was not retained; and his widow is entitled to dower in the land.

2. **Dower—When Decree for Specific Sum in Lieu of, Valid.**‡—There cannot be a decree for a specific sum in lieu of dower without the assent of all the parties interested.

**Dower — Assignment — Parties.* — In Morgan v. Blatchley, 33 W. Va. 158, 10 S. E. Rep. 283, it is said: "In *Blair v. Thompson, 11 Gratt. 441*, the court of appeals of Virginia held that 'in a bill by a widow for dower in land sold in the lifetime of her husband, and coming to the present owner through several intermediate conveyances, the present owner is the only necessary party defendant'; and it follows that where the entire tract in which the bill prays an assignment of dower is owned and held in different surveys, or smaller tract, by different parties, they are all interested in said assignment of dower, and it cannot be legally and properly made without making them parties to the suit." See also, Hunter v. Hunter, 10 W. Va. 354. See sec. VII of monographic *note* on "Dower" appended to Davis v. Davis, 25 Gratt. 587.

†**Sale of Land—Failure of Vendor to Retain Lien—Effect upon Dower of Purchaser's Wife.**—The proposition laid down in the principal case that, when the vendor of land does not retain a lien upon the land the widow of his vendee is entitled to dower in such land, is approved in Hunter v. Hunter, 10 W. Va. 354, that case holding that the converse of the proposition is also true.

‡**Dower—When Decree for Specific Sum in Lieu of, Valid.**—For the proposition that the court cannot decree for a specific sum in lieu of dower without the consent of all the parties interested, the princi-

3. Chancery Practice—Decree between Codefendants.—That the equities between the defendants do not arise out of the pleadings and proofs between the plaintiffs and defendants, and therefore there can be no decree between them.

This was a suit in equity in the Circuit court of Augusta county brought by Jane Thompson, widow of William Thompson, against his representatives, the administrator of Thomas R. Blair, Matthew Blair, William C. Snapp and Jacob Michael, to recover her dower in a tract of land then owned and in the possession of Michael. The facts are sufficiently stated in the opinion of Judge Allen.

442 *Baldwin, for the appellant Matthew Blair.

Hugh W. Sheffey and Michie, for the appellee Jane Thompson.

Stuart, for the appellee Michael.

ALLEN, P. This was a bill filed by the appellee Jane Thompson, widow of William Thompson, to have her dower assigned to her in a tract of land purchased by, and conveyed to her husband during the coverture. It appears that William Thompson purchased the land from Thomas R. Blair as executor of Matthew Blair, and received an absolute conveyance therefor on the 25th of December 1830. The consideration expressed in the deed was two thousand and seventy-five dollars, the receipt of which was acknowledged on the face of the deed. On the 4th of June 1832, William Thompson executed a deed of trust on the land, and on a quantity of personal property, to secure the payment of the deferred installments of the purchase money, for the payment of which he had executed his several single bills, with William C. Snapp as security, payable in six equal annual payments, the first falling due on the 25th of December 1832. Thompson thereafter took the oath of insolvency, and in November 1832 conveyed his equity of redemption to the sheriff, who made a return that he had sold the same to Thomas R. and Matthew Blair, to whom he conveyed it by deed dated the 27th of June 1834. On the same day Thomas R. Blair, Matthew Blair and William C. Snapp united in a deed conveying the land to Jacob Michael with covenants of general warranty, for the consideration, as expressed in the deed, of two thousand four hundred dollars; and Michael on the same day executed a deed of trust to secure the deferred installments. This deed was signed by both the Blairs, by Michael and the trustee, and with the other deeds of the same date, duly recorded.

443 *The bill makes the representatives of William Thompson, the administrator of Thomas R. Blair, Matthew Blair, William C. Snapp and Jacob Michael, the purchaser in possession of the land, defendants, and prays that her dower be decreed to her, to be laid off by metes and bounds; and that an account of the rents and profits be ordered; and for general relief.

Jacob Michael in his answer, admits the execution of the deed of trust to secure the deferred payments on the land; avers that the deed was executed in pursuance of the original understanding between the parties and William C. Snapp, that the land should be bound for the deferred payments; and insists that the vendor's lien for the unpaid purchase money was not released or discharged as it respected the purchaser himself or his widow claiming dower in the land so purchased after the coverture. But should her claim to dower be sustained, he prayed in his answer, that the value of her dower interest should be ascertained in money, and a decree be rendered in her favor directly against William C. Snapp, Matthew Blair and the representative of Thomas R. Blair.

It is said by Chancellor Kent, 4 Kent's Com. 153, "That the taking the note, bond or covenant of the vendee is not of itself an act of waiver of the vendor's lien; for such instruments are only the ordinary evidence of debt. But taking a note, bill or bond, with distinct security, or taking distinct security exclusively by itself, either in shape of real or personal property, from the vendee, or taking the responsibility of a third person, is evidence that the seller did not repose on the lien, but upon independent security; and it discharges the lien. Gilman v. Brown, 1 Mason's R. 212; Cole v. Scott, 2 Wash. 141; Brown v. Gilman, 4 Wheat. R. 290. So too the presumption that the vendor intended to rely on the implied equitable lien, is repelled by the ven-

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pal case is cited and followed in Wilson v. Branch, 77 Va. 69; Harrison v. Payne, 32 Gratt. 389, 391, and *note*; Jarrell v. French, 43 W. Va. 470, 27 S. E. Rep. 268.

In Verlander v. Harvey, 36 W. Va. 379, 15 S. E. Rep. 56, the principal case is cited for the above proposition, but the second headnote of that case is as follows: Sections 10, 11, and 12 of chapter 65 of our Code, on dower, jointure, and curtesy, construed, and *held*, that where the husband has sold realty in his lifetime, which was subject to dower, the value of the widow's dower is to be computed, as against the alienee, at the date of her recovery, if in kind, with lawful interest from her suit; but she cannot insist that her dower shall be assigned in specie nor can she refuse to receive the equivalent annuity, or a gross sum in lieu thereof, the option in this matter being lodged by the statute exclusively with the alienee; and when, under section 12, the alienee elects to pay an annuity, or a gross sum in lieu thereof, the value of the dower is computed as of the time of the alienation.

See further, on this subject, sec. VII, monographic *note* on "Dower" appended to Davis v. Davis, 25 Gratt. 587.

§Chancery Practice—Decree between Codefendants.—On this subject, see the principal case cited in the following cases: Steed v. Baker, 13 Gratt. 384; Ould v. Myers, 23 Gratt. 405, and extensive *foot-note*, where a large number of cases are collected and the question discussed; Glenn v. Clark, 21 Gratt. 39, and *note*; Hansford v. Coal Co., 22 W. Va. 75; Ruffner v. Hewitt, 14 W. Va. 741; McKay v. McKay, 33 W. Va. 734, 11 S. E. Rep. 217; Watson v. Wigginton, 28 W. Va. 567. See also, monographic *note* on "Decrees."

444 dor's taking a mortgage *on the property subsequent to the deed of conveyance to the vendee. Little & al. v. Brown, 2 Leigh 353. In such case the vendee becomes the owner without qualification at the time of the conveyance; he becomes beneficially seized for his own use; and the wife's title to dower attaches, and cannot be divested by the subsequent incumbrance, unless she concurs therein.

In this case there was the personal security of a third person for the deferred payments, on which the vendor rested from the 25th of December 1830, until the 4th of June 1832, which of itself shows no lien was reserved; and the deed of trust upon that and other property would have superseded it. The purchaser Michael has not introduced any evidence to sustain the affirmative allegation of his answer, that the deed of trust was executed in pursuance of the original understanding of the parties and William C. Snapp, that the land should be bound for the deferred payments. The court properly determined by the interlocutory decree of November the 1st, 1848, that the appellee was entitled to her dower, and that commissioners should be appointed to allot and assign the same to her.

The decree furthermore directed the commissioners to report what sum would be a fair annual rent or annuity for the dower estate, and what gross sum in fee, payable in presenti, would be a fair equivalent for the plaintiff's dower interest. This provision of the interlocutory decree seems to have grown out of a prayer in the answer of the defendant Michael, that in the event of the claim to dower being sustained, the value thereof should be ascertained in money, and a decree be rendered directly against his vendors in favor of the appellee. In pursuance of this order the commissioners laid off the dower by metes and bounds, and ascertained the yearly
445 rent; and a report was *made ascertaining the present fee simple cash value of the dower estate: And a final decree was rendered in favor of the appellee for the arrears of rent, and the cash value of the dower estate, against said Michael. And the court furthermore proceeded to give Michael a decree over against his vendors, for the amount so decreed against him; and being satisfied that Snapp and Matthew Blair were only sureties of Thomas R. Blair in the deed and warranty to Michael, liberty was reserved to them, in the event of their being compelled to pay the sum decreed in favor of Michael, to apply for a decree against the estate of Thomas R. Blair; or the said M. Blair was, if he so elected, to be permitted to make a certain offset referred to in the decree.

From this decree the appellant Matthew Blair has appealed. The suit was a simple claim for dower to be laid off and assigned to the plaintiff in the court below, in lands of which she alleged her husband was beneficially seized during the coverture, and for an account of rents and profits. The purchaser in possession, Michael, holding the legal title by deed duly recorded, was the only necessary defendant, the only person against whom the plaintiff was entitled to a decree. She had no privity with or claim against the intermediate parties through whom the legal title may have passed from her husband to the purchaser in possession. In giving the history of her claim, the bill set out the various alienations and made the vendors of Michael defendants, but asked no decree against them. It was for Michael's benefit that they were made defendants, as it gave them notice of a claim for which they might be eventually liable on the warranty in their deed, and so enabled them to unite with him in resisting the plaintiff's claim; but there was nothing in the allegations of the bill which raised any question as between the codefendants themselves. The right of the appellee Jane Thompson to have her dower assigned and the extent of it, was in
446 nowise *dependent on the transactions between the codefendants. Yet the litigation and delay which the female appellee has been compelled to encounter and submit to, has grown out of and been caused by matters to which she was a stranger, and entirely beside the issues raised by the bill and pleadings. The appellant Matthew Blair does not seriously controvert her right to have her dower assigned; but files an elaborate answer to show that he should not be held liable on the warranty in his deed to Michael; a matter foreign to the issue presented by the bill, and with which the female appellee had no concern. The final decree not only determines this question as between Michael and his vendors, though no issue had been raised between them, but proceeds a step further, and decides that as between these vendors, one was principal in the joint warranty and the other two were sureties.

But little is to be found in the English books in relation to proceedings in equity upon the subject of decrees between codefendants. The leading case on the subject is the case of Chamly v. Lord Dunsany, 2 Sch. & Lef. 689, decided in the house of lords. The case, according to Lord Chancellor Erskine, was more entangled than any other he ever had to consider; but the general doctrine in regard to such decrees was laid down by Lord Eldon and Lord Redesdale. "Wherever (said Lord Eldon) a case is made out between defendants by evidence arising from pleadings and proofs between plaintiffs and defendants, a court of equity is entitled to make a decree between the defendants, and is bound to do so. The defendant chargeable has a right to insist that he shall not be liable to be made a defendant in another suit for the same matter which may be then decided between him and his codefendant. And the codefendant may insist that he shall not be obliged to institute another suit, for a matter which may be then adjusted between the defend-
ants." Conry v. Caulfield, 2 Ball &
447 Beat. 255, was an instance of a *decree

between codefendants upon evidence arising from pleadings and proofs between plaintiffs and defendants.

The case of Taliaferro v. Minor, 2 Call 190, presents the first instance in which the practice was adverted to in this court. That was a suit by distributees against two administrators for an account and distribution. The report ascertained a balance to be due by one administrator to the estate of the other administrator; and a decree was rendered for such balance by the chancellor. But upon appeal it was reversed, because no contest appeared between the administrators, in the record, nor any account of their separate transactions, except in the statement of the accounts by the commissioner. The principle of the case is that the pleadings raised no issue between the codefendants as to the state of accounts between themselves.

Roberts v. Jordans, 3 Munf. 488, was an injunction to a judgment obtained by the assignee of a bond against the obligor, upon the allegation of payments to the obligee and assignor. This court directed the injunction to be made perpetual as to such sum only as had been paid to the assignor before notice of the assignment; but gave the plaintiff a decree over against the obligee and assignor for any sums received by the latter after notice of the assignment, as soon as the plaintiff should have paid the judgment. This was not a decree between codefendants, but in favor of the plaintiff against one of the defendants for money improperly received by him on a note he had assigned to a third person.

The case of Dade v. Madison, 5 Leigh 401, is similar in principle to the case last cited; a decree over in favor of the plaintiff against a defendant ultimately liable to pay back to the plaintiff money he had been compelled to pay under the order of such defendant in favor of a third person.

448 *Ruffners v. Barrett, 6 Munf. 207, is to the same effect; an injunction by the obligor to a judgment in favor of the assignee, upon the allegation of payment to the obligee before notice of the assignment. Upon proof of payment after notice of assignment the injunction was dissolved as to the assignee; but leave was given to proceed against the assignor.

These cases, though referred to sometimes as instances of decrees between codefendants, are in fact cases in which decrees were rendered in favor of the plaintiff against one defendant upon a proper case made against him.

Morris v. Terrell, 2 Rand. 6, was a case of a decree between codefendants. The principal in that case filed a bill against his agent and a purchaser of land from the agent, to set aside a sale for which the agent admitted he had received the purchase money, upon the ground that the agent had no authority to sell. The sale was set aside; the principal restored to his property; and the agent decreed to repay the purchase money received from the purchaser. In that case the authority of the agent to sell constituted the gravamen of the bill. His liability to refund to the purchaser resulted from the establishment of the fact that he had sold without authority; and the question was directly presented and arose from the allegations of the bill and the proofs to sustain them.

The case of Mundy v. Vawter, 3 Gratt. 518, agrees in principle with Morris v. Terrell. The bill of Vawter the substituted trustee, made the purchasers of the land and the previous trustees and others who had united in a deed to Dillard, defendants, alleging that the sale was without authority. The court so held as to one-fourth of the subject, and gave the plaintiff a decree therefor; and then decreed over in favor of the purchaser against his grantors, in the order of their liability, upon the ground set forth in the decree, that

449 *the claim of the purchaser to relief upon the recovery from him, arose out of the decree against him upon the pleadings and proofs between the plaintiff and his grantors. There as in the former case, the authority to sell constituted the stress of the case; and upon that depended the liability to refund. Upon that question the issue was fully made up by the allegations of the bill to which the defendants ultimately made responsible to their vendee and codefendant, had an opportunity of responding by their answers. In another branch of the case of Mundy v. Vawter, the court refused a decree in favor of Norvell against his codefendants, because the pleadings did not make a proper case for such decree.

In the case of Templeman v. Fauntleroy, 3 Rand. 434, the plaintiff charged that Fauntleroy an absentee, was indebted to him, and that the home defendant was indebted to Fauntleroy; and being a foreign attachment, he sought satisfaction of his debt out of the debt alleged to be due by the home defendant to the absentee. The fact of indebtedness was directly alleged in the bill and established by the report of the commissioner; and though the plaintiff took his decree against the absentee alone, and waived a decree against the home defendant, it could make no difference to the latter whether he should be decreed to pay to the plaintiff or to his codefendant and creditor, the absentee. A payment to either would have discharged his debt. The existence of the debt being alleged, the case between the defendants was fully made out by evidence arising from the pleadings and proofs between the plaintiff and defendants.

In Toole v. Stephen, 4 Leigh 581, a judgment in favor of the assignee against the maker of the note was enjoined on the ground of usury. It was insisted in this court, upon the authority of Chamly v. Ld. Dunsany, that the court below erred in

450 not giving the *assignee a decree against the assignor a codefendant, when the judgment of the assignee was enjoined; but this court affirmed the decree. In McNeil v. Baird, 6 Munf. 316, the plaintiff sought to enjoin the endorsee of negoti-

able notes from proceeding to enforce them, on the ground of the failure of consideration and fraudulent concealment by the payee. The endorsee claimed to be an endorsee for value without notice; but as against the payee the equity in the bill was fully supported by the testimony. The court held that as both maker and endorsee were before the court, the endorser and payee should be first subjected to the payment of the notes; he being the principal debtor. In this case the liability of the payee arose out of the failure of the consideration and his own fraud; and this constituted the gravamen of the charge contained in the bill. And it appearing by his own answer, according to the report, that he had endorsed the notes for value, the case as between himself and his codefendant, was fully made out by evidence arising from the pleadings and proofs between the plaintiff and defendants; it being a case in which the plaintiff, in the event of his being compelled to pay the debt, would have been entitled to a decree upon the pleadings and proofs against the said defendant; and in fact the decree contained a provision for such decree in favor of the plaintiff.

In Allen & Ervine v. Morgan's adm'r & als., 8 Gratt. 60, the plaintiff, a judgment creditor of the intestate, filed a bill against the administrator of the debtor and his official sureties, charging a devastavit by the payment of debts of inferior dignity. Some of the sureties in their answers insisted that the devastavit had been committed by the fraudulent application of the assets by the administrator to the payment of a debt due to another of the sureties; and as the administrator was insolvent, they contended that this surety should be primarily liable, or that the other sureties

451 *should have a decree over against him. This court held that although the plaintiff was entitled to a decree against all the defendants, there was nothing in the allegations of the bill and pleadings, which raised an issue between the codefendants, so as to let in evidence as to their liabilities as amongst themselves; and that it was not therefore a proper case for a decree between them.

The case of Morris v. Terrell, 2 Rand. 6, and Mundy v. Vawter, 3 Gratt. 518, are the only cases in which the plaintiff was not entitled to a decree in any event against the defendant, as against whom a decree was made in favor of a codefendant. In Templeman v. Fauntleroy, and McNeil v. Baird, the plaintiff was entitled to a decree against the defendant charged in favor of the codefendant. In each case the liability of the party and the extent of it, arose from the facts which entitled the plaintiff to any relief. They were, therefore, necessarily charged in the bill; the defendant had an opportunity of responding in his answer; and the evidence applied directly to the issue thus made up by the pleadings.

Nothing of that kind appears in the present case. The widow was entitled to her dower in the lands to be assigned by metes and bounds, and to an account of rents and profits. The court had no authority to decree a sum in gross in lieu of dower except by the assent of all parties interested. She had therefore no right to a decree against the defendant Matthew Blair and his associates who conveyed to the purchaser Michael. And her right to a decree against him as the owner of the land could not be affected by the contracts and dealings between him and his vendors. Whether they were legally liable upon their warranty and the extent of that liability, and how far that legal liability might be affected by the matters set out in the answer of Matthew Blair, were questions not arising upon any of the allegations of the bill; and

452 proof *in relation thereto could not have applied to any issue made by the pleadings.

In Hubbard v. Goodwin, 3 Leigh, 492, 522, Tucker, president, observed, "That the practice of decreeing between codefendants should not be extended further than it had already gone. A defendant who answers the plaintiff's bill does not always go on to state his own case as between him and his codefendant. There is no issue made up nor any provision for taking their testimony in reference to the peculiar matters in difference between them. And hence in many cases the contest between them cannot come fairly before the court." And he further remarked, that a decree between codefendants was proper in no case where the plaintiff was not entitled to a decree against both or either. The cases of Morris v. Terrell, and Mundy v. Vawter, ubi supra, were cases in which the plaintiffs did not seek decrees against the defendant who was charged in favor of the codefendant; but they were different in all their circumstances from the case under consideration.

I think the decree here between the codefendants extends the practice further than any of the cases justify, and was unwarranted under the pleadings and proofs as applicable to them.

I also think the court erred in decreeing a gross sum against the purchaser in lieu of dower. As has been remarked, such a decree could be authorized only by the assent of all the parties interested. Herbert v. Wren, 7 Cranch's R. 370; Wilson v. Davisson, 2 Rob. R. 384. The appellee Jane Thompson did not pray for such a decree in her bill. The defendant Michael asked that it should be ascertained in money, and a decree over be rendered in her favor against his vendors. It was ascertained in money, and a decree was rendered against him for the amount in her favor; and there was a decree over in his favor against the appellant. From this decree neither the widow nor Michael

453 *have appealed; and if they were the only parties, their assent to the conversion into a gross sum might be presumed. Michael no doubt acquiesced because it was substantially a decree

against his warrantor for the amount of the widow's claim. But as the appellants never assented to such a conversion of her claim into a gross sum, the decree would not bind them or furnish the measure of their liability in an action upon the warranty. I think therefore a reversal of the decree as to them draws with it a reversal of the entire decree, so as to leave the purchaser at liberty to proceed against his vendors upon their warranty for such damages as he may show himself entitled to. I think the decree should be reversed with costs against the appellee Michael; and the cause remanded with instructions to enter a decree in favor of the appellant Jane Thompson, for her dower as laid off and assigned to her by the commissioners under the interlocutory decree of the 1st of November 1848; to whose report there has been no exception; and also for the arrearage of rent ascertained by the report of the commissioner to which there has been no exception; and for a decree for an account of rents and profits accrued since the 1st of June 1849, up to the period of entering the decree aforesaid.

MONCURE, J., concurred in the opinion of Judge Allen as to the dower. He doubted whether it was a proper case for a decree between codefendants; but under the circumstances of the case he thought it was too late to object to it, and that the decree should be affirmed.

The other judges concurred in the opinion of Allen, P.

Decree reversed.

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454 *Steele v. Levisay & als.

July Term, 1854, Lewisburg.

Wills—Property to Wife to Distribute among Children—Case at Bar.—Testator says, "Having implicit confidence in my beloved wife F, and knowing that she will distribute to each of my children in as full and fair a manner as I could, I hereby invest my said beloved wife F with the right and title of all my property, both real and personal, to dispose of to each of my children in any way she may think proper and right." By a subsequent clause of the will it was provided that if F died without making a will, the children should have an equal distribution of testator's estate. HELD:

1. **Same—Same—Discretion of Wife.***—That F has an unlimited discretion as to the time and manner of distributing the property among the testator's children. She may distribute it, or any part of it, in her life time or at her death, by any instrument adapted to pass property of the kind which she distributes; and she may distribute to either child such kind of property as she may choose to give to him or her.
2. **Same—Same—Power to Sell Property.**—That F may sell and convey the whole or any part of the property, and distribute the proceeds of sale.
3. **Same—Same—Same—Liability of Purchaser for Application of Purchase Money.**—That F having a discretion as to the time and manner of distribution, a purchaser of land from her is not bound to see to the application of the purchase money.
4. **Same—Same—Share of Each Child Quære.**—If each child is entitled to have ultimately an equal share of the estate.

At the June term of the County court of Augusta in 1835, the will of Samuel Steele, junior, was admitted to probat, and Frances Steele his widow, who was named executrix therein, qualified as such. The second, third and fourth clauses of the will are as follows:

"2d. Having implicit confidence in my beloved wife Frances Steele, and knowing that she will distribute to each of my children in as full and fair a manner as I could, I hereby invest my said beloved wife Frances with the right and title of all my property, both real and personal, to
455 dispose of to each of *my children, in any way she may think proper and right.

"3d. If my wife Frances should depart this life without making and publishing her last will and testament, then my son James Henry shall account to my estate for the sum of one thousand dollars, which has been expended upon his education, &c., over and above any other children.

"4th. If my said wife Frances should depart this life without making her will as aforesaid, it is my desire that all my young children shall have a good English education, and that each one shall have an equal distribution of of my estate, except my son James Henry, who shall account as aforesaid out of his share."

The testator left six children. In 1841 Mrs. Steele entered into a contract in writing with Jesse J. Levisay, by which she contracted to sell to him a tract of land in the county of Greenbrier, a part of Samuel Steele's estate; and she bound herself to convey the same to him with general warranty upon the payment of the purchase money. Levisay paid all but the last installment of the purchase money; and a question being started as to the power of Mrs. Steele to sell and to make a good title, he filed his bill in the Circuit court of Augusta county, in which he stated the will of Samuel Steele, the sale to himself by Mrs. Steele, and his payment of nearly all the purchase money. That the money he had paid had been divided among all the children but John H. Steele; and that he was therefore unwilling to unite with the other heirs and the executrix in making a sufficient deed to the plaintiff: And that

*Wills—Property to Wife to Distribute among Children—Discretion of Wife.—Upon this subject, see the principal case cited in the following cases: Thrasher v. Ballard, 35 W. Va. 529, 14 S. E. Rep. 233; Whelan v. Reilly, 3 W. Va. 611; Morgan v. Fisher, 82 Va. 420; McCamant v. Nuckolls, 85 Va. 340, 12 S. E. Rep. 160. See also, *foot-note* to Cochran v. Paris, 11 Gratt. 348; Shearman v. Hicks, 14 Gratt. 96.

the other heirs were only willing to convey with special warranty. And making Mrs. Steele and the children of Samuel Steele defendants, he called upon her to state by what title she held the land, and what interest she claimed in it; what disposition she had made of the pur-
456 chase money *paid to her; and how she had disposed of the rest of the estate of her husband. And he prayed that the court would ascertain and settle the rights of the parties in the land purchased by him, and decree to him a good and sufficient title according to the contract; and for general relief.

Mrs. Steele answered, admitting the contract, and that the plaintiff had paid nearly all the purchase money. She insisted that she had a perfect right to sell and convey the land; and she says that she had always been ready to make the conveyance so soon as the plaintiff paid the balance of the purchase money. She admitted that the will of her late husband did not constitute her the absolute owner of the whole estate; but she insisted that it conferred upon her the legal control and title, subject to a fair distribution among her children; a trust for which she was responsible to her children, but to no other person. She therefore declined to account to the plaintiff for the manner in which she had disposed of the purchase money received of him, or the application she intended to make of that yet to be paid, further than to say that in what she believed to have been the sound exercise of the discretion vested in her by the will, she had thought it proper to sell the land purchased by the plaintiff, and to use the proceeds in the advancement of her children in a full and fair manner, such as she believed to have been contemplated by her husband, and to be just and expedient under the circumstances of the family.

John H. Steele and two others of the children answered, insisting upon an equal distribution of the estate; but not objecting to the sale, if the purchase money was thus distributed.

The cause came on to be heard in November 1851, when the court held that Frances Steele took under the will of her husband a life estate for her own use
457 *in the estate, with a power of distributing it equally by will at her death among the children of the testator: that her power of sale was confined to the personal estate; and was only such as she might lawfully exercise as executrix: That as devisee she had a power of distribution or appointment only among certain persons, the children of the testator, but not of sale to strangers; and that if she could not conveniently distribute or appoint without selling, she must apply to a court of equity for power to sell. And even if she had the power of sale, the purchaser was bound to look to the application of the purchase money.

And the sale not being objected to by any of the children of the testator, if the proceeds were to be distributed equally, and the court seeing no objection to it, the sale was confirmed, and Frances Steele was decreed to convey the land to the plaintiff with general warranty; and that the other defendants should release in writing endorsed on her deed all their claim in and to the land so conveyed. That upon the filing said deed among the papers duly authenticated for record, the plaintiff should pay to Frances Steele the balance of the purchase money, after deducting his costs in this cause; and that she should distribute the proceeds of said sale equally among all the children of her testator, so as to place each child on an equal footing with the rest. From this decree Mrs. Steele applied for and obtained an appeal to this court.

Baldwin, for the appellant, insisted:

1. That by the second clause of the will of Samuel Steele, Mrs. Steele was placed in loco parentis to his children; and that she had full power and authority to sell and convey the property and distribute the proceeds of sale among the children, when and in such proportions as she deemed just and reasonable under
458 *the circumstances. He cited on this question Kenworthy v. Bate, 6 Ves. R. 793; Long v. Long, 5 Id. 445; Bullock v. Fladgate, 1 Ves. & Bea. 471; 1 Sugd. on Powers 508—510; 2 Lomax Dig. 169, 170; 4 Kent's Com. 345.

2. That there being in this case a discretion in the trustee as to the application of the purchase money, the purchaser was not bound to see to its application. 2 Story's Equ. Jur. § 1134; 1 Lomax Dig. 245.

3. That the will does not require an equal distribution among the children by Mrs. Steele: And that the fact of conferring the power to distribute implies the power to appoint unequally. At law the giving a penny is sufficient; but it is held in equity that the appointment must not be illusory. 2 Lomax Dig. 170–172; 1 Sugd. on Powers 568; Maddison v. Andrew, 1 Ves. sen. 57; Kemp. v. Kemp, 5 Ves. R. 855.

H. W. Sheffey and Michie, for the appellees, insisted:

1. That Mrs. Steele had no power to sell the estate; but that her power was confined to a disposition by will. That it was certain the will gave no express power to sell; and there was nothing in the will from which such a power might be inferred; but on the contrary, the third and fourth clauses showed that the testator contemplated the disposition of the property by her will. They cite Carrington v. Belt, 6 Munf. 374; Knight v. Yarbrough, Gilm. 27.

2. That equality of benefit to the children was plainly intended. The testator, by the provisions of the third and fourth clauses, showed what he considered a full and fair disposition of his property: And

the phrase "in any way she may think proper," referred to the mode in which the property was to be distributed, and not to the proportion which was to be given. They cited Harrison v. Harrison, 2 Gratt. 1; Briggs v. Penny, 8 Eng. Law
459 & Equ. R. 231; 2 *White & Tudor's Cases in Equ. part 2, p. 349-352, 72 Law Libr.

3. That there being no discretion vested in Mrs. Steele, but she being bound to distribute the estate equally among the children, the purchaser was bound to see to the application of the purchase money. 3 Sugd. on Vend. 96-112.

DANIEL, J. The main questions to be considered are: First, whether the will of the testator confers upon his wife Frances the power to sell the real estate? And if so, secondly, whether the purchaser is bound to see to the application of the purchase money?

The second clause of the will, taken apart from the other provisions, seems to me to indicate a design on the part of the testator, to leave his wife, after his death, clothed with all the control over his estate which he had himself enjoyed in his life time, subject only to the restriction that his children, as a class, should become ultimately the beneficiaries of the whole, and that each of his children should receive a portion of the estate.

The expressions of confidence in respect to his wife's distribution and disposition of the estate, whilst they raise a trust in favor of the children, impose no limitation on the discretion of the donee of the power, as to the time or mode of executing it. Under this clause, the appointment might be made by Mrs. Steele, in her life time, by the performance of any act or the execution of any instrument by her, which would be sufficient to pass property of the like kind belonging to her absolutely; or she might defer the appointment till her death, and make it by last will and testament. I think it equally clear that she is left free to select the species of property belonging to the estate, to be appointed to the several children; that
460 she might give *land to one, slaves to another, and money or bonds to a third. The power to sell the estate, or any portion of it, is not given expressly, but is, I think, fairly to be inferred from the obvious scheme of the testator and the broad terms used in relation to the distribution and disposition of the property. A power to convert land into money or money into land or other species of property, and thus to shape and adapt the intended bounties to the wants and conveniences of the several beneficiaries, falls so manifestly within the scope of the broad and parental control with which it was the design of the testator to leave his wife invested after his death, that it seems to me, to deny it, would be to run counter to the rule which makes the intention of the testator the main guide in the construction of his will.

The courts have been liberal not only in sustaining a substantial execution of the power in cases where the appointment has been perfected, but also in inferring the power to sell when essential to the full execution of the trust, in cases where efforts have been made to arrest the donee of the power in the course of his proceeding to execute it. Thus in the case of Roberts v. Dixall, 2 Equ. Cas. Abr. 668, where a father had a power to appoint and divide an estate among his children in such proportions as he should think proper, and bequeathed a legacy of three thousand pounds to one of them as a charge upon the estate, Lord Hardwicke held that the power was in substance well executed. "It is true (he said) the direct terms of the power are not pursued, but the intent and design of it are. It is admitted that the father might have appointed part of the estate to be sold and the money raised by such sale; and what is done is exactly the same thing; this court may order a sale."

So in Long v. Long, Ves. R. 445, where a father was clothed with a power to
461 charge an estate with the *payment of such sum or sums of money for the benefit of such child or children, payable in such proportions and at such time or times as he should by deed or by will direct, limit and appoint, the power was held well executed by a will directing a sale and appointing the money.

And again, in the case of Kenworthy v. Bate, 6 Ves. R. 793, where an estate was devised to the use of such a child or children as the father should, by his will, give, direct, limit and appoint, the power was held to be substantially executed by a devise by the father to trustees to sell, and an appointment of the money produced by the sale. The master of the rolls said, it having been decided that a power to charge included a power to sell, it would be difficult to maintain that a power to give did not include a power to sell for the purpose of giving the money instead of the land.

In the case of Winston v. Jones, &c., 6 Alab. R. 550, the will was in many of its features like the one here, and the question whether a power of sale was given, was considered in immediate reference to its bearing on the rights and responsibilities of the purchaser. The decision in that case is, therefore, more directly applicable to the state of things in this. The will in that case, after providing for the payment of the testator's debts, and giving one-third of the real estate to his wife for life, proceeds: "Now it is my will and desire that after the payment of all my just debts and alloting to my wife her portion, to add to the residue of my estate of every description, the sum of one dollar value of property conveyed in trust for the use of my daughter Sarah W. Washington, and to divide the sum total, after making such addition, into seven parts; and I do hereby direct my executors to distribute and pay

over the residue of my estate, both real and personal, in the following man-
462 ner, to wit: After *deducting from one of said seven parts the said sum of one dollar conveyed for the use of my daughter Sarah W. Washington, to pay over to said trustees the residue of said portion to be held by them in like trust for her use, &c., and to pay to my other children (naming them) each one-seventh part of the residue of my estate as aforesaid," &c.

The executors sold a tract of land belonging to the estate of the testator, and received the purchase money; but having delayed to make the conveyance, the purchaser filed his bill seeking to rescind the contract, and for general relief, mainly on the ground that the will did not confer on the executors the power of making sale of the real estate of their testator. The bill was dismissed by the chancellor on demurrer; and the court of appeals affirmed his decree.

The court held that no precise form of words was necessary to the creation of a power of sale: If the intention to confer the power was apparent, to enable the executor to execute the trusts of the will, it would be inferred. They said that the use of the terms adds to the residue of his estate of every description the sum of one dollar, &c.; and after making such addition, to divide the sum total into seven parts, and to distribute and pay over the residue of the estate, both real and personal, &c., was persuasive that the prevailing idea in the testator's mind was, that of a sum of money which might be added to, divided and paid over. It ought not to be overlooked (they further said) in construing the will, that an entire plantation is more valuable as a whole, than the aggregate of all its parts would be if divided; and that the process of selling land so circumstanced, for the purpose of more equal distribution, is common in the country; the power being lodged with the County court, and with which all persons were familiar. The
463 probability, therefore, *was, that the testator was merely providing by his will for doing that which he knew would be done on application to the County court.

Much of the reasoning on which the decision in that case was rested, is, I think, applicable to this. And whilst there are no terms employed in the clause of the will under consideration, which, in their ordinary sense, negative the idea of a distribution of the estate in kind, the terms "to dispose of to each of my children in any way she may think proper and right," are, I think, sufficiently broad to confer a discretionary power not only in respect to the shares and proportions in which the estate is to be distributed, and the act or instrument by which it is to pass, but also to the kind, form or nature of the property which may be given; as whether real estate or personal chattels, or the proceeds of both or either, in the shape of bonds or money. That these terms were designed to confer such a power is, I think, rendered more probable when they are read in connection with the terms "knowing that she will distribute to each of my children in as full and fair a manner as I could."

It has been held, that when the intention is clear, a power may enable the disposition of a fee, although no words of inheritance are used; as where a testator gives a power to sell lands, the donee may sell the inheritance, because the testator gives the same power he himself had. 1 Sugd. on Powers 501. This was decided in the case of Liefe v. Saltingstone, 1 Mod. R. 189. The devise was to the testator's wife for life, "and by her to be disposed of to such of my children as she shall think fit." It was held by one of the judges, that the wife had power to dispose of an estate for life only, because if the testator had said, I dispose of it to my son, it would have been but an estate for life: But a majority of the court held otherwise, as there was a difference (they said) between the devise
464 *of an interest and a power; and they granted that if the testator had said, I dispose of it to my son, it would have been but for life; but here the testator gives a power to dispose, which seems to imply such a power as he himself had, which was to dispose of the fee. Ibid. 503.

It is true, there is no question here as to the quantity of estate, or whether for fee or for life, which may be given under the power; yet the reasoning upon which the decision in the foregoing case is founded, seems to me to be not without force as applied to this. When the testator, in clothing his wife with such broad powers, as must be conceded under any reasonable construction of the clause in question, employs language susceptible of a construction which (without violence to the ordinary import of the words) would carry the power of sale, and this too, in close connection and association with the idea of his own power and control over the estate, it would seem to be in accordance with the spirit and reasoning of the foregoing case to hold, that he designed to make his own power and control the measure or standard of that which he was conferring on the wife, subject only to the restriction already mentioned; that in conferring such a broad discretion, he did not mean to withhold a power which might be so essential to its proper exercise, to wit, a power to bestow the gifts in such shape as would, in the judgment of his wife, probably be most advantageous to the several objects of his bounty.

Whether the third and fourth clauses of the will are to be taken as restrictions on the powers of the wife in respect to the shares or proportions in which the estate is to be distributed, and as requiring that ultimate equality is to be the rule of such distribution, is a question which, in the view I take of the case, it is not necessary for us to decide. I think it clear, that in making provision for the manner in
465 which the estate *should be apportioned in the event his wife should

die without making or publishing her last will and testament," the testator did not mean to point to such last will or testament as the only instrument or means by which his wife might dispose of his intended bounty. It is true, that the express grant of a power as to the disposition of the estate which the donee would have had, without such express grant, has in many cases been taken as indicative of an intention to confine the donee to that power, on the ground that such express grant would otherwise be supererogatory. But to give the will such a construction here, would be to destroy that scheme of placing the wife in his stead; of conferring on her a parental control, and clothing her with the power and means of advancing the interests of the children, as and when they might in her judgment require aid and assistance, which is so obvious on reading the whole will.

It is to be observed too, that the power to make the appointment by last will and testament is not given in express and direct terms; and if that was the only mode of appointment in the mind of the testator, it is difficult to suppose that he would not have given more prominence to a provision so directly in conflict with the otherwise apparent general intention of the will.

In the case of Grace v. Wilson, the inference in favor of restricting the appointment to a devise was far stronger than here; and yet it was held that the power was general. In that case Thomas Grace by his will gave to his wife Mary Grace four thousand pounds, or whatever surplus might arise after the moiety left to his two minor children, subject to a proviso therein contained (that is to say) that she should enjoy the interest thereof for her natural life, and dispose of the same to such of her children as she should devise and think proper. It was insisted that the power was confined to a will. In favor of the
466 *contrary construction, Tomlinson v. Dighton, 1 P. Wms. 149, and other cases were relied on, and the case was distinguished from Doe v. Thornley, 10 East's R. 438; and the case was decided accordingly. Sir William Grant was clearly of opinion that the power was not confined to a will. If the devise had been to her for life, and then to devise as she might think proper (he said), then the word devise would have admitted but of one sense; but here it is, as she shall dispose, which admits of two constructions, and thus means as she should think right. Suppose you translate devise, as she shall bequeath by will; how then would it read? To dispose thereof as she shall bequeath by will and think proper; therefore she has a general power.

I have taken the statement of the case from Sugden on Powers, vol. 1, p. 271. Take the language of the will here providing for the event of the wife's dying without a will in connection with the preceding clause, and the inference of a general power from the whole, is much more obvious than in the case just cited.

If the views I have already presented be correct, little remains to be considered in order to dispose of the only other question in the case necessary to be decided, viz: Whether the purchaser is bound to see to the application of the purchase money. For even upon the supposition that the testator designed ultimate equality in the gifts to his children (as to which I express no opinion), the wife is left free to sell the estate if she thinks proper, and to make advancements to the children in money or property, from time to time, as she in her discretion may deem best. I know of no rule which would involve the purchaser in the performance of a trust so broad and complicated, and requiring such a time for its final consummation. The general rule is, I think, clearly the other way; for when the trusts are defined, and yet the money is not merely to be paid over to third persons, but is
467 to be *applied by the trustees to certain purposes, which require, on their part, time, deliberation and discretion, it seems that the purchaser is not bound to see to the due application of the purchase money. As where it is to pay all debts which shall be ascertained within eighteen months after the sale; or where the trustees are to lay out the money in the funds, or in the purchase of other lands on certain trusts. 2 Story Equ. Jur. § 1134.

Upon the whole, it seems to me not only that a sale of the real estate, followed by an appointment of the proceeds thereof to the children, should be sustained by a court of equity as a substantial execution of the powers under the will, in accordance with the principles declared in the cases of Roberts v. Dixall, Long v. Long, and Kenworthy v. Bate, but that upon the payment of the purchase money by Levisay to Mrs. Steele, he would stand discharged of all other duty; and on receiving the conveyance which she has stipulated to make, he would be invested with a title to the land he has purchased, which would be available to him as well at law as in equity.

I think, therefore, that Levisay has shown no case for the interposition or aid of a court of equity; and that the decree rendered should be reversed, and the bill dismissed: But as the questions raised by the bill are not free from doubt, it should be dismissed, on the terms of the plaintiff's paying only his own costs.

The other judges concurred in the opinion of Daniel, J.

Decree reversed.

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468 *Bailey v. James.

July Term, 1854, Lewisburg.

[62 Am. Dec. 659.]

(Absent DANIEL, J.)

1. **Contract for Sale of Land—Partial Failure of Title—Right of Vendee to Partial Rescission.***—Where the

*Contracts—Rescission—In Toto.—If a rescission of a contract is decreed, it should be complete and en-

contract for the sale of land is entire, for a specific sum of money, and the title to a part of it fails from a cause of which both vendor and vendee were ignorant, it is ground for the rescission of the whole contract; but the vendee cannot insist upon a partial rescission.

2. **Same—Same—Vendee Declines to Rescind—Effect.**—In such a case, if the vendee declines to rescind the contract, he must pay the whole purchase money.

3. **Bonds—Purchase Money of Land—When Interest Allowed—Case at Bar.**†—Upon a bond to pay the purchase money of land, but with a provision that upon the vendee's failure to get the legal title from a third party, the contract of sale shall be void; the vendee having been let into possession and continuing to hold, and himself neglecting to get in the title; he shall pay interest.

4. **Specific Performance—Sale of Interest without Warranty—Decree.**‡—The vendor having but an equitable title, and only selling his interest in the property without warranty, and authorizing the vendee to proceed to get in the legal title; it is not error to decree a specific execution of the contract at the suit of the vendor, without directing a conveyance by him.

This was an appeal from a decree of the Circuit court of Wood county, rendered in September 1851 in a cause in which John James was plaintiff and Charles P. Bailey was defendant.

In the year 1797 or 1798 John James the elder purchased from Joseph Spencer a tract of between seven hundred and eight hundred acres of land in Wood county, and received a title bond for the title. He died, as the bill alleges, in or about 1800, leaving several children and heirs, of whom each was entitled to one-seventh of the land. On the 8th of July 1803, John Gillispie and Esther his wife, who was one of the heirs, entered into an agreement to sell to John James, another of the heirs, their in-
469 terest in the estate *of John James the elder, in consideration of eighty dollars. And on the 19th of January 1804, James purchased of Seth Bailey and Mary his wife, another of the heirs, their interest, for the price of one hundred and sixty dollars. The wives of Gillispie and Seth Bailey signed the instruments evidencing the contracts; but there seems to have been no regular conveyance or privy examination, and the contracts could only be effectual in transferring the life interests of the husbands. John James the younger resided in Ohio, and was there visited by the appellant his nephew, who, on the 31st of July 1832, entered into a contract with him for the purchase of his interest as heir, and the interests he had acquired under the executory contracts aforesaid with Gillispie and wife and Seth Bailey and wife. The agreement executed by James to Bailey recites, amongst other things, that for and in consideration of three hundred dollars in hand paid he sells all his right, title, claim and demand in said land, being the land sold to John James by Joseph Spencer, and descended to and acquired by John James, one undivided seventh as a child and heir of John James the elder, and two other undivided sevenths, by purchase from Gillispie and wife and Bailey and wife; and he further covenanted to give the appellant immediate possession of the land; and authorized him to acquire the legal title to the land, by virtue of Spencer's bond, from his heirs.

On the same day, the appellant executed his bond to James for three hundred dollars, with a condition reciting the purchase in nearly the same terms as the agreement; and with a further provision, that if the appellant should not succeed in setting aside a decree obtained in the County court of Wood in the name of Joseph Spencer against John James' heirs, and should not succeed in acquiring the legal title from the heirs of Spencer, then the obligation to be
470 void; but if he *should succeed, then to be valid. The agreements with Gillispie and wife and Seth Bailey and wife seem to have been delivered to the appellant, as he filed them as part of his exhibits with his answer in another suit brought against him by Gillispie and wife, heard together with the present case.

In some short time after the sale and transfer as aforesaid to the appellant, Gillispie and wife brought suit against the appellant and the heirs of John James, asserting their right to their one-seventh of the land; and alleging that the contract between them and John James was executed when they were both under age. The appellant answered, insisting on the right acquired by his purchase from John James; and furthermore contending that if the con-

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tire. Ferry v. Clarke, 77 Va. 409, citing the principal case. Where an agreement is rescinded, it must be entirely rescinded. Glassell v. Thomas, 3 Leigh 113.

In Clarke v. Reins, 12 Gratt. 98, it was held that, where a wife was one of three equal joint owners of land, and they and the husband united in a contract for the sale of said land, though the husband and wife would not be compelled to execute the contract on their part, the other two joint owners would be compelled to convey their undivided interests, upon the payment by the vendee of their shares of the purchase money. The principal case was said not to be in conflict with this decision, but to be of a wholly different character from the case at bar.

Same—Failure of Title—Rescission.—In Crislip v. Cain, 19 W. Va. 477, the principal case is cited to the point that, where an estate is sold to which the vendor is supposed to have an unquestionable title, but it turns out on due investigation of the facts—unknown at the time to both parties—that the vendor has no title (as, for instance, if there be a nearer heir than the vendor, who was supposed to be dead but is in fact living), in such case equity will relieve the purchaser and rescind the contract.

See also, principal case cited in Butcher v. Peterson, 26 W. Va. 452.

†**Bonds—When Interest Allowed.**—See monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

‡**Special Performance—Sale of Interest with Special Warranty.**—See the principal case cited in *foot-note* to Christian v. Cabell, 22 Gratt. 83. See also, *foot-note* to Goddin v. Vaughn, 14 Gratt. 102.

tract should be annulled, the complainants asking equity should be compelled to refund the eighty dollars paid by James, which he, being substituted to the place of his vendor, would be entitled to receive.

About the same time or shortly after Gillispie and wife instituted their suit, the bill in this case was filed by the appellee against the appellant, in which, after setting out the contract between himself and the appellant, and averring that the decree referred to in the bond and agreement had been rendered inoperative, and though no deed had been made by Spencer's heirs, yet possession had been held under the title bond for thirty-five years, which was supposed to be a good title; he charges that the appellant does not intend to attempt to get a deed, but held and enjoyed the land and refused to pay the three hundred dollars or cancel the contract. The bill asked that the contract be rescinded on the ground of fraud, or because of the failure of the appellant to comply with it; or if it could not be rescinded, that the land should be subjected to the payment of the purchase money.

The appellant in his answer admits
471 that he was in *possession of the land, but resisted payment for it, because as he alleged, Spencer's heirs were seeking to subject the land to the payment of purchase money said to be due by John James the elder; and also upon the ground that Gillispie and wife and Seth Bailey and wife refused to confirm the sales of their undivided interests aforesaid: And he denied the right of the court to rescind the contract.

The cause, together with the cause of Gillispie and wife, came on to be heard together on the 17th of February 1847; and it appearing that the suit instituted by Spencer's representatives had been dismissed on the 25th of March 1846, a copy of the decree dismissing the said suit being filed as an exhibit, whereby the decree in favor of Spencer's representatives could not be enforced; but it further appearing that the appellee could make no title to the share of Gillispie and wife, because in that suit, heard at the same time, the court had annulled their sale, upon the ground of infancy, the court gave the appellant his election to rescind the contract, or pay the entire purchase money. Upon his failure to elect to rescind, the court directed the sale of the one-seventh, the share of said John James, for the payment of the entire purchase money. The land was sold; and upon the report of the sale, a decree was rendered against the appellant for three hundred dollars, with interest from the date of the contract, to be credited by the net proceeds of sale. From this decree the appellant has appealed.

Price, for the appellant.
Fry, for the appellee.

ALLEN, P., after stating the case, proceeded:

It is objected by the appellant's counsel that the court erred in not decreeing a deed from the vendor to the vendee. The vendor had not the legal title. This
472 *was known to the vendee, and the vendor merely sold his equitable interest under the title bond, and authorized and empowered the vendee to acquire the legal title from Spencer's heirs. The obligation devolved on the appellant to institute proper proceedings to get in the legal title if he had deemed it of any importance to him. He was no doubt content to rest on the title bond executed more than fifty years prior to the final decree in this cause, and the possession held under it by himself and those under whom he claimed. His default in not getting in the legal title furnishes him with no protection against the payment of the purchase money.

As to the decree referred to in the condition of the bond, it appears from the decrees in this case and the case of Gillispie and wife against the appellant and others, that the said decree has been rendered inoperative by the decree of the same court of the 25th of March 1846, in the case of Spencer's administrators and heirs against John James, &c.

It is further insisted, that the appellant purchased three-sevenths of the land, and gets but one-seventh. That Seth Bailey and wife have not conveyed; and that Gillispie and wife have, by the decree rendered in their favor, annulled their contract of sale to the appellee, on the ground of infancy. The appellee agreed to sell all his right, title and interest in and to three undivided seventh parts of said land, one being his own undivided equitable interest as an heir. The other two undivided interests he claimed by purchase as aforesaid; and the contracts of purchase were delivered over to the appellant, and are filed by him as evidence of the interests he acquired in the land, with his answer to the bill of Gillispie and wife. He saw, therefore, when he contracted, the extent of his vendor's interest. He required and received no covenant of warranty. He knew, or is
473 presumed to have known, *that the contracts of the husbands would not pass the equitable estates of their wives, and that they were effectual only to pass the life estates of the husbands. He agreed to pay for the absolute interest of James, as heir, to one-seventh, and these interests acquired by the contracts with Gillispie and S. Bailey, a specific sum.

The contract was entire, and there is nothing on the face thereof from which it can be ascertained at what price the different interests were valued. In relation to the one-seventh, the interest of John James, there is no dispute or controversy. Nor is it shown that the appellant has not obtained all that he was entitled to under the contract with S. Bailey and wife. It does not appear that the validity of this contract has been impeached, or that the appellant has been disturbed in the enjoyment of what the contract vested in John James, and which the latter sold to him. Seth Bailey and wife, by the contract of

January 1804, merely sold and relinquished their equitable interest to the appellee; nor did the latter, by his agreement, covenant with the appellant that they should make any further conveyance. But in regard to Gillispie, though there was no covenant or warranty as to the title of the thing contracted to be sold, there was an implied undertaking on the part of the appellee that the contract of Gillispie was what it purported to be, a contract by a party who was competent to enter into and bind himself by such contract. In this it appears he was mistaken. Gillispie has succeeded, by the decree of the court, in vacating and annulling the contract, upon the ground of infancy; and the appellant thereby loses the life interest of said Gillispie in the subject for which he contracted to pay the appellee the sum of three hundred dollars. For this cause he would have been entitled to call for a rescission of the contract. But instead of resorting to this course, he resisted
474 *all efforts of the appellee to procure a rescission; and he did this, with full knowledge of the pretensions of Gillispie. He purchased from the appellee on the 31st of July 1832. The bill of Gillispie was filed on the 3d of June 1833. He was then apprised of the difficulty as to this interest. He had then paid no part of the purchase money. Instead of abandoning his claim, he insisted in his answer upon the validity of the transfer in the first instance, or that, from long acquiescence, it could not be then impeached; but in the event of his being mistaken in these views, he claimed the right to recover from Gillispie the consideration paid to him for the sale of his interest by the said John James.

In a short time after the institution of the said suit by Gillispie, the appellee filed his bill, mainly for the purpose of rescinding the contract; but this was resisted by the appellant; and when, in February 1847, the cause was heard, the court, by its interlocutory decree, gave the appellant the election to rescind the contract, or to pay the purchase money. In this case no fraud is imputed to the appellee. It is nowhere pretended that he knew Gillispie was an infant in 1803, when he sold to the appellee, or when the latter transferred his interest to the appellant in 1832. On the contrary, he had a right, from the long silence of Gillispie, to presume that the transfer was valid. But the mutual error of the parties, in the substance of the thing contracted for, was a good ground for rescinding the contract; and if the appellant had sought such rescission when the knowledge of the mistake was first acquired, or consented to it when the appellee filed his bill for that purpose so soon after the sale, the parties could have been placed in statu quo, without injury to either, so far as the record discloses. But he resisted a rescission, and even so late as 1847; and when the election was tendered to him, he still
475 *declined it: He cannot now be permitted to claim a partial rescission.

The contract was entire; an agreement to pay a gross sum for the interests transferred; and he has no right to rescind one-third of the contract, and enforce the residue. Glassel v. Thomas, 3 Leigh 113. There is no middle ground here between a rescission in toto and an execution in toto. But the record shows a sufficient motive for his not desiring a rescission. In the suit of Gillispie, he claimed to be substituted to the rights of the appellee, and as such, entitled to a decree against Gillispie for the price paid to him by the appellee for his interest in the land; and the court, upon vacating Gillispie's release, decreed he should refund the consideration with interest, subject to a deduction for rents and profits. The consideration, with interest from 1803, would, in all probability, have much exceeded the value of Gillispie's life estate in the subject. The appellant may have rested satisfied that the existence of this claim would either induce Gillispie to forego the assertion of his right to the subject, or would more than indemnify him for the price he agreed to pay to the appellee for this particular interest. In truth, it would seem from the record that the appellant was rather disposed to raise up objections to his own title, so long as they would avail him to resist the claim of his vendor for payment. It does not appear that he instituted any proceedings to set aside Spencer's decree; and it was not until the dismissal of the bill filed by Spencer's administrators that said decree was ascertained to be inoperative. He took no steps to procure a legal title from Spencer's heirs. He refused to rescind, though apprised at an early day, of the mistake as to Gillispie's interest. He has availed himself of his right, as representing his vendor, to repel the claim of Gillispie until he shall refund the price he received from John James,
476 *with the long arrears of interest. In the mean time, he has held all he contracted for, and enjoyed the profits. I think the court properly required him to pay the purchase money when he declined to rescind the contract.

It is further argued, that the court erred in giving interest on the three hundred dollars from the date of the contract; that it was not payable but upon a contingency which has never happened. The contract recites that it was in consideration of three hundred dollars in hand paid; and the bond was payable presently, though a condition was attached, in the nature of a defeasance, upon a certain contingency. The appellee bound himself, by the contract of sale, to give immediate possession; and the appellant, by his answer, admits that he was in possession. He has enjoyed the profits, and in equity should pay interest on the price contracted to be paid: and that, it seems to me, is the effect of the bond and agreement. The latter shows a cash sale, and the bond admits an existing debt due presently, but liable to be defeated in the event of his failure to set aside the

decree or get a title. It seems to me that interest was properly allowed from the date of the contract.

I am for affirming the decree.

MONCURE and LEE, Js., concurred in the opinion of Allen, J.

SAMUELS, J., dissented.

Decree affirmed.

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477 *Wilson v. Lazier & als.

July Term, 1854, Lewisburg.

1. **Foreign Statutes—Authentication of.***—A certificate of the secretary of state of Ohio under the great seal of the state, that the statute certified is correctly copied from the original rolls now on file in this (his) office, is a due authentication of the statute, according to the act of congress.†

2. **Conflict of Laws—Notes¶—Governed by Lex Loci Celebrationis.**‡—A note made in a particular country is to be deemed a note governed by the laws of that country, whether it is made payable there, or it is payable generally, without naming any particular place.

3. **Negotiable Instruments¶—Presumptions from Possession.**§—The possession of a negotiable instrument is *prima facie* evidence that the holder took it for value, and that he came to it honestly.

4. **Same—Failure of Consideration¶—Effect on Holder.**—A total failure on the consideration of a negotiable note does not impose on the innocent holder the *onus* of proving that he gave value for it.

5. **Same—Fraud in Procurement¶—Effect on Holder.**‖—If the evidence raises a suspicion of fraud in the procurement of the note, then the holder is bound to show that he gave value for it.

6. **Same—Failure of Consideration¶—Liability of Maker.**—Bill by maker of a negotiable note against payee, endorser and holder for value to enjoin its payment on the ground of failure of consideration. As between the maker, payee and endorser, it appears the consideration of the note had wholly failed, and that the payee had endorsed it, without consideration, as a gift to the endorser. Though the maker is bound to pay the note to the holder, he is entitled to recover the amount so paid from the payee; or upon his inability to pay, to recover of the endorser the amount received by him for the note.

In June 1848 Noah L. Wilson filed his bill in the Circuit court of Wood county, in which he alleged that on the 26th of September 1837 Enoch Rector of that county sold and conveyed, with general warranty, to the plaintiff and John Mills one undivided fourth of certain lands and lots in the county of Washington in the state of Ohio; and that for one moiety of the
478 purchase *money, amounting to two thousand one hundred and eighty-seven dollars and fifty cents, the plaintiff executed to Rector his note, bearing date the 1st day of January 1838, payable ten years thereafter, and bearing three per centum per annum interest. That shortly afterwards, Rector, without any consideration, but intending it as a gift, assigned the said note to certain persons, trustees of Rector college, an institution located in Taylor county in Virginia, all the parties to this assignment then living in this state, and the same having been made here; and that

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***Foreign Laws—Authentication of.**—A law of another state is sufficiently authenticated under the act of congress, if it has the seal of the state affixed thereto; and the particular officer entitled to affix the seal, depends upon the regulations of the several states, respectively. Hunter v. Fulcher, 5 Rand. 126. See also, Warner v. Com., 2 Va. Cas. 95.

†See JUDGE DANIEL'S opinion for the act of congress, 2 Story's Laws U. S. p. 947-48.

‡**Conflict of Laws—Notes—Governed by Lex Loci Celebrationis.**—A note made in a particular country is deemed to be a note governed by the laws of that country, whether it is made payable there, or it is payable generally, without naming any particular place. For this proposition, the principal case was cited as authority in Backhouse v. Selden, 29 Gratt. 586; Pugh v. Cameron, 11 W. Va. 532; Hefflebower v. Detrick, 27 W. Va. 26. For where no different place is designated for the payment of the note, the legal presumption is that it was intended to be performed (*i. e.*, paid) where made, and must, therefore, be treated as a contract of that place. Shipman v. Bailey, 20 W. Va. 144.

And see Freeman's Bk. v. Ruckman, 16 Gratt. 126, and *foot-note*, where it is said that the character of a note is governed by the place of performance, which is generally the place where made *unless a different place is designated.* See also, on this subject, Min. Conf. of Laws, pp. 355-474.

§**Negotiable Instruments—Presumption from Possession**—See the proposition laid down in the third headnote, approved in Fant v. Miller, 17 Gratt. 58, 81.

¶See monographic *note* on "Bills, Notes and Checks."

‖**Same—Fraud in Procurement—Effect on Holder.**—Although the general rule is that the holder of the negotiable note, regular upon its face, is presumed to have acquired it before maturity for value and without notice of any infirmity in the paper, yet if the maker or party primarily liable for its payment, or any party bound by the original consideration, proves that it was obtained by fraud or illegality in its inception, or if the circumstances raise a strong suspicion of fraud or illegality, the burden of proof is shifted, and the holder of the note must show that he acquired it *bona fide* for value in the usual course of business while current, and under circumstances which create no presumption that he knew of the facts which impeach its validity. Piedmont Bk. v. Hatcher, 94 Va. 231, 26 S. E. Rep. 505, citing the principal case; Vathir v. Zane, 6 Gratt. 246; Duerson v. Alsop, 27 Gratt. 248. See also, the principal case cited in Fant v. Miller, 17 Gratt. 58; *foot-note* to Duerson v. Alsop, 27 Gratt. 230.

Same—Rights of Bona Fide Holder.—The well-established rule of law is, that a *bona fide* holder of negotiable paper, who purchased it for value in the ordinary course of business before maturity and without notice of facts, which impeach its validity between antecedent parties, has title thereto unaffected by such facts and may recover on such note, although as between such antecedent parties it is without legal validity. Bk. v. Johns, 22 W. Va. 524, citing among others the principal case; Vathir v. Zane, 6 Gratt. 246; Davis v. Miller, 14 Gratt. 1.

these trustees had since assigned the note to William Lazier.

The bill further charged, that previous to the conveyance to the plaintiff and Mills, Rector had mortgaged the property to the Ohio life and trust company; and in a suit by that company in the state of Ohio to foreclose the mortgage, all the property had been decreed to be sold, and part of it had been sold under the decree, and the whole of it would be required to be sold to satisfy the mortgage debt; so that the consideration of the note had wholly failed. And it was further alleged that Rector was insolvent.

The bill made Rector, Lazier and the trustees of Rector college defendants; called upon them to state the consideration Rector had received for the assignment of the note, and what was the consideration which the plaintiff had received for it. And the prayer of the bill was that the contract for the sale of the land might be rescinded; that the note might be delivered up to be canceled; and for general relief.

Lazier answered the bill. He stated that he purchased the note of Wright and Baldwin for a full, valuable consideration: That they were house carpenters, and had built Rector college, and received the note, in part payment of their bill, from the trustees. That he had afterwards endorsed it, and passed it off; but when it became due, he had been sued upon it,
479 *and had paid it with the interest and costs. That he had no knowledge whatever of the transactions between Wilson and Rector and Rector and the trustees of the college. That he was a purchaser for value, without notice of any equity, want of consideration, or any other fact or circumstance connected with said note, until some time after he had purchased it. And he alleged that the note was made and delivered to Rector in Ohio; and that by the laws of Ohio it was a negotiable instrument, and to be governed by the law merchant.

Rector also answered, and alleged that the note was given upon a compromise between himself and the plaintiff and Mills, with a full knowledge, on their part, of the existence of the mortgage on the property. He states that he never received any value for the note. The bill was taken for confessed as to the trustees of Rector college.

There was no evidence but the answer of Rector, that the consideration of the note was the land in Ohio. If that was the consideration it had wholly failed. The note was dated at Marietta in Ohio, and was payable generally to the order of Rector; and Wilson the maker lived at the time, and continued to live, in Marietta. It did not appear, except from the answer of Rector, upon what terms he assigned it to the trustees of Rector college.

It was also shown that Wright and Baldwin built the college, and the note was assigned to them by the trustees, by endorsement on the back thereof. It was proved that they stated they had sold the note to Lazier; and there was in the record a deed by which the trustees conveyed the college property in trust, that if Lazier failed, upon the use of due diligence, to recover the amount of the note from Wilson or Rector, the property should be sold, and Lazier should be paid the sum of one thousand three hundred dollars,
480 with six *per centum interest thereon from the 30th of September 1839 until paid; that being the amount they had received for the note. These statements of Wright and Baldwin, and the deed from the trustees, were excepted to by the plaintiff as incompetent evidence.

There was also in the record the copy of an act of the legislature of the state of Ohio, by which all notes for a sum certain, and payable to order, were made negotiable. The first section will be found in the opinion of Judge Daniel. The copy of the act was certified by the secretary of state of Ohio, under the great seal of the state, as being correctly copied from the original rolls then on file in his office.

When the cause came on to be heard, the court dismissed the bill as to all the parties but Rector, and gave the plaintiff a decree against him for the amount of the note, with three per cent. per annum interest. And thereupon Wilson applied to this court for an appeal, which was allowed.

Price, for the appellant.
Grattan, for the appellee Lazier.

DANIEL, J. I do not perceive any ground for the objection made to the authentication of the copies of the statutes of the state of Ohio, filed by the appellee Lazier. The act of congress, approved March 27, 1804, declares that all records and exemplifications of office books, which may be kept in any public office of any state, not appertaining to a court, shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper of said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the county or district in which such office may be kept; or of the governor, the secretary of state, the chancellor, or the keeper of
481 *the great seal of the state, that the said attestation is in due form, and by the proper officer. And if the said certificate be given by the governor, the secretary of state, the chancellor or keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made. Story's Laws of the U. S. vol. 2, 947-8. And we have the certificate of the secretary of state of the state of Ohio, under the great seal of the state, stating that the said acts "are correctly copied from the original rolls now on file in this (his) office."

From this certificate it appears that the secretary of state is himself also the keeper of the rolls. If the offices had been separate, his certificate of the attestation of the keeper of the rolls would, plainly,

under the provisions of the law, have been sufficient, without any additional certificate by the governor. I do not see how the fact that he happens to hold both offices, detracts at all from the efficacy of his certificate as secretary of state.

By the first section of the first of the above mentioned acts, all bonds, promissory notes, bills of exchange, foreign or inland, drawn for any sum or sums of money certain, and made payable to any person, or order, &c., are placed on the footing of negotiable paper. The note for two thousand one hundred and eighty-seven dollars and fifty cents is dated "Marietta." In the deed from Rector to Mills and Wilson, of the 29th of September 1837, the two latter are described as of Marietta, Washington county, Ohio. And the witness Murdock in his deposition states that he has been acquainted with Wilson for some ten years, and during that time, had always understood that his residence was in the town of Marietta in the state of Ohio. The evidence is, therefore, I think, ample to show that the note was executed
482 in Ohio; *and by the laws of that state, as we have seen, it stands on the footing of a negotiable instrument.

Such being the lex loci contractus, the note must be treated as negotiable paper here: For it seems to be well settled that a negotiable note, made in a particular country, is to be deemed a note governed by the law of that country, whether it is expressly made payable there or is payable generally, without naming any particular place; since at most, under the latter circumstances, it is as much payable in that country as elsewhere. Hence such a note makes the maker liable only according to the law of the country where the note is executed, although endorsed in another country; and his liabilities, and so also his rights; as for example, the right to set up equitable defences against the note, if allowed by the country where the note is executed, are regulated by the law of the same country. Story on Promissory Notes, § 172.

Lazier must be presumed to be prima facie a holder for value. Story on Promissory Notes, § 196. "The owner of a bill is entitled to recover upon it, if he came to it honestly; that fact is implied, prima facie, by possession; and to meet the inference so raised, fraud, felony or some such matter, must be proved." Extract from the Opinion of Lord Denman in Arbouin v. Anderson, 1 Ad. & Ellis N. R. 498, 504, 41 Eng C. L. R. 642, cited in note to foregoing section. Vathir v. Zane, 6 Gratt. 266, opinion of Allen, J. Upon the supposition, however, that the establishment of want or failure of the consideration would make it incumbent upon the holder to show that he had given value for the note, no such matter is established here as against Lazier. In his answer, he denies all knowledge whatever of the transactions between Wilson and Rector. He avers that he is an innocent purchaser for a full, fair and valuable consideration, without any notice whatever of any
483 equity, want of consideration, *or any other fact or circumstance connected with the note, until some time after he had purchased. The statements in the bill, and the admissions in the answer of Rector as to the contract on which the note was founded, furnish no proof against Lazier. As to him there seems to be the entire absence of any competent evidence to show what was the origin of the note.

Even, however, if there were evidence competent and plenary, as against Lazier, to show a failure of the consideration of the note, I should still hold that he was not bound to prove that he paid value for it. There is no evidence of fraud in the origin or negotiation of the note; and the mere failure of consideration does not impose on the innocent holder the onus of showing the consideration he gave for the note. In a note to Chitty on Bills, 10th American edition, p. 648, we have a report of the case of Whitaker v. Edmonds, 1 Mood. & Rob. 366. In that case, Patterson, judge, said, "Since the decision of Heath v. Sansom, 2 Bar. & Adol. 291, 22 Eng. C. L. R. 78, the consideration of the judges has been a good deal called to the subject; and the prevalent opinion among them is, that the courts have of late gone too far in restricting the negotiability of bills and notes. If indeed the defendant can show that there has been something of fraud in the previous steps of the transfer of the instrument, that throws upon the plaintiff the necessity of showing under what circumstances he became possessed of it. So far, I accede to the case of Heath v. Sansom; for there were in that case circumstances raising a suspicion of fraud: but if I added on that occasion, that even independently of those circumstances of suspicion, the holder would have been bound to show the consideration which he gave for the bill, merely because there was an absence of consideration as be-
484 tween the *previous parties to the bill, I am now decidedly of opinion that such doctrine was incorrect."

And in Knight v. Pugh, 4 Watts & Sergeant 445, the authorities are fully examined and reviewed, and the rule stated to be, that in a suit against the maker, by an endorsee, the plaintiff cannot be called upon to prove that he paid value for the note, until the defendant has shown it was obtained or put in circulation by fraud or undue means. In the opinion of Sergeant, judge, it is conceded that the rule at one time obtained of allowing the defendant on proving that he received no consideration, to call upon the plaintiff to show the consideration he gave for the note; but he proceeds to show that the latest authorities exclude want of consideration in the note or subsequent failure, from the class of cases in which the defendant may call on the plaintiff to prove the consideration he paid. See Low v. Chifney, 27 Eng. C. L. R. 383.

There is nothing in Vathir v. Zane, 6 Gratt. 246, decided by the court, or intimated by any of the judges in conflict with these authorities. The proposition there decided, is, that when fraud in the procurement of the note is averred and proved, the maker has brought himself within the exception to the general rule; that the onus probandi is then shifted, and thrown on the holder to show he has paid value.

In this view of the law the exclusion of the declarations of Wright and Baldwin, in reference to the transfer of the note, could not affect the case, so far as Lazier is concerned, no ground being laid for requiring him to prove what consideration he paid for the note. The court below has therefore, I think, very properly refused any relief against the note in the hands of Lazier.

As between the maker and the payee of the note, however, the want of con-
485 sideration or subsequent *failure is a proper defense, and the equities between them are not lost or destroyed by the transfer of the note: As between Wilson and Rector, the testimony is ample to show that there has been an entire failure of the consideration for which the note was given, the whole of the land in payment of the purchase money of which it was executed, having been absorbed by a paramount incumbrance.

In this state of things the principles decided in the cases of Dade's adm'r v. Madison, 5 Leigh 401, and Pettit v. Jennings, 2 Rob. R. 676, would seem fully to sanction such a decree as has been rendered by the Circuit court in favor of Wilson against Rector. In the first mentioned case, an order was drawn by Dade on Madison in favor of Tankersly, and accepted by Madison. Tankersly having obtained a judgment at law on the order against Madison, the latter enjoined the judgment, on the ground that the order and acceptance were founded on a gaming consideration. Dade, in his answer, admitted that the order was drawn by him for money which he had won of Madison at cards; and he said that Tankersly was apprised of the consideration and took the order at his own risk. Tankersly denied all knowledge of the transactions between Dade and Madison, in consideration of which the order was drawn; averred that he had given Dade an adequate valuable consideration for it; and that Madison accepted it without hesitation or objection, and had obtained indulgence from time to time, on promise of payment. There was no evidence as between Madison and Tankersly to establish that the order was founded on a gaming consideration, unless the answer of Dade could be used against Tankersly.

This court held that the answer of Dade was no evidence against Tankersly; and there being a failure to show, by any testimony competent, as against him,
486 *that there was any vice in the consideration of the order, Tankersly was permitted to execute his judgment against Madison. But the court also held that the Circuit court had properly rendered a decree over in favor or Madison against Dade, of which Madison should be permitted to avail himself as soon as he satisfied the judgment in favor of Tankersly.

In the second case (Pettit v. Jennings), the same principles were reaffirmed. In an injunction suit by the obligor in a gaming security against the obligee and an assignee, the gaming consideration was admitted by the obligee in his answer, but there was no competent proof against the assignee. The assignee was permitted to recover, but the obligor was indemnified by a decree over against the obligee. The grounds for such relief are forcibly stated by Judge Baldwin in his opinion. "When a failure of proof (he says) as to the assignee on a supervening equity between him and the obligor, induces a court of equity to enforce the security in behalf of the assignee, or, what is in effect the same, to suffer it to be enforced; then the court ought to proceed, if the subject and parties be properly before it, to administer the justice of the case as between the obligor and the obligee. The latter having by his contract of assignment appropriated to himself the avails of the security, and being enabled to retain them, by the act of the court, which relieves him incidentally from all responsibility to his assignee, the result is, when the security shall have been enforced against the obligor, that the obligee has obtained from him in substance, though not in form, by means of a compulsory proceeding, satisfaction of a debt destitute of consideration, and denounced by the law: but the subject and the parties are still before the court, and I am at a loss to conceive upon what principle the
487 court can refuse *redress to the obligor against the obligee." So here, the whole foundation on which the note rested, having been swept away by an entire failure of the consideration, it was a worthless paper, and liable to be canceled so long as it remained in the hands of Rector. By means of his transfer, and of the transfers of others claiming under him, the note has reached the hands of one who, from considerations of commercial policy favoring the negotiability and circulation of such instruments, is allowed, under the circumstances, to enforce it against the maker as a valid security. But Rector has thereby acquired no advantage which can avail him in a court of equity. Having voluntarily placed it out of his power to cancel the note, he is bound, in equity and good conscience, to place Wilson, as nearly as may be, in the position he occupied before the note was endorsed away. The measure of the indemnity is the amount that Wilson is bound to pay to Lazier, viz: the principal and interest of the note.

The decree in favor of Wilson against Rector is, therefore, I think, clearly right; but the court has, it seems to me, stopped short of giving to Wilson the whole relief to which he is entitled. It is alleged in the

bill that Rector assigned or endorsed the note to the trustees of Rector college, without consideration; that he made a donation of said note to the college; and that the said trustees had transferred the note to Lazier. They have not answered, and the bill as to them has been taken as confessed; and from the deed executed by the trustees on the 11th November 1839, styling themselves Trustees of the Western Virginia Education Society, it is recited that Rector transferred the note to the said trustees; and that they, for the purpose of raising funds to erect the necessary buildings of said society, sold and
488 transferred the said note *to James D. Wright and David Baldwin, and that Wright and Baldwin subsequently sold and transferred it to Lazier: And the said deed conveys property for the purpose of indemnifying and securing Lazier, in the event that he should fail, after using due diligence, to recover the debt from Wilson and Rector.

The want or failure of consideration in the note may be insisted upon as a defense, not only between the original parties to the contract, but also between the maker and one who claims under the payee without having given value for the note. Story on Promissory Notes, § 190. If the note were now in the possession of the society, they would have nothing to plead against its cancellation. The presumption which has stood to Lazier in the place of proof, and protected him as a bona fide holder for value, cannot be invoked by the society. They have not denied the positive allegation of the bill, that they acquired the note by donation. They have, by their own admission, sold and transferred the note, and have placed their endorsee in a position to enforce it. If permitted to retain the purchase money of the note to the prejudice of Wilson, they will in substance and effect have coerced him to pay to them the amount of a note against which, as between him and them, he had a valid defense. They may have parted with the note, and most probably did part with it, without any knowledge of the defect or failure in the consideration. But they gave nothing for the note, and to the extent that they have received value for it, they are in the receipt of money which they had no right, in equity, to collect. They are holding funds to which another in foro conscientiæ has a better right. Rector is alleged and proved to be insolvent. The decree over against him will, therefore, in all probability, prove unavailing. In such an event, I do not perceive upon
489 *what grounds of equity his voluntary donee can claim to hold the funds which have been realized, in effect, by the collection of an instrument wholly void of consideration.

It seems to me that the society, in such a state of things, is bound to hand over to Wilson whatever they may have received as the price of the transfer of the note.

Upon the whole, I think the decree is right in all things except in dismissing the bill as to the Western Virginia education society. I am, therefore, for affirming the decree, so far as it refuses to relieve Wilson against the note in the hands of Lazier, and gives him a decree over against Rector; but for reversing, so far as it dismisses the bill against the society, and for remanding the cause for further proceedings with liberty to Wilson, on paying the amount of the note and interest to Lazier and on showing that the decree against Rector has proved unavailing, to apply for and have a decree against the society for the amount that they received as the price of the note, with its interest.

The other judges concurred in the opinion of Daniel, J.

The decree was as follows:

The court is of the opinion that the appellee Lazier ought to be regarded as the bona fide endorsee for value of the note for two thousand one hundred and eighty-seven dollars and fifty cents, in the bill and proceedings mentioned, without notice of the failure of the consideration for which it was given, and that the said note, as between the said Lazier and the maker, the appellant Wilson, is a valid instrument, liable to be enforced against the said Wilson.

The court is further of opinion,
490 that the testimony *in the cause is competent and plenary to show, as between the said Wilson and the appellee Rector, that the consideration of the said note has entirely failed; and that if Rector still held it, it would be liable to be canceled at the suit of the said Wilson.

The court is further of opinion, that as the said Rector has endorsed the note and placed it in the power of his remote endorsee, the said Lazier, to enforce it as a valid instrument against the said Wilson, he is bound in equity to indemnify the latter by paying to him the principal and interest of the said note, whenever he the said Wilson shall have paid the same to the said Lazier.

The court is further of opinion, that as the trustees of Rector college obtained the said note from the said Rector, without having paid value therefor, and by way of donation from the said Rector, and have endorsed the same for a valuable consideration; and have by means of the said endorsement and of the subsequent endorsement of their endorsees, Wright and Baldwin, enabled Lazier to enforce the note against the said Wilson, the said Wilson has a right in equity, on showing that he has paid the same, and that he is unable to obtain the indemnity against the said Rector to which he is entitled, by reason of the insolvency of the latter, to recover of the said trustees of Rector college the price of their transfer of said note, with its interest.

The court is, therefore, of opinion to affirm the whole of the decree, except so much thereof as dismisses the bill against

the said college, with costs to the said Lazier; and to reverse so much as dismisses the bill against the said college, with costs to the plaintiff in error against said college; and to remand the cause for further proceedings, with liberty to the said Wilson, on showing that he has paid the
491 principal *and interest of the said note to the said Lazier, and that the decree in his favor against Rector has proved unavailing, to ask for and have a decree against the said trustees of Rector college for so much as they received from their endorsees Wright and Baldwin, as the price of their endorsement of said note to the latter.

Upon the application of the said Wilson to have the decree aforesaid, the trustees of the college may, if they can, show that they received less for their transfer than the nominal value of the said note; and in such event, the decree will be for such smaller sum, with its interest. But in case they fail to furnish such proof, the decree must be for such nominal value, and its interest.

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492 *Rossett v. Fisher & al.

July Term, 1854, Lewisburg.

1. **Deeds of Trust—Outstanding Title—Duty of Trustee.**—Real estate is conveyed in trust to secure debts. The grantor in the deed has at the time but an equitable title, but is entitled to have the legal title. It is an abuse of his power by the trustee to sell the property before getting the legal title.
2. **Same—Failure of Trustee to Get in Legal Title before Sale—Effect—Case at Bar.***—The trustee having sold the property for one-fourth of its value, without getting the legal title, and the principal creditor secured by the deed having become the purchaser: And the grantor being absent at the time, and the money to pay the debts having been forwarded to his agent at the place of sale, and being at the time in the post-office at the place and not delivered to the agent, though in the expectation of receiving it he had several times applied at the office for the letter, a court of equity will set aside the sale.

*Sale of Land by Trustee—Cloud on Title—Effect.—For the proposition that a sale made by a trustee, where there is a cloud on the title, will be set aside, the principal case is cited and approved in the following cases: Roberts v. Roberts, 13 Gratt. 641, and *note*; Wash., A. & G. R. R. Co. v. Alex. & W. R. R. Co., 19 Gratt. 617; Graeme v. Cullen, 23 Gratt. 287; Shurtz v. Johnson, 28 Gratt. 662, and *note*; Horton v. Bond, 28 Gratt. 825, and *note*; Preston v. Stuart, 29 Gratt. 303; Schultz v. Hansbrough, 33 Gratt. 577, and *note*; Muller v. Stone, 84 Va. 837, 6 S. E. Rep. 223; Alexander v. Howe, 85 Va. 202, 7 S. E. Rep. 248; Brown v. Lawson, 86 Va. 285, 9 S. E. Rep. 1014; Parsons v. Snider, 42 W. Va. 521, 26 S. E. Rep. 287; Thomas v. Bank, 86 Va. 293, 9 S. E. Rep. 1122; Fowler v. Lewis, 36 W. Va. 134, 14 S. E. Rep. 454; Burlew v. Quarrier, 16 W. Va. 141; Hartman v. Evans, 38 W. Va. 679, 18 S. E. Rep. 814; Dryden v. Stephens, 19 W. Va. 18; Spencer v. Lee, 19 W. Va. 198; Curry v. Hill, 18 W. Va. 373, 375; Fleming v. Holt, 12 W. Va. 157; Machir v. Sehon, 14 W. Va. 783, 787; Kinports v. Rawson, 29 W. Va. 497, 2 S. E. Rep. 90; Lallance v. Fisher, 29 W. Va. 519, 2 S. E. Rep. 779; Livey v. Winton, 30 W. Va. 560, 4 S. E. Rep. 455.

Rossett, by deed of trust dated the 12th of April 1844, conveyed certain real estate, consisting of a lot of ground with a brick house thereon, in the town of Ripley, in the county of Jackson, to Joseph Smith, in trust to secure the payment of two single bills, one to Andrew Wilson & Co. for forty-three dollars and seventy cents, dated the same day with the deed, and payable one year thereafter, with interest from the date, and the other to Henry J. Fisher, for one hundred and fifty-two dollars, dated the 2d of January 1844, and to indemnify Fisher as security for costs in the case of Hassler's lessee, &c. v. King. The deed provided that in case of default in the payment of the said debts and exoneration of said security in one year from the date of the deed, the trustee should sell the property for ready money, at public auction, before the front door of the court-house of Jackson county, and apply the proceeds to the satisfaction of the purposes of the trust. Rossett having made default,
493 the *trustee, at the request of Fisher, after giving thirty days' notice of the time, place and terms of sale, by causing an advertisement thereof to be posted at the door of the said court-house, did, on the 23d of June 1845, (that being the first day of a quarterly term of said county,) at the door of the said court-house, expose the said property to public sale for ready money, when the said Fisher, being the highest bidder, became the purchaser, at the price of two hundred dollars. And the property was accordingly conveyed to him by the trustee, who received the purchase money, and applied it to the purposes of the trust, and made a report of the sale according to law.

In July 1847 Rossett filed his bill in the Circuit court of said county, for the purpose of setting aside the said sale; stating in the said bill that for a short time previous to the expiration of the trust he had been in Pennsylvania for the purpose of raising money to discharge the debts secured by the deed, having left D. G. Morrill of Ripley as agent to attend to his business; that shortly before the expiration of the trust he forwarded, or caused to be forwarded, to his said agent, through the medium of the mail, a draft from the treasury department at Washington, on the

See further on the subject, monographic *note* on "Deeds of Trust."

As applied to judicial sales, see monographic *note* on "Judicial Sales" appended to Walker v. Page, 21 Gratt. 636. In the following cases the principal case was distinguished on the grounds that there was no cloud on the title: Graeme v. Cullen, 23 Gratt. 287, and *note*; Kinports v. Rawson, 29 W. Va. 497, 2 S. E. Rep. 90; Shurtz v. Johnson, 28 Gratt. 662; Curry v. Hill, 18 W. Va. 373, 375; Lallance v. Fisher, 29 W. Va. 519, 2 S. E. Rep. 779; Preston v. Stuart, 29 Gratt. 303; Fleming v. Holt, 12 W. Va. 157; Muller v. Stone, 84 Va. 837, 6 S. E. Rep. 228; Fowler v. Lewis, 36 W. Va. 134, 14 S. E. Rep. 454; Brown v. Lawson, 86 Va. 285, 9 S. E. Rep. 1014; Thomas v. Bank, 86 Va. 293, 9 S. E. Rep. 1122; Dryden v. Stephens, 19 W. Va. 18.

Commercial Bank of New York, for the sum of two hundred and twenty dollars, with directions to be applied towards the liquidation of the said debts; that the draft arrived at the post-office in Ripley two days before the day advertised for the sale of the property; but from some cause, either accidental or designed, the post-master neglected to hand the letter containing the draft to the said agent, although repeated applications were made therefor, until two days after the sale, when the agent received the draft and tendered it to Fisher, who refused to receive it. That when the property was exposed to sale Fisher bid two hundred dollars for it, and directed the sale to be suspended for the time
494 *then present; that late in the afternoon, near sundown, of the same day, when there were no bidders present, as complainant was advised, but the said Fisher, the sale was resumed, and no further bid being made, the property was cried out to Fisher at his said bid of two hundred dollars; the complainant's said agent being present and forbidding the sale. That the sum of two hundred dollars was a greatly inadequate price for the property, which was worth one thousand two hundred dollars; and complainant believed would have sold for the same, if it had not been represented to some who were anxious to purchase, that the sale would be postponed; and that Fisher had frequently, after the execution of the deed of trust and before the sale, made different offers for the property, greatly exceeding the price at which he purchased it, but complainant rejected them as inadequate. Other statements are contained in the bill, but it is unnecessary to notice them. Fisher, Smith the trustee, and Wilson & Co. were made defendants.

In August 1847 Fisher filed his answer, denying many, if not most, of the material allegations of the bill. He denies that the property, (the imperfect and dilapidated condition of which he minutely describes), could under any circumstances have been sold for as much as one thousand two hundred dollars; and attributes the sacrifice, if any, at which it was sold, to the fact that the sale was forbid by Rossett's agent, and also to the condition of the title at the time of the sale. In regard to the latter, he states, that Rossett had no deed for the property, and only incumbered his equitable right thereto, the legal title being in A. N. Kinnaird of Wood county, whose wife had and still has a claim of dower therein; "that it was very uncertain whether Kinnaird would make the deed or not; for if there is not now, there formerly was, a suit depending on the equity side of Jackson county Super-
495 rior *court, brought by respondent for Rossett against Kinnaird, to compel him to make this very deed; which suit or another similiar one had to be brought at the sale under the trust; all of which was well known to respondent, and it is believed also to most, if not all of the capitalists present at the sale; and it is believed most of the capitalists of Jackson county were present." He further states that after getting the trustee's deed, he turned his attention to getting in the legal title outstanding in Kinnaird; and on the 1st day of August 1845 drew a deed which was by him executed and acknowledged on the 4th day of September 1845, and came to respondent's hands some months thereafter, when it was placed on record. A copy of this deed is filed with the answer.

In October and November 1847 Wilson & Co. and the trustee Smith filed their respective answers. That of the former it is unnecessary to notice. The latter states in his answer that there was a large crowd at the sale; that at its commencement between 10 and 11 o'clock, D. G. Morrill, representing himself to be Rossett's agent, forbade the sale, which was disregarded, and the sale went on; that after getting two or three, or perhaps more bids, respondent suspended the sale until after dinner, when he recommenced it, and there being no other bid, was about to close the sale, when Morrill requested him to leave it open as long as he could; representing that a few, perhaps two or three days before, Rossett had gone to Point Pleasant, and would very likely be back before sundown, and perhaps be able to effect an arrangement and obviate the sale; that with Fisher's consent the sale was suspended until near sundown; that shortly before the sale was closed respondent went to several who had during the day bid, or talked of bidding, and let them know that the sale would shortly be closed at the court-house door, and at
496 more than one place *gave public notice that the property would there be cried for the last time; and after crying it thirty or forty minutes at the court-house door, without receiving another bid, he cried it out to Fisher, who requested respondent not to make a deed for the property until he should see respondent again. That in fact the deed was not made until the date of the acknowledgment, (which is the 30th of July 1845,) though it bears date on the day of sale. That it was not true that any person was prevented from bidding at the sale in consequence of the time it was closed. That he knows of no representation having been made to any person anxious to purchase, that the sale would be postponed; and if he had known of any such representation, he would at once have undeceived the person to whom it was made; and that he would not, acting as trustee, (and knowing his duty to be to act as the agent of both parties,) have sold property under such circumstances as are alleged in the bill.

Sundry depositions were taken in the case; and among them the depositions of Smith the trustee, Morrill the agent of Rossett, Wetzel the deputy post-master at Ripley, and Hassler. Smith proved substantially the same facts stated in his answer. Morrill proved that he was Rossett's agent in Jackson, at and before the time of

the sale, informed Rossett, who was absent, that the property would probably be sold under the deed of trust, and furnished him with a statement of the probable amount necessary to discharge the deed. Rossett replied that he would make arrangement with Hassler to have the requisite amount forwarded for that purpose. Previous to the sale deponent had frequently called at the post-office at Ripley and enquired for a letter in which he expected a draft to discharge the deed of trust, and was as often informed by the post-master that there was no such letter. When the trustee was about to proceed to
497 *make the sale, deponent, as the agent of Rossett, forbade it, stating that he had received the most positive assurance that an arrangement would be made to pay the money, and that he expected Rossett (who had been a few days before in Ripley, and had gone to Point Pleasant to see if the draft had not been sent to that place) to arrive every hour. Deponent's statement of what followed the sale substantially agrees, as far as it goes, with that of the trustee. On the 27th of June, four days after the sale, deponent received the draft which he had no doubt was in the office at the time of the sale. He afterwards called on Fisher and asked him if he would receive the draft in discharge of the deed, which he refused to do. Deponent's impression was that in the letter conveying the draft, Hassler required that Fisher, on receiving the draft, should have the trust deed assigned to him. Wetzel's deposition confirms that of Morrill in regard to his repeated enquiries for letters, and his belief that the letter enclosing the draft was in the post-office at the time of the sale and when the enquiries were made; but it was overlooked, being, as deponent thought, in a wrong box. Hassler proved that early in the spring of 1845 Rossett applied to him for two hundred and twenty dollars to pay to Fisher for the redemption of his property in Ripley. Deponent would have advanced the money immediately to Rossett, but he preferred a check for the amount to be forwarded to Morrill; and deponent accordingly enclosed a government check on the Commercial Bank of New York for the amount, and mailed the letter on the 12th of June 1845. Such checks he was in the habit of disposing of for a premium in gold. A letter from Rossett to Fisher, dated the 9th of June 1845, and directed to Point Pleasant, stating the arrangement made with Hassler, was received by Fisher on the 18th of June 1845, and was filed as an exhibit by
498 him. *From that letter it appears that Rossett expected the check to be sent to Fisher at Point Pleasant, the place of his residence, about thirty miles distant from Ripley: But it was sent to Morrill at Ripley.

The evidence of the value of the property at the time of the sale is somewhat complicated and conflicting. A great deal of evidence was taken by Fisher to show the bad construction and dilapidated condition of the building; but none of it I believe fixes the value in numero at that time. A letter from Fisher to Rossett, dated May 29th, 1844, between one and two months after the date of the deed of trust, is exhibited with the bill. In that letter the writer manifested a strong desire to purchase the property, and complained that Rossett had asked him one thousand dollars for it, while, as the writer had been informed, Rossett had offered to sell it for six hundred dollars. The fair inference to be drawn from this letter is, that when it was written Fisher would have given at least six hundred dollars for the property. But I think the best evidence of the value of the property at the time of the sale is to be found in the deposition of William Shepard, high sheriff of Jackson, who proved that in his opinion the property was then worth at least eight hundred and fifty or nine hundred dollars.

On the 19th of September 1848, the cause came on for final hearing, and the bill was dismissed. From that decree Rossett has appealed.

Price, for the appellant, and Patton, for the appellees, submitted the case.

MONCURE, J., after stating the case, proceeded:

A trustee in a deed of trust is the agent of both parties, and bound to act impartially between them; nor ought he to permit the urgency of the creditors to force the sale under circumstances injurious to the
499 *debtor at an inadequate price. 1 Lom. Dig. 323; Quarles v. Lacy, 4 Munf. 251. He is "bound to bring the estate to the hammer," as has been said by Lord Eldon, "under every possible advantage to his cestui que trusts;" and he should use all reasonable diligence to obtain the best price. Hill on Trustees 479, marg. and the cases cited. He may and ought, of his own motion, to apply to a court of equity to remove impediments to a fair execution of his trust; to remove any cloud hanging over the title; and to adjust accounts if necessary, in order to ascertain the actual debt which ought to be raised by the sale, or the amount of prior incumbrances. And he will be justified in delaying for these preliminary purposes, the sale of the property, until such resort may be had to a court of equity. If he should fail, however, to do this, the party injured by his default has an unquestionable right to do it; whether such party be the creditor secured by the deed, or a subsequent incumbrancer, or the debtor himself or his assigns. And this may be done notwithstanding the impediments in the way of a fair sale, may have been known to the debtor at the time of the execution of the deed, and the removal of them before the time prescribed in the deed for the sale was impracticable, and could not therefore have been contemplated by him.

For these principles I refer to 1 Lom. Dig. 322-326; 1 Tuck. Com. book 2, p.

101-106; Quarles v. Lacy, 4 Munf. 251; Gray v. Hancock, 1 Rand. 72; Chowning v. Cox, Id. 306; Gibson's heirs v. Jones, 5 Leigh 370; Miller v. Argyle's ex'or, Id. 460; Wilkins v. Gordon, 11 Leigh 547.

Let us apply these principles to this case. The property was sold for less than a fourth of its value. The sale was made under circumstances and in a manner well calculated to produce such a result. Even if the title had been unexceptionable,

500 I think the trustee *ought to have postponed the sale to another day; which would have subjected the creditors to no other inconvenience than a little delay, while it would have avoided a sacrifice, and might have obviated the necessity of a sale. It may be said that Rossett's agent ought not to have forbid the sale. Whether he ought or not, he did what he thought was his duty, and I do not think that this act of the agent justified the sacrifice of the principal's property. See Ord v. Noel, 6 Madd. R. 126; Wilkins v. Gordon, 11 Leigh 547.

But in my view of this case it is unnecessary to consider whether the sacrifice of the property, and the circumstances under which it was sold, independently of the state of the title, would, severally or together, be sufficient ground for setting aside the sale. I am of opinion that the cloud over the title at the time of the sale is of itself a sufficient ground for that purpose. The deed conveyed, and the trustee sold only the equitable title to the property. The legal title was outstanding in A. N. Kinnaird. It should have been gotten in before the sale; and the trustee would have been justified in delaying the sale, and in bringing a suit, if necessary, for that purpose. No efforts were used to get it in. It probably might have been gotten in without a suit, and merely by calling on Kinnaird and presenting him a deed for execution. The deed of trust recited that Rossett had paid Kinnaird for the property. Fisher obtained a deed from Kinnaird shortly after the sale, and seems to have had no difficulty in obtaining it. That this defect was a cloud over the title, which it was the duty of the trustee to have had removed before the sale, and that on his failing to do so the debtor had a right to have the sale enjoined until the cloud was removed, are propositions which are fully established by the authorities before referred to. The existence of the defect appeared upon the face of the

501 deed of trust, and was *well calculated to affect the sale. Indeed, Fisher states in his answer that it was well known to him and most if not all the capitalists present at the sale, that the legal title was in Kinnaird; that it was very uncertain whether he would make a deed for it or not; and that a suit would probably be necessary to compel him to do so: And this is stated in the answer as one of the causes of the sacrifice in the sale of the property. But the trustee having made the sale without having the cloud over the title removed, and the principal creditor secured by the deed having become the purchaser, the question is, whether the debtor is entitled to have the sale set aside? He had provided funds for the payment of the trust debts, and expected in that way to prevent a sale; but was disappointed by an unforeseen and unaccountable accident. But for having made such provision he might have resorted to an injunction. He was not present at the sale, forbade it by his agent, and has never acquiesced in it. The purchaser was the principal creditor, was well acquainted with all the facts which rendered the sale improper, and yet insisted on its being made. A few days after the sale and before a deed was made to him by the trustee, the draft for two hundred and twenty dollars, which exceeded the amount of the trust debts, was offered him by the debtor's agent, but he refused to receive it, or give up the benefit of his purchase, and required the trustee to execute the deed; assigning as a reason therefor that the debtor had used abusive language to him. He says in his answer, that he believes when Rossett's agent first offered him the draft, he required an assignment of the deed of trust; though after the draft was refused on these terms, he perhaps offered it as a payment. All that Hassler could have expected was, to be substituted to the place of the creditors whose claims he was willing to pay; and not that they should incur any per-

502 sonal liability *as assignors to him; or that the operation of the deed as an indemnity to Fisher as security for costs in Hassler's lessee, &c. v. King, should be impaired. It is obvious that Fisher did not refuse to give up the benefit of his purchase on account of the terms on which the draft was offered to him; though I do not consider that question material.

Whatever might have been the rights of a bona fide purchaser without notice at such a sale, as to which I express no opinion, I think that the creditor being the purchaser under the circumstances before stated, the debtor has lost none of his rights by the sale, but is entitled to have it set aside and the property resold, if necessary, for the purposes of the trust. See Gibson's heirs v. Jones, 5 Leigh, 370; Breckenridge v. Auld, 1 Rob. R. 148; Dabney, &c., v. Green, 4 Hen. & Munf. 10; Lord Cranstown v. Johnston, 3 Ves. jr. R. 170.

But it may be said that the cloud over the title is not mentioned in the bill as one of the causes of the sacrifice of the property; and therefore the sale should not be set aside on that ground. It is true that nothing is said about it in the bill; but it is fully stated in the answer, and is thus made a part of the case. A defect in a bill may be cured by a statement in the answer, where such statement, as in this case, is not inconsistent with the case made by the bill. An instance of this kind occurred in Wood v. Dummer, 3 Mason's R. 308. There the bill charged fraud as the ground for relief; whereas trust was the only ground

on which it could be given; and to maintain that ground it was necessary to show that a certain corporation was insolvent. That fact was not charged in the bill, but was admitted in the answer; and thereupon relief was given. After the answer was filed in this case the appellant might have amended his bill and stated the fact in regard to the title. He actually did move at the hearing for leave to make such
503 amendment, *but it was denied by the court. If an amendment of the bill had been necessary, I think the court ought to have granted the leave, even at the late period at which it was asked. Bellows v. Stone, 14 New Hamp. R. 175. But I do not think it was necessary. It could have answered no good purpose, and would have been attended with expense and delay. There was much less reason for an amendment of the bill in this case than in Shugart's adm'r v. Thompson's adm'r, 10 Leigh 434, which was a suit to set aside a settled account. The answer denied the grounds on which the settlement was impeached in the bill. There was an order of account, and proofs were adduced, which, though they did not sustain the specific objections taken in the bill, yet ascertained that the settlement might be justly surcharged in other respects. It was held, that although according to the strictest and most formal practice, the plaintiff may be required to amend his bill, and urge therein the objections to the settlement shown by the evidence, yet it is competent to the court to dispense with this proceeding and permit the plaintiff to proceed in respect to the objections shown by the evidence, in like manner as if they had been noticed by the bill. Judge Stanard said, "Such a practice seems to me recommended by many considerations. It is more compendious and less expensive, and tends to prevent or shorten those delays in the administration of justice which are grievances admitted by all, and by many urged as a reproach to its ministers."

Upon the whole, I think the decree should be reversed, the sale set aside, the property reconveyed by Fisher, with covenants against his own acts only, to the appellee Smith, on the trusts declared by said deed of trust, and the said Fisher should account for the rents and profits of the property since the sale, after deducting the value of any permanent improvements made thereon by him, and also deducting any reason-
504 able *expense he may have incurred in getting in the legal title which was outstanding in Kinnaird at the time of the sale. And the cause should be remanded to the Circuit court for further proceedings to be had therein, as follows, to wit: An account should be taken of the said rents and profits, and of any such improvements and expense, for the purpose of ascertaining the balance due thereon by said Fisher; which balance should be applied to the purposes of said deed of trust, to wit, to the payment of the debts secured thereby, (both of which are now due to said Fisher, he having paid the debt to Wilson & Co. out of the price at which the land was sold to him at the trust sale,) with the interest which may be due thereon, and to the indemnity of the said Fisher as security for costs in the case of Hassler's lessee, &c., v. King. If the said balance should be sufficient to satisfy the said purposes, the surplus, if any, should be paid, and the property released, forthwith to the appellant. If there should be no such balance, or it should be insufficient to satisfy the said purposes; and the appellant, in a reasonable time to be prescribed by the court, should satisfy the same, or so much thereof as might remain unsatisfied by the application of any such balance as aforesaid, then the property should be released to the appellant. But if he should fail to make such satisfaction, then the said property should be sold in the manner and on the terms prescribed by the said deed of trust; and the proceeds applied to the satisfaction of the purposes of the trust, or so much thereof as might remain unsatisfied as aforesaid. The costs of the appellant in the Circuit court should be paid by the appellee Fisher.

The other judges concurred in the opinion of Moncure, J.

Decree reversed.

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505 ***Caperton & al. v. Gregory & als. Lessee.***

(Absent ALLEN and DANIEL, Js.)

July Term, 1854, Lewisburg.

Coparceners—Adverse Possession of One—Case at Bar.†—J T died in 1823, leaving seven children, and seized in fee of a tract of land. S T, one of his sons, took possession of the land soon after his death, claiming that J. T. had made a will giving it to him for life, with remainder to his two sons; and he filed a bill against the other heirs to set up the will, which could not be found. This suit was pending until 1837, when it was dismissed for a failure to give security for costs. S T held the exclusive possession of the land during his life, and his two sons and those claiming under them, continued to hold it until 1844, when the other heirs filed a bill for partition of the land; and in that suit the court directed that the plaintiffs should first establish their title at law. At the death of J T four of his heirs were married women, and three of them so continued; one of them died in 1832, leaving infant children and her husband surviving her; and he died in 1833: This suit was brought in 1848. HELD:

1. **Same—Same—When Statute Begins to Run.†**—That S T having taken possession of the land in

*For monographic note on Infants, see end of case.

†Coparceners—Adverse Possession—What Constitutes—When Statute of Limitations Begins to Run.—In Cooey v. Porter, 22 W. Va. 124, 125, it is said: "It is undoubtedly true that the possession of one parcener is ordinarily regarded as the possession of all the others, and such possession, being subordinate and not adverse, cannot, however long continued,

1823, claiming title to it, and his sons having taken possession on his death, and they and those claiming under them having continued to hold the land claiming title, such taking and holding possession was adverse to the other heirs, and the statute of limitations commenced to run from the time of such taking possession by S T.

operate as a bar to his coparceners. But it is equally true that such parcener in possession may disseise his coparceners and from the time of such disseisin his possession will be adverse. That one coparcener, joint tenant or tenant in common may disseise his cotenants there can be no legal doubt. The law on that question is fully settled. McClung v. Ross, 5 Wheat. 116; Purcell v. Wilson, 4 Gratt. 16; Clarke v. McClure, 10 *Id.* 305; *Caperton v. Gregory*, *11 Id. 505.* * * * * The authorities it seems to me fully sustain the doctrine that it is the *quo animo*, the intention of the tenant or parcener in possession to hold the common property in severalty and exclusively as his own, with notice or knowledge to his cotenants of such intention, that constitutes the ouster; therefore, any open, notorious act evincing such intention, or any explicit disclaimer or denial of the claims of his cotenants, or the assertion of a several and individual estate or title in himself to the entirety of the common property, will operate as a disseisin or ouster of his cotenants, and from the time they have notice or knowledge of such act, disclaimer or assertion of title his possession will be adverse and the statute of limitations will commence to run. Clymer v. Dawkins, 3 How. 674; Jackson v. Smith, 13 Johns. 406; *Caperton v. Gregory*, *11 Gratt. 505;* Terrill v. Murray, 4 Yerg. 104; Peeler v. Guilkey, 27 Tex. 355; Lodge v. Patterson, 3 Watts 74. * * * The nature or character of the title or claim under which the occupying tenant asserts his ownership is entirely immaterial. It is the fact that he claims the property as his own and not the goodness of his title which makes his possession adverse. His claim may be founded on a defective or even a void deed or paper as well as upon a valid instrument, or it may be simply *in pais* without any paper or color of title and resting wholly upon a naked assertion of title or claim in himself accompanied by exclusive possession. *Caperton v. Gregory*, *supra;* Jackson v. Brink, 5 Cow. 483; Jackson v. Ellis, 13 Johns. 118; Jackson v. Long, 7 Wend. 170; Leonard v. Leonard, 10 Mass. 231; Jackson v. Huntington, 5 Pet. 401; Towle v. Ayer, 8 N. H. 57; Walker v. Wilson, *Id.* 217; Comins v. Comins, 21 Conn. 413; Tyler on Eject. & Ad. E. 887, and cases cited."

Also, in Stonestreet v. Doyle, 75 Va. 379, it is said, as between tenants in common and others claiming in privity, the entry and possession of one are ordinarily the entry and possession of all; this presumption will prevail in favor of all until some notorious act of ouster or adversary possession is brought home to the others, and until there is notice, actual or constructive, that the possession is hostile, it will be considered amicable, even though the tenants' possession may have been adversary, citing *Caperton v. Gregory*, *11 Gratt. 505.* The principal case is cited for the same proposition in Hannon v. Hounihan, 85 Va. 438, 12 S. E. Rep. 157.

In Taylor v. Philippi, 35 W. Va. 554, 14 S. E. Rep. 132, it is said: "We have many cases which discuss the doctrine of adversary possession. Among them: Taylor's Devisees v. Burnsides, 1 Gratt. 165; Overton's Heirs v. Davisson, *Id.* 211; Shanks v. Lancaster, 5 Gratt. 110; Pasley v. English, *Id.* 141; Evans v. Spurgin, 6 Gratt. 107; Hannon v. Hannah, 9 Gratt. 146; Creigh v. Henson, 10 Gratt. 231; Clarke v. McClure, *Id.* 305; Anderson v. Harvey, *Id.* 386; Staats v. Board, *Id.* 400; Flanagan v. Grimmet, *Id.* 421; Smith v. Chapman, *Id.* 445; Koiner v. Rankin, 11 Gratt. 420; *Caperton v. Gregory*, *11 Gratt. 505*; Levasser v. Washburn, *Id.* 572; Kincheloe v. Tracewells, *Id.* 587; Erskine v. North, 14 Gratt. 60; Genin v. Ingersoll, 2 W. Va. 558; Kenna's Heirs v. Quarrier's Heirs, 3 W. Va. 210; Pitzer v. Burns, 7 W. Va. 63; Western Mining, etc., Co. v. Peytona Cannel Coal Co., 8 W. Va. 406; Moore v. Douglass, 14 W. Va. 708; Duff v. Good, 24 W. Va. 683; Lynch v. Andrews, 25 W. Va. 751; Jones v. Lemon, 26 W. Va. 630; Hall v. Hall, 27 W. Va. 468; Oney v. Clendenin, 28 W. Va. 34; Congrove v. Burdett, *Id.* 220; Flynn v. Lee, 31 W. Va. 487, 7 S. E. Rep. 430; Ketchum v. Spurlock, 34 W. Va. 597, 12 S. E. Rep. 832."

See generally, monographic *note* on "Adverse Possession" appended to Nowlin v. Reynolds, 25 Gratt. 137.

2. Same—Same—Pendency of Suit to Set Up Will—Effect upon Running of Statute.‡—That the pendency of the suit brought by S T to set up the will of J T, did not prevent the running of the statute; that, having commenced to run, could not be stopped by anything occurring subsequently: And moreover, the will as a will of lands, being valid without probat, and the suit being not to acquire title, but to establish evidence of title.

3. Same—Same—Suit for Partition—Effect on Statute.—If in the suit for partition the heirs of J T had alleged and proved any equitable grounds to repel the statute, the chancery court might have given it effect by an order, when directing the suit to be brought for trial of title; but no such ground having been shown, and no such order made, the statute must have the operation which a common law court ascribes to it.

4. Same—Same—Running of Statute against Femes Covert.§—The statute runs against the *femes covert* and their husbands, so as to bar a recovery during the coverture.

‡**Statute of Limitations—No Subsequent Event Stops Running of.**—In Jones v. Lemon, 26 W. Va. 635, it is said, that if the statute of limitations has once begun to run no subsequent event will interrupt it, citing 1 Barton's Ch. Pr. (2d Ed.), sec. 34; Ang. on Liens, §§ 194, 197; Parsons v. M'Cracken, 6 Leigh 495; *Caperton v. Gregory*, *11 Gratt. 505;* 1 Rob. (New) Pr. 609.

§**Adverse Possession—Statute of Limitations—Effect as against Husband and Wife.**—In Merritt v. Hughes, 36 W. Va. 366, 15 S. E. Rep. 60, the court says: "The case of *Caperton v. Gregory* is authority to show that the statute does run against a wife owning lands and against her husband during coverture, and, as the law then stood (Acts 1836-37, ch. 8), barring them after the lapse of the common period of bar, however long the coverture exist, with a revival of the wife's right upon the cessation of the coverture for the period fixed by the saving clause in favor of persons under disability, during which period she or her heirs might sue, notwithstanding she and her husband had already been barred during coverture. But *Caperton v. Gregory* does not touch the case where the husband alone, or he and she together, make a deed, void as to her, passing the husband's right, so that they could not, nor could either, sue the grantee. *Caperton v. Gregory* is yet

506 ***5. Same—Same—Effect on Infant Children of Coparcener.**‖—The infant children of the female heir who died a *feme covert*, are barred after three years from the death of their mother, though they may continue infants all that time.¶

This action was instituted in 1848. The case is stated in the opinion of Judge Samuels.

Price and Caperton, for the appellants.

N. Harrison and Stanard, for the appellees.

SAMUELS, J. This cause is brought here by supersedeas to a judgment of the Circuit court of Monroe county, rendered upon a special verdict in an action of ejectment, wherein the defendant was here plaintiff, and the plaintiffs here were defendants.

The finding of the jury shows this case: John Thompson was seized in fee of the land in controversy, and departed this life in June 1823. He left seven children, and several grand children the issue of two sons who had died in the life time of their father; the lessors of the plaintiff are some of the children and grand children of
507 the deceased claiming as heirs, *and others claiming by purchase from others of the heirs.

The defendants below also claim title as derived from John Thompson deceased. It appears that after the death of the ancestor in June 1823, and before August 29th of that year, Samuel Thompson, one of his sons and heirs at law, entered upon the land in controversy, claiming that his father had left a will wherein he devised the land in controversy to said Samuel for life, remainder to said Samuel's wife for life, remainder in fee to John Thompson and William Thompson, the sons of said Samuel. This alleged will was not found after John Thompson's death. Samuel Thompson, however, having taken possession of the land at some time after his father's death in June 1823, and before the 29th of August of that year, on the day last named instituted a suit in chancery in the District court of chancery holden at Lewisburg, alleging the due making of the will devising the land to the complainant, his wife and sons as above stated; that the will was in force at testator's death; that it could not be found; and praying that the whole will, or so much of it as devised the land to complainant, his wife and sons, might be established. To this bill the heirs at law of John Thompson were made defendants, and served with process to answer. Under this color or claim of title Samuel Thompson took and held the exclusive possession of the land during his life. After his death the parties claiming under the will, successively took and held the land for their own use, to the exclusion of John Thompson's other heirs at law. The title thus claimed has been transmitted by intermediate alienations, until equal moieties of the land vested in the parties Caperton and Tiffany respectively, who are the plaintiffs here, and who were in possession at the time of bringing this suit, using and enjoying the property as their own.
508 *The entry and possession of Samuel Thompson must, under the circumstances, be held to have been adverse to the other heirs at law of his father John Thompson. A will, although not admitted to probat, is a valid will of land. Bagwell v. Elliott, 2 Rand. 190: And the record shows that Samuel Thompson had reason to insist on his claim under the alleged will. The exclusive use and enjoyment of the property in the hands of the several and successive holders, accompanied with a denial of all right in the parties now claiming as coparceners, from 1823 to 1848, when this suit was brought, is such an adverse possession as is protected by the statute of limitations. See Shanks v. Lancaster, 5 Gratt. 110; Purcell v. Wilson, 4 Gratt. 16.

The defendant must be barred by the stat-

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authority to show that husband and wife have right of entry and action, notwithstanding coverture, against one claiming the wife's land, not under their conveyance, but adversely, and that, as they have right of entry and action, they must sue before the proper limit for the particular case expires, as the statute is operating against them."

See the principal case cited to the same effect in Blackwell v. Bragg, 78 Va. 535; Harrison v. Gibson, 23 Gratt. 224, and *note*; Cecil v. Clark, 44 W. Va. 669, 30 S. E. Rep. 219; Cooey v. Porter, 22 W. Va. 128.

‖**Same—Same—Effect upon Infant Children of Ancestor.**—In Wilson v. Harper, 25 W. Va. 182, it is said: "It is well settled that when the statute of limitation has begun to run in the lifetime of the ancestor, it will not cease to run against his infant heirs, unless so specially provided by statute. Angell on Lim. section 477, and cases cited. (Moore v. Jackson, 4 Wend. 58; Floyd v. Johnson, 2 Litt. 109; *Caperton v. Gregory, 11 Gratt. 505.*)"

See monographic *note* on "Infants" at end of case.

¶Sess. Acts of 1830-7, p. 11, § 10. Be it further enacted, that all writs of *formedon in decender, remainder* or *reverter*, of any lands in that part of this commonwealth which lies west of the Alleghany mountains, hereafter to be brought upon any title or cause heretofore accrued, or which may hereafter fall or accrue, in that part of this commonwealth, of lands situated there, shall be sued within seven years next after such title or cause of action accrued, and not afterwards; and that no person or persons who now hath or have, or hereafter may have any right or title of entry into any lands, shall make an entry but within seven years next after such right or title accrued; and such person or persons shall be barred from any entry afterwards: provided nevertheless, if any person or persons entitled to such writ or writs, to such right or title of entry as aforesaid, shall be or were under the age of twenty-one years, *feme covert, non compos mentis* or imprisoned, at the time such right or title accrued or came to them, every such person, and his or her heirs, shall and may, notwithstanding the said seven years are or may be expired, bring and maintain his or her action, or make his or her entry within three years next after such disabilities removed, or the death of the person so disabled, and not afterwards.

ute, unless it can be shown that his lessors or some of them are exempt from its operation. The counsel for the defendants here seek to withdraw all the lessors of the plaintiff from the bar of the statute, for several reasons: As that the entry and possession by Samuel Thompson, one of the coparceners, must be regarded as the entry and possession of all the coparceners; and, therefore, the statute did not run. Conceding that the entry and possession by one coparcener enures to the benefit of all in the absence of proof to the contrary, yet when it appears that the coparcener entering and taking possession, claimed the property as his own under color of title; that he took the profits to his own exclusive use, and denied the title of the other coparceners, of all which they had notice; the party so taking and holding is regarded as having disseized his coparceners. See Clymor's lessee v. Dawkins, 3 How. S. C. R. 674; Ricard v. Williams, 7 Wheat. R. 59; McClung v. Ross, 5 Wheat. R. 11; Purcell v. Wilson, 4 Gratt. 16.

Another reason for which the counsel sought to withdraw all the plaintiff's
509 lessors from the operation *of the statute, is the fact that Samuel Thompson, after his entry, filed a bill in chancery against the other heirs at law seeking to establish the alleged will of their common ancestor; that this bill was pending until the year 1837, when it was dismissed for a failure to give security for costs, which complainants had been required to give. The answer is obvious, that the statute commenced running the day Samuel Thompson disseized the other heirs; and the course of the statute would not be arrested by anything occurring subsequently. The further answer is equally obvious, that this cause was decided in a court of common law jurisdiction, which court necessarily decided it upon its own rules and principles, without reference to the principles governing chancery courts. Without doubt, in the absence of any injunction restraining the lessors of the plaintiff from making an entry or from bringing suit, the law court must allow full force to the statute. The chancery suit was not brought for the purpose of acquiring title; that, as was alleged, had been acquired by the will and the death of the testator: It was brought to establish the evidence of the title. It would be strange if a party in possession of property, claiming it under color of title, should lose the protection of the statute, by making an ineffectual effort to procure evidence to sustain his title.

The defendant here further sought to obviate the effect of the statute by the suit for partition brought in 1844, in which suit an order was made requiring complainants to establish their title by suit at law, under which order this suit was brought. In the view I take of the subject, this suit for partition is wholly without the effect ascribed to it, as, if the statute applied at all, it had run its course before the suit was brought: The adverse entry was made before the 29th of August 1823; the suit for partition was commenced 21st of March 1844. If the complainants in
510 *the suit for partition had alleged and proved any equitable reason to repel the statute, the chancery court might have given effect to such reason by an appropriate order when directing the suit to be brought for trial of title. No reason of this nature is shown, no such order of the court was made; and the statute is thus left to have the operation which a common law court ascribes to it.

The counsel for the defendants here, if they may not exempt all the lessors from the bar of the statute, yet seek to exempt some of them by bringing them within the proviso in favor of femes covert and infants.

At the time of John Thompson's death, some of his heirs, that is to say, Margaret the wife of Isaac Cole, Elizabeth the wife of Joseph Canterbury, Isabella the wife of Willis Ballard, and Jane the wife of Samuel Gregory, were femes covert. The first named three of these femes still survive, and have continually remained covert since the death of John Thompson; and they unite with their husbands in this suit: Jane Gregory lived until 1832, when she died, leaving issue and leaving her husband Samuel Gregory surviving; he died in 1833. The issue of Jane Gregory are lessors of the plaintiff in this suit. The title of Canterbury and wife, who unite as lessors of the plaintiff, was divested by the decree of a court of competent jurisdiction, and vested in Nancy Thompson for life; remainder in fee to her sons John and William, under whom the plaintiffs here claim; no recovery, therefore, can be had under this title.

The titles of Cole and wife and Ballard and wife stand upon a different footing from that of Jane Gregory's heirs; and must be separately considered. That title descended from John Thompson to the femes when they were covert-baron, in which condition they have hitherto continually remained. Samuel Thompson made his adverse entry upon the land al-
511 leged to *have descended, whereof the husbands and wives were jointly seized in right of the wives, thereby putting these parties to their right of entry, and giving them cause of action to recover possession.

The question whether the statute is a bar under such circumstances, has never before occurred in this court; it must, therefore, be decided upon the terms of the statute itself, applied to estates of the nature of this, and claimed by parties in their condition. We must look to the decisions of other courts upon the question.

The statute giving the rule is found in Sess. Acts 1837, p. 11, § 10. The body of the enactment excludes all rights of entry, by whomsoever held; and creates a bar in seven years. The proviso declares, "that if any person or persons entitled to such writ or writs, to such right or title of entry, as aforesaid, shall be or were under

the age of twenty-one years, feme covert, non compos mentis or imprisoned, at the time such right or title accrued or came to them, every such person, and his or her heirs, shall and may, notwithstanding the said seven years are or shall be expired, bring and maintain his or her action, or make his or her entry, within three years after such disabilities removed, or the death of the person so disabled, and not afterwards."

The body of the statute gives seven years to every party having a right of entry in which to assert the right, and interposes a bar after that time; the proviso gives a further time of three years to parties under disability: this three years to be computed from the removal of the disability. The period, if any, between the end of the seven years and the beginning of the three years, is not, in terms, withdrawn from the operation of the statute.

In regard to an infant, and a person non compos mentis, it has been decided
512 that the right of action exists *continually from its accrual until the end of the time allowed after the disability removed: that suit may be brought by such parties after the end of the time prescribed as a bar, and before the beginning of the time secured by the proviso. However this may be in regard to such persons, a feme covert stands on a different ground. She and her husband are jointly seized in her right; but the husband has also certain interests in the property, and capacity to dispose of such interests, without the concurrence of the wife, and against her consent. He may invest another with seizin by conveying a freehold estate for the joint lives of himself and wife; and if issue be born (Cole and wife had issue), the husband may convey the property for his own life; his estate by the curtesy intervening before that of the heirs of the wife. The husband may moreover subject the freehold estate for the joint lives of himself and wife, or for his own life in case issue be born, to the payment of his debts. See Clancy on the Rights of Married Women 161; Bac. Abr. Baron & Feme C. 1; Watson v. Watson, 10 Conn. R. 75, 91, Judge Church's opinion. If the husband may do all this by direct conveyance; if he may thereby deprive himself and wife of a right of entry for their joint lives, I perceive no reason why he may not allow his and her right of entry to pass away by operation of law. This construction of the statute is sustained by Littleton, § 403, and the commentary thereon, 3 Thos. Coke Litt. p. 47; Moore v. Jackson, 4 Wend. R. 58.

I am of opinion that no recovery can be had in this action under the title of Cole and wife, or that of Ballard and wife.

The sixth count in the declaration is upon the demise of Jane Gregory's heirs; and upon his count only judgment was rendered for the plaintiff by the Circuit court. As already said, Jane Gregory's title descended to her heirs, and is
513 somewhat different from *those of Cole and wife and Ballard and wife. Mrs. Gregory was a feme covert at the time her right of entry accrued in 1823; and so continued until her death in 1832. She left her husband surviving, who died in 1833. She also left children her heirs at law, who were infants under the age of twenty-one years at the time of her death, to whom descended her right of entry with capacity to make the entry after the death of the husband. This entry was not made nor suit brought by the heirs within three years after their capacity to do either had accrued to them, nor within the further time allowed by the act of 1837. The question is thus presented, Whether their right is protected by the proviso?

It is insisted by the counsel for the defendant in error, that the possession of Samuel Thompson and of those holding in succession after him was not adverse to Jane Gregory at any time during her life; and as a consequence, she was not under the necessity of relying on the proviso to preserve her rights: that the possession became adverse after her death, and that her heirs are the parties to whom the rights of entry on the adverse possession for the first time accrued. This position of the counsel, to be of any avail, must be true in all its parts; for if the right of entry accrued to Jane Gregory in her life time, her coverture must be relied on to save the right of entry in her person: her heirs in that case can claim only the benefit secured to them as her heirs. That the possession of Samuel Thompson and others holding after him, was adverse to John Thompson's other heirs, has, I conceive, been fully shown. Jane Gregory's right of entry would then be preserved only by her coverture; and her heirs can recover only by showing an entry, or suit brought within the time allowed to them for these purposes. Is this the full period allowed to parties who are infants "at the time such
514 right or title *accrued or came to them," or is it only the three years allowed to the heirs of one whose right of entry has once already been protected? I think the latter. Jane Gregory's right of entry, whatever it was, descended at her death to her heirs; her right up to that time was protected by the proviso: her heirs, however, in express terms, are bound, unless they enter within three years, no disability of theirs being protracted. Yet this plain language is to be set at naught, if the counsel be right; the heirs are not to be regarded as heirs succeeding to a limited right of entry, but as infants "at the time such right or title accrued or came to them." We must take a new departure in the computation of time; we must hold that the heirs do not take the right of entry held by the ancestor, but a renewed and prolonged right, to be transmitted, perchance, to other infant heirs, with a renewed right en-

grafted thereon and still further prolonged; and thus onwards indefinitely. Such a construction I regard as at war alike with the letter and purpose of a statute of limitations. Our act of assembly is substantially copied from the statute 21 James 1, ch. 16. The English courts hold that an heir under disability, acquiring a right of entry by descent from an ancestor also under disability, cannot claim the whole time allowed by the statute to a party in whom the right originally vested to make the entry, but that the heir may only claim the time secured by the proviso to a party taking derivatively by descent.

An English court acting on established principles, in applying a statute like ours in the case of Jane Gregory's heirs, would hold that the heirs, notwithstanding their disability of infancy, could enter only within three years after their right of entry accrued. See Doe v. Jesson, 6 East's R. 80.

Justice McLean, in delivering the opinion of the Supreme court of the United States in Mercer's lessee v.
515 *Selden, 1 How. S. C. R. at page 55, in regard to the right of Mrs. Swaim's infant heirs who were alleged to have acquired a right of entry from their mother, a feme covert, says, "They were bound, without regard to their infancy or other disabilities, to bring their action in ten years from the decease of their ancestor." This was the construction placed upon the statute of limitations of Virginia existing prior to the act of 1837, and applying at that time throughout the whole state. The act of 1837 prescribes different times of limitation for lands lying west of the Alleghany mountains. The old and the new statutes, however, are identical in all particulars except time, and the territory to which they apply. Thus the decision of the case is directly upon the question in which Jane Gregory's heirs are concerned; and is adverse to their pretensions. See also Floyd's heirs v. Johnson et al., 2 Litt. R. 109, in which the same question is decided in the same way; Moore v. Jackson, 4 Wend. R. 58.

Following these decisions as giving the true meaning of the statute, as well according to its letter, as to its obvious spirit and policy, I am of opinion no recovery can be had under the title asserted by Jane Gregory's heirs.

Having thus passed upon the title of each one of John Thompson's heirs, in whose behalf an attempt could be made to exempt them from the statute of limitations, on the facts found in the verdict, and finding the attempt in regard to each without foundation in law, I am of opinion to reverse the judgment of the Circuit court, and to render a judgment for the plaintiffs in error.

MONCURE and LEE, Js., concurred in the opinion of Samuels, J.

Judgment reversed.

INFANTS.

I. Liability in Contract.
II. Liability in Tort.
III. Liability for Crimes.
IV. Competency as a Witness.
V. Suits by and against Infants.
  A. Criminal Cases.
  B. Civil Cases.
  C. Sale of Infants' Lands.
  D. Effect of Decrees on Infants.
  E. Waiver by Infants.
  F. Statute of Limitations.
  G. Powers of a Court of Chancery, Election.
VI. Succession to Infant's Estate.
VII. Estoppel.
VIII. Commitment to Reformatory.

Cross References.

Infants.—See monographic *note* on "Guardian and Ward" appended to Barnum v. Frost, 17 Gratt. 398; "Parent and Child"; "Judicial Sales."

I. LIABILITY IN CONTRACT.

Generally.—The only contract binding on an infant is the implied contract for necessaries; the only act which he is under a legal incapacity to perform is the appointment of an attorney; all other acts and contracts, executed or executory are voidable or confirmable by him at his election. Dictum by MONCURE, J., in Mustard v. Wohlford, 15 Gratt. 329; Gillespie v. Bailey, 12 W. Va. 70.

What Are Not Necessaries.—When an infant has acquired a fair education and lives with his mother and step-father, and his only estate consists of a remainder in a 535-acre tract worth $977.55, his step-father was not allowed a claim of $799.83 for further education and support on the ground of necessaries. Gayle v. Hayes, 79 Va. 542.

Particular Contracts.

Contract of Partnership.—An infant is capable of being a partner and his contract of partnership is not void but voidable. If he affirm it after he arrives at age, he will be bound by it. Penn v. Whitehead, 17 Gratt. 503, 94 Am. Dec. 478.

Release of Right to Damages.—A release executed by an infant for a valuable consideration, of his right to damages against a railroad, may be disaffirmed by him, on coming of age, without restoring the consideration, when it does not appear that he has it at that time. Young v. W. Va., etc., Ry. Co., 42 W. Va. 112, 24 S. E. Rep. 615.

Release of Dower Right by Infant Feme Covert.—An infant married woman, though she join her husband in a deed, executed with all the formalities required by the statute, 1 Old Rev. Code Va., ch. 90, § 6, Code 1887, § 2562, may disaffirm the contract, after her husband's death and her arrival at full age, and may recover her dower in the land. Thomas v. Gammel, 6 Leigh 9.

Contracts Binding on Infants.

Contract of Enlistment.—An infant, if he enlist by his own free choice, though without the knowledge or consent of his parent, will be bound by his contract of enlistment. U. S. v. Lipscomb, 4 Gratt. 41; U. S. v. Blakeney, 3 Gratt. 405.

Contracts of Marriage Settlement.—Infants' contracts of marriage settlement are binding on them, though made during infancy, *a fortiori* if there be issue of the marriage, and cannot be avoided by them on coming of age. A settlement made by them through a father or guardian is likewise binding. Tabb v. Archer, 3 H. & M. 399, 3 Am. Dec. 657.

BALDWIN, J., in a dictum in Healy v. Rowan, 5 Gratt. 414, 52 Am. Dec. 94, approved the doctrine of Tabb v. Archer, 3 H. & M. 399, 3 Am. Dec. 607, saying, "Marriage articles, made between an infant feme and her intended husband, beneficial to her and her contemplated issue, will be enforced in equity, by a settlement in conformity therewith, on the application of the issue."

Though it was held in Healy v. Rowan, 5 Gratt. 414, 52 Am. Dec. 94, that marriage articles, to which an infant feme is not a party, but which are made between her guardian and her intended husband are not binding on the infant, yet, BALDWIN, J., said, obiter: "She may, after full age, adopt or ratify such marriage agreement."

Liability as Administrator.—An infant is not liable as administrator for a devastavit of his intestate's goods, either on his express contract (his bond) or on an implied contract as a constructive trustee, where no fraud or tort is charged. Saum v. Coffelt, 79 Va. 510.

Infants' Contracts Voidable.—The contract of an infant is voidable by the infant, after she arrives at the age of twenty-one years. Bedinger v. Wharton, 27 Gratt. 857; Birch v. Linton, 78 Va. 584; Wilson v. Branch, 77 Va. 65.

Not Void.—An infant's contract is voidable, not void, and subject to be affirmed or disaffirmed by the infant after his arrival at age, though the fact of infancy were known to the other party. Mustard v. Wohlford, 15 Gratt. 329; Gillespie v. Bailey, 12 W. Va. 70; Wamsley v. Lindenberger, 2 Rand. 478. In this respect differing from the contract of a feme covert which is void. Ogle v. Adams, 12 W. Va. 213, 241.

Hence Infant Must Be Sued with Adult on a Joint Contract.—A promissory note is executed by one of two partners, in the name of the firm. One of the partners was an infant at the time of the execution of the note. An action is brought against the adult partner only. The action is badly brought; the act of the infant being voidable only, and not void. Wamsley v. Lindenberger, 2 Rand. 478.

Defence of Infancy Personal to Infant.—The defence of infancy is a personal privilege and cannot be interposed by a stranger. Fry v. Leslie, 87 Va. 269, 12 S. E. Rep. 671; Wamsley v. Lindenberger, 2 Rand. 478.

Disaffirmance of Infants' Contracts.

Mere Acquiescence Not Sufficient.—Mere acquiescence, though for an unreasonable time after age, in the case at bar twenty-seven years, will not amount to an affirmance of a contract made during infancy, when the purchaser has not been in possession, except for a year or two before the bringing of the action to set the sale aside. To make silent acquiescence for the period of the statute of limitations, an affirmance of such a contract, it must be under the same circumstances as required by that statute, that is, the purchaser must be in possession of the land during the whole of this period, and if he is not in possession, but the land is wild and unoccupied, the mere lapse of time, though it exceed the period required by the statute, will not amount to an affirmance, especially where the property is in litigation during that time. Gillespie v. Bailey, 12 W. Va. 70.

Mere silence for any length of time less than the statutory period which would bar an action of ejectment, when unaccompanied by some act of a confirmatory nature, will not amount to an affirmance of an infant's deed. Birch v. Linton, 78 Va. 584; Wilson v. Branch, 77 Va. 65.

In a dictum in Wilson v. Branch, 77 Va. 65, LACY, J., said that an infant must disaffirm his contract within a *reasonable* time after coming of age; but acknowledged that many cases held the contrary, as in the cases *supra*, that silent acquiescence was no bar, if for a shorter period than the statute of limitations. In this case, eighteen months was held a reasonable time.

Effect of Disaffirmance.—The disaffirmance of an infant's contract after age extinguishes any interest in law or equity which the other party may have acquired under it and entitles the quondam infant, or any party claiming under him, to recover possession of the subject of the contract and hold it free from any equity of the other party. Such a disaffirmance avoids the infant's contract *ab initio*, and the parties revert to the same situation, as if the contract had not been made. The right of the infant to avoid his contract is a paramount right and may be exercised even against a purchaser from the vendee. Mustard v. Wohlford, 15 Gratt. 329.

Rights of Third Persons on Disaffirmance.—Where a husband contracts to convey five-sevenths of his share of certain lands to his wife, but, by a prior contract, had conveyed to his co-tenant, his share in a certain tract of the land and had contracted to convey the other half of that particular tract, if it fell to his share, and, on its falling to his share, his wife, an infant, joins him in a conveyance to the co-tenant; if his wife, on coming of age, and after her marriage is annulled, seeks in equity a conveyance of the legal title to the said five-sevenths including that particular tract on the ground that her deed was voidable on account of infancy, the court, where the particular tract did not exceed in value the remaining two-sevenths, refused to take the particular tract out of the hands of third persons, who had bought, but decreed compensation out of the remaining two-sevenths. Kerr v. Kerr, 84 Va. 154, 5 S. E. Rep. 89.

Co-existent Disabilities.—But if the infant is also a *feme covert* at the time of making the contract, the time allowed for disaffirmance is extended to a reasonable time after coverture and no act of hers while either disability continues will amount to an affirmance of her contract. Bedinger v. Wharton, 27 Gratt. 857; Darraugh v. Blackford, 84 Va. 509, 5 S. E. Rep. 542.

What Amounts to Disaffirmances.

Resale of Subject-Matter of Contract.—A voidable act of an infant may be avoided by different means according to the nature of the act. It is not necessary, in order to produce that effect that the disaffirmance should be express. It is enough that the two acts are inconsistent with each other, in which case the former is disaffirmed by necessary implication. Thus, a sale of his lands by an infant, is disaffirmed by his selling them to a third party after age, even though the first vendee be in possession under the first contract of sale. Mustard v. Wohlford, 15 Gratt. 329.

Necessity for Re-entry by Grantor.—If there be an adverse possession, then, it is said, in those states where one out of possession cannot sell, there should be an entry of the grantor, in order to avoid the first deed by another. But no entry is necessary in those states where one out of possession of real estate, can sell his interest therein, as in Virginia. Nor is entry necessary where, though the vendee is in possession, his possession is not adverse but is

subordinate to the title still remaining in the vendor. Mustard v. Wohlford, 15 Gratt. 329.

Bringing of Action Sufficient.—It is not necessary for the infant to do more than bring his suit within the proper time; that is all the disavowal of his deed that is required. Birch v. Linton, 78 Va. 584; Bedinger v. Wharton, 27 Gratt. 857.

May in Same Suit Ask for a Partition.—A party may in the same suit, sue to set aside a conveyance made during infancy, and also sue for a partition of the land. Gillespie v. Bailey, 12 W. Va. 70.

Infants Must Have an Existing Interest in the Subject-Matter of the Contract.—Where a father assigns absolutely a title bond to real estate purchased by him, to his sons, who are his sureties on another bond, and then the father and sons sell the land and assign the title bond to another party, and one of the sons, being a minor at the time of this contract, on coming of age attempts to avoid the contract and have one moiety of the real estate decreed to him, *held*, that the assignment of the title bond was in the nature of an equitable mortgage to secure the sons as sureties on the other bond, and when the other bond was paid by the purchaser in accordance with an agreement, their mortgage was discharged and the interest of the infant in the real estate ceased. Trader v. Jarvis, 23 W. Va. 100.

Return of Consideration.

Executory Contracts.—If an infant avoid his executory contract he must return the consideration, *if he has it;* but if he has wasted it during his infancy, he is not obliged to return what he has not. Mustard v. Wohlford, 15 Gratt. 329; Gillespie v. Bailey, 12 W. Va. 70, cited with approval in Ogle v. Adams, 12 W. Va. 213, 241.

Executed Contracts.—MONCURE, P., in a dictum in Bedinger v. Wharton, 27 Gratt. 857, said that if the contract were an executed one, it could not be avoided by the infant without restoring any part of the consideration which remained in his hands on coming of age; but that the question, whether in such a case the infant could avoid the contract if he had wasted the consideration during infancy, or if it was not in his hands on coming of age, had never been decided in Virginia, and though that case was one of an executed contract where the consideration was not in his hands when he came of age, yet that case went off on other grounds. Cited with approval in Ogle v. Adams, 12 W. Va. 213, 241.

In Gillespie v. Bailey, 12 W. Va. 70, GREEN, P., citing Bedinger v. Wharton, *supra*, inclined to the opinion that the infant need not return the consideration for an executed contract; if it is not in his hands on coming of age, but he expressly declined to decide the question and the case went off on the ground that the rents and profits for the period since the conveyance, for which the purchaser was responsible, exceeded the amount of the purchase money paid to the infant, and sought to be recovered back, and, as the purchaser did not insist on this account being taken and did not complain of the final decree being rendered without it, he cannot assign it as error in the appellate court that the consideration paid was not decreed to be returned to him. See Young v. W. Va., etc., Ry. Co., 42 W. Va. 112, 24 S. E. Rep. 610, and *supra*, "Particular Contracts."

No Consideration Received.—*A fortiori* if the infant has made no contract at all and has received no consideration, but a commissioner has conveyed away his property under a void decree, he can recover the property, without making restitution to the holders of it. Abernathy v. Phillips, 82 Va. 773, 1 S. E. Rep. 113.

In Any Case, He Must Return It, if He Has It.—Whether a contract of an infant be completely executed or be executory merely, it is very clear that it cannot be avoided by the infant, after attaining lawful age, without restoring anything which may have been received by him as consideration in the contract, and may remain in his hands on his arrival at such age. Bedinger v. Wharton, 27 Gratt. 871.

Infant Having Only a Life Interest in Property Not Accountable for Principal of Consideration.—Where an infant has only a life interest in property and joins her husband, the trustee, in a conveyance of the fee simple, while an infant, she is in no way accountable for the principal of the consideration received and no benefit which she may possibly have derived from that consideration can prevent her from avoiding the deed executed by her during her infancy, and having the property thereby conveyed, reconveyed and held under the original trusts. Bedinger v. Wharton, 27 Gratt. 857.

Ratification.—While an infant may avoid a bond given by him when under age, if he promises to pay it after age, he will be bound by his promise. Buckner v. Smith, 1 Wash. 296.

What Is Necessary under the Statute.—No particular form of words is required for a confirmation of a debt contracted by a person when an infant, after he attains his majority, but they must import an unequivocal recognition and confirmation of the previous engagement, though they need not amount to a direct promise to pay. Section 2840 of the Code provides that no action shall be maintained whereby to charge any person upon any promise, made after full age, to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing, signed by the party to be charged therewith. This statute follows almost in exact terms 9 Geo. IV., ch. 14, sec. 5, and the decisions construing that statute have held that any written instrument, signed by the parties, which, in the case of adults, would have amounted to an adoption of the act of a party acting as an agent, will, in the case of an infant who has attained his majority, amount to a ratification. The memorandum or writing, to be sufficient, must recognize the debt as a debt binding upon the party who signs it. It must, either in terms, or on a fair construction of the instrument, refer to the contract which is to be ratified, and treat it as a subsisting contract. Ward v. Scherer, 96 Va. 318, 31 S. E. Rep. 518.

Must Identify the Contract Ratified.—A replication to a plea of infancy, in an action on a bond executed during infancy, that the obligor has ratified and acknowledged the bond, in writing, after coming of age, is bad, when the ratification relied on refers to an *open account* for a different amount from that of the bond sued on and there is nothing in it to show that the bond was given for the open account. Ward v. Scherer, 96 Va. 318, 31 S. E. Rep. 518.

By Consenting to a Decree of Compensation.—An infant *feme covert* after age may not only disaffirm her deed made under disabilities, but, being *sui juris*, may ratify it, among other ways, by consenting to a decree compensating her for her dower rights. Darraugh v. Blackford, 84 Va. 509, 5 S. E. Rep. 542.

Ratification after Age, Final.—If an infant has once confirmed his contract after arriving at full

age, he can never afterwards elect to hold it void. Gillespie v. Bailey, 12 W. Va. 70.

Infant May Have an Injunction against the Enforcement of a Replevy Bond.—If an infant becomes security in a twelve months' replevy bond, a court of equity will grant a perpetual injunction against its enforcements even against an assignee without notice, for the infant has no day in court in such a case, since the plaintiff can sue out execution on his own affidavit without application to the court. Allen v. Minor, 2 Call 70.

Infancy No Defence to a Proceeding in Rem.—Infancy is no defence to a bill to proceed, *in rem*, against land to enforce a vendor's lien reserved upon the face of the deed, for the purchase money. Smith v. Henkel, 81 Va. 524.

Contract of Apprenticeship.

Infant Must Be a Party.—By the doctrines of the common law, long and well established, a father cannot bind his infant son apprentice without the assent of the son, and such assent proved by his signature to the indenture, but that in this manner he may bind him. State v. Reuff, 29 W. Va. 751, 2 S. E. Rep. 801.

A father cannot bind his infant child apprentice by indentures to which the child is not a party; and indentures of apprenticeship executed by the father, without the child's concurrence, are not voidable only, but void. Pierce v. Massenburg, 4 Leigh 493.

But by Statute Neither Infant Nor His Mother Necessary Parties to Covenants in Their Favor.—Under Acts April 6, 1839, where the indenture contains covenants by the master in favor of the mother of the apprentice, and also in favor of the apprentice, but they are not parties to it, it is nevertheless valid, and the remedies will be adapted to the case. Brewer v. Harris, 5 Gratt. 285.

Duration of Contract.—The statute directs that female apprentices shall be bound out until they are eighteen years old. A binding out until the age of seventeen years is valid. Brewer v. Harris, 5 Gratt. 285.

No Appeal from County or Corporation Court.—No appeal lies from an order of a county or corporation court for binding out an apprentice, or for rescinding his indentures. It *seems* that, in such case, a writ of *certiorari* lies from the general court, to bring up the record, and correct the proceedings. Cooper v. Hopkins, 1 H. & M. 412.

Liability of Master for Medical Attendance.—The master of an apprentice is bound to pay for medical attendance on the apprentice, from the very nature of the relation between master and apprentice. Easley v. Craddock, 4 Rand. 423.

Liability of Father.—The father of an apprentice is only bound when the services were rendered at his instance. Easley v. Craddock, 4 Rand. 423.

In Whose Name Action Should Be Brought.—An action in behalf of an apprentice, upon his indenture of apprenticeship, ought not to be brought in the name of the overseers of the poor, but in his own name. Poindexter v. Wilton, 3 Munf. 183.

But covenant will not lie in the name of an apprentice on an indenture of apprenticeship entered into by the overseers of the poor without any previous order of court for binding out the apprentice; such indenture is not a statutory deed; and, therefore, covenant can only be maintained on it in the name of the overseers who are the parties to it. Bullock v. Sebrell, 6 Leigh 560.

Present Provisions in West Virginia.—In West Virginia a minor child can only be bound as an apprentice "by his father, or, if none, by his guardian, or, if neither father nor guardian, by his mother, with the consent entered of record of the county court of the county in which the minor resides; or, without such consent, if the minor, being fourteen years of age, agree in writing to be so bound, or unless such minor be found begging in such county, or is likely to become chargeable thereto"; and, if not so bound, the indentures of apprenticeship are void. State v. Reuff, 29 W. Va. 751, 2 S. E. Rep. 801; Code W. Va. ch. 81, sec. 1.

II. LIABILITY IN TORT.

Tort Must Be Wholly Independent of Contract.—An infant can only be held liable for a fraud or a tort which is wholly independent and irrespective of contract, express or implied. Saum v. Coffelt, 79 Va. 510.

Seduction.—The plea of infancy is no defence to an action for seduction, since an infant is as liable for a tort, not arising out of a breach of contract, as an adult. Fry v. Leslie, 87 Va. 269, 12 S. E. Rep. 671.

Negligence.—If an infant is permitted to hold an office of pecuniary trust, he is not liable for negligence with respect to money placed in his hands, unless he is guilty of a *tortious conversion*. Saum v. Coffelt, 79 Va. 510.

Contributory Negligence.

Presumed Incapable between Seven and Fourteen.—The law presumes that an infant between the ages of seven and fourteen cannot be guilty of contributory negligence; such presumption must be rebutted by evidence and circumstances establishing her maturity and capacity. Roanoke v. Shull, 97 Va. 19, 34 S. E. Rep. 34.

Age and Discretion to Be Considered.—An instruction to the jury that the rule as to contributory negligence on the part of a child, is, that it is required to exercise only that care which a person of that age would naturally and ordinarily use in the same situation, and under the same circumstances, and that, in determining the relative degree of care or want of care manifested by the parties at the time of the injury, the age and discretion of the parties injured are proper subjects of inquiry for the jury, was approved in Blankenship v. C. & O. R. Co., 94 Va. 449, 27 S. E. Rep. 20.

Infant Acting under Orders of a Superior.—Where an infant of thirteen years of age is employed to perform certain services which he is competent to perform, and which are not hazardous, as carrying water, etc., but a person who has a right to his obedience orders him to perform a dangerous service, adjusting a belt amongst rapidly moving machinery, entirely outside the business he was employed to do, the master will be liable, where the boss was acting within the scope of his employment in giving the orders. Jones v. Old Dom. Cotton Mills, 82 Va. 140.

Age Not the Only Criterion.—The jury in their deliberation, should not be confined by instructions to the consideration of the plaintiff's age alone, but should also be instructed to take into consideration his intelligence, capacity and ability to know the danger and to avoid it, but these considerations need not all be submitted to the jury in the same instructions, but may be embodied in distinct instructions, if, when read together, they will convey to the minds of the jury the fact that both age and intelligence, etc., are factors to be considered. Wash., etc., R. Co. v. Quayle, 95 Va. 741, 30 S. E. Rep. 391.

Where Infant Is a Trespasser.—Though an infant be

a *trespasser*, no one has a right to inflict wanton or reckless injury on him; so, where a railroad company upon whose train he is riding, puts him in a position of peril by increasing the speed of its train to an unlawful and dangerous rate, and under such circumstances requires him to jump from the train, the railroad will be liable. Wash., etc., R. Co. v. Quayle, 95 Va. 741, 30 S. E. Rep. 391.

Under Three, an Infant Is Conclusively Presumed Incapable.—In Dicken v. Liverpool Salt & Coal Co., 41 W. Va. 511, 23 S. E. Rep. 582, HOLT, P., said that although it was not necessary to the decision of the case, he was of opinion that a child two years and ten months old could not be guilty of contributory negligence.

In Norfolk, etc., R. Co. v. Ormsby, 27 Gratt. 455, the court, in speaking of the liability of an infant, two years and ten months old, for contributory negligence, said: "It has not been contended, and cannot be, that he was old enough to be guilty of any, or at all events, that he was guilty of any in this case." In that case the railroad had been guilty of negligence in running its trains through a street on which many children lived.

III. LIABILITY FOR CRIMES.

Between Seven and Fourteen Prima Facie Presumed Doli Incapax.—An infant between the age of seven and fourteen is within the age of discretion but still presumed *doli incapax*. This, however, is a mere *prima facie* presumption which may be rebutted by evidence of capacity sufficient to understand the nature of the act and its consequences. Presumption of incapacity is very strong at seven years of age, but it decreases with the progress of years. The first point of inquiry is whether the accused was able to distinguish between right and wrong, to understand the nature of the crime he was committing, and that it was deserving of severe punishment, if so, *malitia supplet ætatem*. It is not intended to assert that the capacity of the offender must be proved by the direct testimony of witnesses. It may be inferred from the facts and circumstances of the particular case. The nature of the crime and the conduct of the perpetrator may, of themselves, present the most pregnant evidence that he knew the nature of the act and its consequences. Law v. Com., 75 Va. 885.

Proof Necessary to Rebut This Presumption.—But where the only direct proof of capacity is that the accused was a boy of "average capacity for his age," this is not sufficient; the commonwealth must go further and prove that the offender in the particular case understood the nature of his act and its consequences, and especially so where he is under twelve years of age. Law v. Com., 75 Va. 885.

May Be Principal in Second Degree in Rape.—A boy, under fourteen, who aids and assists another person, in the commission of the offence of rape, is not the less a principal in the second degree, because he is incapable of committing the offence himself, if it appear from all the circumstances that he had a "mischievous discretion." Law v. Com., 75 Va. 885.

Evidence of Discretion.—The fact that a boy under the age of fourteen, placed his hand over the mouth of the female with a view to prevent her crying out, while his elder brother committed a rape upon her, is not sufficient in itself for his conviction as principal in the second degree. Law v. Com., 75 Va. 885.

Under Seven, Conclusively Presumed Doli Incapax.—An infant under seven years of age is conclusively presumed to be incapable of crime and no evidence can be received to rebut the presumption. Law v. Com., 75 Va. 885.

IV. COMPETENCY AS A WITNESS.

Under Fourteen It Depends on the Individual Discretion of the Witness.—It is a well-settled rule of evidence that an infant under fourteen may be examined as a witness, provided he sufficiently appears to understand the nature and moral obligation of an oath; for competency depends not upon age but understanding. At the age of fourteen, every person is presumed to have common discretion and the necessary understanding of the obligation of an oath, until the contrary appears; but under that age it is not so presumed. Oliver v. Com., 77 Va. 590.

Five Years Usually the Lowest Limit.—Under the age of six presumption of incompetency arises, and at the age of five the utmost limit would be ordinarily reached, when extraordinary development of the mental and religious faculities should be shown, to take the case out of the ordinary course of nature. State v. Michael, 37 W. Va. 565, 16 S. E. Rep. 803.

Must Understand the Nature and Obligation of an Oath.—An infant of such tender years, five years in this case, and feeble intelligence as to have no conception of the religious or moral significance of an oath, is not competent to testify. State v. Michael, 37 W. Va. 565, 16 S. E. Rep. 803.

Where a child of the age of five made the following answers; to the question, "Is it bad to tell stories?" she answers, "Yes, Ma'am," to the question, "What becomes of little girls who tell stories?" she answers, "The bad man gets them," and as to what the court does with them, she answers, "Puts them in jail," and in answer to a question as to whether her mother had ever taught her anything about God, she replies, "No," and says further that she knows nothing about God except that he makes the babies and throws them down to the doctors, she was held incompetent, as these answers were so evidently merely mechanical and the result of previous coaching. State v. Michael, 37 W. Va. 565, 16 S. E. Rep. 803.

A Question for the Court and Not for the Jury.—The question of incompetency is a question for the court and not for the jury, and if on the examination of a witness, her incompetency appears, it is the duty of the court, on motion of the accused to exclude her evidence from the jury and it is error for the court to submit the question of competency to the jury, either by instruction or otherwise. Nor will the court review the decision of the trial judge unless the error is palpable and flagrant. State v. Michael, 37 W. Va. 565, 16 S. E. Rep. 803.

A witness, whose competency has been affirmed by the court, cannot be examined before the jury touching his understanding of the obligation of an oath, since this is a question of the competency of the witness, not of his credibility. Oliver v. Com., 77 Va. 590.

V. SUITS BY AND AGAINST INFANTS.

A. CRIMINAL CASES.

Infant Must Appear in Person or by Attorney.—Upon a presentment against an infant for a misdemeanor, the infant has a right to appear and defend himself in person or by attorney, and it is error to assign him a guardian and to try the case on a plea pleaded for him by the guardian. Word v. Com., 3 Leigh 744.

B. CIVIL CASES.

Infant Cannot Appear by Attorney.—An infant cannot appear by attorney in a civil suit. Ewing v. Ferguson, 33 Gratt. 548.

Actions by Infants.

In West Virginia.

Summons Should Be in Name of Infant by Guardian Ad Litem.—A summons sued out in the name of J. W. B., guardian *ad litem* of W. B., a minor, before a justice, although not in the best form, yet, aided by the provision in section 26 of chapter 50 of the Code, in relation to proceedings before justices, that no summons shall be quashed or set aside for any defect therein, if it be sufficient on its face to show what is intended thereby, is held sufficient, the defendant not being misled by it and the defendant having appeared generally. Blankenship v. Kanawha & M. Ry. Co., 43 W. Va. 135, 27 S. E. Rep. 355.

How Taken Advantage of.—A summons in an action brought before a justice by an infant plaintiff by next friend is not void, but defective, which defect can only be taken advantage of by defendant by special appearance for that purpose only, *i. e.* to quash the summons, to be stated at time of making such appearance. A judgment rendered upon such summons after general appearance by defendant is not void. Blair v. Henderson (W. Va.), 38 S. E. Rep. 552.

Purpose of Appointment of Guardian Ad Litem for Infant Plaintiff.—The object of sec. 24, ch. 50, Code, requiring appointment of guardian *ad litem* for infant plaintiff before bringing suit, and taking consent in writing of such guardian to accept such appointment, and to be responsible for costs if the action fail, is to protect defendant in the matter of costs, that he may have some responsible person to look to in case he succeeds in his defence. Blair v. Henderson (W. Va.), 38 S. E. Rep. 552.

In Virginia.

Prochein Ami.—On this subject of *prochein ami* the doctrine is that the nearest relation is generally the next friend of an infant; but as that relation may, himself, have injured the infant, and be liable to a suit therefor, or may be otherwise an improper person, the court will permit any person to institute a suit on his behalf, and he is to be named as next friend in the bill. The person ought however, to be a person of substance, because he is liable to pay the costs of suit. Dissenting opinion in Burwell v. Corbin, 1 Rand. 131.

Presumption of Assignment of Prochein Ami.—Where, in a suit for partition, one of the parties plaintiff dies, leaving a widow and infant son in whose name and that of the administrator the suit is revived, it will be presumed that some one was allowed to prosecute the suit for the infant as his next friend where the contrary does not appear. Even if there was not a formal assignment of a next friend, it may be questioned whether such a mere informality will avoid the sale, or whether his mother and his father's administrator will not be regarded as his next friends in the absence of evidence to the contrary. In such a case it would have been out of place to have revived the suit in the name of a next friend of the infant. Wilson v. Smith, 22 Gratt. 493.

To Be Answerable for Costs, Prochein Ami Must Consent.—If a man's name is used as next friend for infants, without his knowledge or consent at any time given, he is not answerable for costs, and if not so answerable, and in no other way interested, he is a good witness. Burwell v. Corbin, 10 Am. Dec. 494, 1 Rand. 131.

The Relation Only Begins with the Institution of the Suit.—A declaration is fatally defective in averring the indebtedness of the defendant to the plaintiff *as next friend* for an infant, the court saying, "In a legal sense he could not have such a relation to the infant plaintiff until the institution of the suit, and it follows that there could be no such indebtedness to *him*, as next friend, *prior* to the institution of the suit, if indeed there could be afterwards." Shirley v. Bonham, 5 W. Va. 501.

When Infant Must Sue by Prochein Ami.

Where Infant Has No General Guardian.—An infant who has no guardian appointed by the court who has given bond, may sue by next friend for damage done to his real estate. McDodrill v. Pardee, etc., Co., 410 W. Va. 564, 21 S. E. Rep. 878.

Suits to Call Guardian to Account.—An infant may by his next friend call the acting guardian or any preceding guardian to account by a bill in chancery; but the bill must be in his own name by his next friend. Lemon v. Hansbarger, 6 Gratt. 301.

Suits to Recover the Distributive Shares of Infants.—A bill in equity to secure the payment of the distributive shares of infants in their ancestor's estate, should be filed in the name of the infants by their next friend, who *may* be their guardian. Burdett v. Cain, 8 W. Va. 282.

Affidavit by "Next Friend."—It is sufficient if the affidavit filed by the infant's next friend states that he *believes* the facts stated in the bill to be true, it is not necessary for him to swear that he knows them to be true. Lee v. Braxton, 5 Call 459.

Next Friend Cannot Waive Rights of Infants.—It is not competent to adult plaintiffs or the guardian ("next friends" as appears by the record) of infant plaintiffs to waive the rights of the latter, and it is error to decree on such waiver. Hite v. Hite, 2 Rand. 409.

Suits against Infants.

Parol Demurrer.—The parol does not demur now in Virginia. Tennent v. Pattons, 6 Leigh 196.

Infants Must Be before Court.—It is error to pass upon the rights of infants when they are not before the court. Clendenning v. Conrad, 91 Va. 410, 21 S. E. Rep. 818.

Infant Must Appear by Guardian Ad Litem.—An infant defendant must appear by guardian *ad litem*, and not by attorney. Fry v. Leslie, 87 Va. 269, 12 S. E. Rep. 671.

Guardian Ad Litem Must Be Appointed.—In a suit in chancery an infant can only appear and defend by guardian *ad litem* and one should be appointed by the court for that purpose. If the record does not show that they were before the court in the only way in which an infant can appear and defend, the court of appeals must regard the proceeding as fatally defective. Myers v. Myers, 6 W. Va. 369; Parker v. McCoy, 10 Gratt. 594; Hays v. Camden, 38 W. Va. 109, 18 S. E. Rep. 461; Hart v. Hart, 31 W. Va. 688, 8 S. E. Rep. 562; Piercy v. Piercy, 5 W. Va. 199; Pracht v. Lange, 81 Va. 711.

No Rule Can Be Entered until His Appointment.—No rule can be entered against an infant until a guardian *ad litem* is appointed to defend him, and if no one, on his behalf, applies to the court to appoint one, the plaintiff is bound, at his peril, to do so. Cole v. Pennell, 2 Rand. 174.

Office Judgment Set Aside.—Where an office judgment is obtained, in an action on a promissory note, against two defendants, one of whom is an infant at

the time of confirming the judgment and undefended by guardian *ad litem*; on a writ of error, *coram vobis*, being brought, the proceedings should be set aside, as far as the declaration, or other good pleading, even though the infant becomes adult before the term of court, at which that judgment might have been set aside and he failed to appear. So held by two judges out of three, the third judge holding that the office judgment should be annulled *in toto*. Cole v. Pennell, 2 Rand. 174.

In the above case, COALTER, J., said obiter, that the plaintiff should have taken the office judgment against the other defendant and suspended proceedings against the infant until he came of age.

Failure of General Guardian to Appear When Notified.—The guardian of the infant owner should be notified, but if he fails to appear and make defence, the court should appoint a guardian *ad litem* to defend their interest. Charleston, etc., Bridge Co. v. Comstock, 36 W. Va. 263, 15 S. E. Rep. 69.

Must Be Appointed if Infancy Appear at Any Time before Final Decree.—And although the infancy did not appear in the original proceedings, yet if it be alleged in a petition for a rehearing (the decree being interlocutory) a guardian *ad litem* ought to be appointed. Roberts v. Stanton, 2 Munf. 129.

Usual to Appoint the Husband of an Infant Feme Covert.—When the infant is a married woman, it is nevertheless necessary to appoint a guardian *ad litem* and it is customary to appoint her husband, if he is a defendant with her. Alexander v. Davis, 42 W. Va. 465, 26 S. E. Rep. 291; Ewing v. Ferguson, 33 Gratt. 548.

May Be Appointed at Rules.—In a suit in equity by the guardian of infants for the sale of their real estate, a guardian *ad litem* for the infants may be appointed at rules. Sess. Acts 1839-40, p. 47; Talley v. Starke, 6 Gratt. 339.

Guardian Ad Litem Must Be Notified.—In a creditors' bill to set aside a deed of settlement executed to a trustee by the debtor for the benefit of his wife, and her children, who are minors, it is error to proceed to take the accounts where a notice was served on such minors by publication; the guardian *ad litem* not being named therein, nor otherwise served with notice, the court saying, "It has often been held in this court that it is error to decree a sale of an infant's real estate without the *appointment* of a guardian *ad litem*, and the appointment to protect the interest of the infant would be a vain thing, if the subsequent proceedings should be had without notice to him." Strayer v. Long, 83 Va. 715, 3 S. E. Rep. 372.

Guardian Ad Litem Must Answer.—It is error, to correct which a bill of review may be filed, if no answer is filed by their guardian *ad litem* on behalf of infant defendants, where the bill is not taken for confessed by them. Braxton v. Lee, 4 H. & M. 376; Lee v. Braxton, 5 Call 459.

His Answer Must Be Filed.—The heirs being infants, though their guardian was a party and answered, they were entitled to be defended by a guardian *ad litem*, and although one was appointed for them, and there was a paper purporting to be an answer found among the papers of the cause, yet as it did not appear that it had been filed, it was error to decree the sale of the infant's land, without an answer filed by guardian *ad litem*. Ewing v. Ferguson, 33 Gratt. 548.

Presumption of Appointment.—It is error to decree against infants without a guardian *ad litem* having been appointed, and it cannot be presumed that any such guardian was appointed in the absence of proof that the records were lost or destroyed. McDonald v. McDonald, 3 W. Va. 676; Alexander v. Davis, 42 W. Va. 465, 26 S. E. Rep. 291.

Recital in Final Decree as to Answer of Guardian Ad Litem Not Conclusive.—Although the final decree recites, *inter alia*, that the cause came on to be heard upon the answer of the guardian *ad litem* of the infant defendants, this cannot be presumed to be true, when no such answer appears in the record as certified and there is no certificate by the clerk that it was lost or destroyed. Alexander v. Davis, 42 W. Va. 465, 26 S. E. Rep. 291.

Appointment Must Appear by the Record.—An office judgment against an infant, who in the writ is named as defendant "by J. K. his guardian," cannot be supported, but must be reversed *in toto*, if there be nothing in the record to show that J. K. was guardian by testament, or *ex provisione legis*, or guardian *ad litem*, appointed by the court. Brown v. McRea, 4 Munf. 439.

Where Guardian Ad Litem Fails to Act.—Where one of the defendants in a suit is an infant, but it is not stated in the record, that he appeared by his guardian in the suit, nor does it appear that the guardian *ad litem*, appointed by the court ever acted or even had notice of such appointment, it is error to enter a judgment by default against the infant, but a motion should be made to the court to proceed against that guardian *ad litem* or to appoint another. Fox v. Cosby, 2 Call 1.

When Not Necessary to Appoint a Guardian Ad Litem.

When His General Guardian Makes His Defence.—If a guardian has been appointed by the county court, and her answer has been received for the infants and full defence made under the sanction and authority of the chancery court, although she was not expressly appointed guardian to defend that suit, the infants must be equally bound by that defence as if she had been in form appointed by the court guardian *ad litem*. Ewing v. Ferguson, 33 Gratt. 548. But if the suit abate as to such guardian by her death before the decree, a guardian *ad litem* ought to be appointed, notwithstanding all the testimony and accounts were taken before his death. Beverleys v. Miller, 6 Munf. 99.

Where the Decree Is in the Infant's Favor.—Although a decree be rendered without the appointment of a guardian *ad litem* for an infant, if it is in the infant's favor, she has no ground of complaint against it. Alexander v. Davis, 42 W. Va. 465, 26 S. E. Rep. 291.

Appointment of Guardian Ad Litem and Infancy Not Questions for the Jury, How Taken Advantage of.—In Campbell v. Hughes, 12 W. Va. 183, 206, 210, it was held that the court did not err in refusing to give the following instruction in an action of ejectment: "If the jury find that the defendants are infants under the age of twenty-one and that no guardian *ad litem* for them was appointed in the cause, then their verdict must be for the defendants," the court saying that infancy is not a good plea in bar of an action of ejectment, that it is right and proper for a guardian *ad litem* to be appointed at the proper time, but that whether the defendants were infants or not, or a guardian *ad litem* had been appointed are questions with which a jury has nothing to do. But where the proofs show that a part of the defendants were infants, and no guardian *ad litem* had been appointed for them, it might perhaps be cause for a new trial, and when judgment was rendered

on the verdict, and a part of the defendants were infants and the facts properly appeared on the record, it will be cause for reversal upon writ of error *coram nobis* on motion under sec. 1, ch. 134, Code W. Va.

Bill Should Not Be Dismissed.—If anything appears in relation to the appointment of the guardian *ad litem*, or in other respects, which is not satisfactory to the chancellor, so that, in his opinion, further proceedings are necessary to enable him to pronounce a decree on the merits, the bill ought not to be dismissed, but such further proceedings directed. Garland v. Loving, 1 Rand. 396.

Not Obliged to Accept Appointment.—A guardian *ad litem*, appointed to prosecute an appeal on an infant's behalf, is not obliged to accept the appointment. A reasonable time ought, therefore, to be given him to consider whether he will accept, and to prepare for trial. Wells v. Winfree, 2 Munf. 342.

When Depositions May Be Read against Infants.

With Consent of Guardian Ad Litem.—It is not improper to read depositions in evidence against infant defendants with the consent of their guardian *ad litem*. Hardman v. Orr, 5 W. Va. 71.

Notice to Guardian Sufficient, Except in Suits to Sell Infants' Lands.—But if the guardian *ad litem had notice* of the taking of the depositions, the fact that the depositions were not taken in his presence will not render them inadmissible. Sections 2435 and 2619 of the Code Va. 1887, rendering depositions not taken in the presence of the guardian or upon interrogatories agreed to by him, inadmissible, refer only to suits for the *sale* of lands of persons under disability and contingent estates, there referred to, and do not apply to suits generally in which infants may be interested. Moore v. Triplett (Va.), 23 S. E. Rep. 69.

Section 4, ch. 83, Code W. Va., providing that no deposition shall be read in the suit except by leave of court, unless it be taken in the presence of the guardian *ad litem* or on interrogatories agreed to by him, applies only to bills, whose object is the leasing and selling of the lands of persons under disability as the caption of the chapter shows, and the mere fact that an infant is a stockholder in a corporation would not bring within the operation of the provisions of ch. 83, a bill to dissolve the corporation and sell the property under ch. 53, sec. 57. Any deposition can be taken in such a cause that could be taken in any other cause in which an infant is a party. Hurst v. Coe, 30 W. Va. 158, 3 S E. Rep. 564.

But Guardian Ad Litem Must Be Notified.—It is error to allow a deposition to be read against infants, when it does not appear that their guardian *ad litem* had been served with notice. Walker v. Grayson, 86 Va. 337, 10 S. E. Rep. 51.

Powers of Guardian Ad Litem.

His Power Confined to the Case in Which He Is Appointed.—The power of the guardian *ad litem* is confined to that particular case and his duty is to manage the case and see to the interest of that particular infant, who must in some way, by appointment and answer be specifically named or designated, for some defendant may appear to be an infant, who is not so named in the bill, as in the principal case. Alexander v. Davis, 42 W. Va. 465, 26 S. E. Rep. 291.

May Consent to Removal of Cause.—A guardian *ad litem* may consent, for his wards, to the removal of the suit from one circuit court to another. Lemmon v. Herbert, 92 Va. 653, 24 S. E. Rep. 249.

His Answer Cannot Be Read against Infant.—"No rule is better settled, than that an answer of an infant by guardian *ad litem* cannot be read against him at all, for any purpose." BALDWIN, J., in Bank of Alex. v. Patton, 1 Rob. 499.

Presumption That Infant Has Come of Age.—Though the defendant was an infant when the action was instituted, yet as she did not set up her infancy to defeat the action, and as it may be reasonably inferred from the evidence that she was of full age when the cause was heard upon a demurrer to evidence, and appeared and defended herself by counsel, she is bound by the judgment. Staton v. Pittman, 11 Gratt. 99.

Where an infant defendant answers a bill by her guardian *ad litem* and the case is heard on such answer, if she afterwards appeals in her own name and her right to appeal is not questioned in the record, it is assumed that she has arrived at majority and her appeal will be allowed, though other adult defendants will not be allowed to appeal, where the bill was taken as confessed as to them and they made no motion in the lower court to reverse the decree, under Code W. Va. ch. 134, § 5. Bock v. Bock, 24 W. Va. 586.

C. SALE OF INFANTS' LANDS.—See this subject in monographic *note* on "Guardian and Ward" appended to Barnum v. Frost, 17 Gratt. 398.

Jurisdiction of Equity.—Courts of equity have no inherent power to sell the lands of infants, and can do so only as statutes enable them to do so. Hoback v. Miller, 44 W. Va. 635, 29 S. E. Rep. 1014; Pierce v. Trigg, 10 Leigh 406; Faulkner v. Davis, 18 Gratt. 651.

Sales under Acts of Assembly.

When Valid.—An act of assembly for the sale of an infant's lands, not proved to have been obtained by fraud, is valid, when it enforces no new obligation, nor takes away any antecedent rights from the heir, whom it is intended to benefit by selling the lands upon credit and consequently more to his advantage. And the fact that a small excess is raised beyond the sum required, by the act, will not invalidate the sale, when it arises from unexpected amounts of land discovered upon the surveys, to be in the lots, in excess of the quantities called for in the leases. Spotswood v. Pendleton, 4 Call 514.

Conduct of Sale.—A sale under an act of assembly may be either public or private and sales to tenants, who, before the lands were put up, agreed to give the prices contained in a previous contract made by the trustees, were good, as nobody bid against them. In such case the trustees may sell by agents. Spotswood v. Pendleton, 4 Call 514.

In Pursuance of Ancestor's Contract.—Where there is a contract between the owners of realty that the survivor may sell it, a court of equity on the death of one may decree the specific performance of the contract, though the heirs of the deceased party are infants. It is not necessary in such a case, to proceed under the statute providing for the sale of infants' lands, and though the surviving party to the contract undertakes to make a sale of the property by his own authority without seeking the aid of a court of chancery, yet, on a bill by the executrix and heirs of the deceased party to affirm the sale, the court may affirm the sale already made, if it appear proper, instead of ordering a new one. Goddin v. Vaughn, 14 Gratt. 102.

On a Bill to Marshal the Assets.—In a proceeding by the plaintiffs as simple contract creditors, entitled to marshal the assets, the court has author-

ity to decree, at a proper time, a sale of the real estate in the hands of the infant heirs, so far as necessary, but it is premature to do so before ascertaining the amount of indebtedness chargeable upon the lands of the decedent. Cralle v. Meem, 8 Gratt. 496.

A Sale Not Compulsory on the Court.—On a bill to marshal the assets, a court of chancery is not bound to decree a sale of the lands of infant heirs, and if it appears that the debts can be satisfied within a reasonable time out of the rents and profits, a sale should not be decreed; but if a sale is decreed, the marshal must follow the directions of the decree; if he has good reasons for thinking the sale injurious to an infant defendant, he should make a special report to the chancellor. Tennent v. Pattons, 6 Leigh 196.

Sale in Lieu of Partition.—Under the section of the Code Va. 1887, § 2564, providing for the sale of infants' lands if partition cannot conveniently be made, it must appear that partition cannot conveniently be made and also that the interests of the parties will be promoted by the sale. It is not necessary that these facts should appear from the report of the commissioners or by the depositions of witnesses. It is sufficient if the facts appearing in the record reasonably warrant the decree of sale. This is especially true when the proceeding is to defeat the title of an innocent purchaser. Zirkle v. McCue, 26 Gratt. 517.

Construction of Act for the Sale of Small Inheritances.—The statute providing for the sale of small inheritances was construed in Parker v. McCoy, 10 Gratt. 594, to apply to cases where the value of each heir's share after partition was less than $300, even though the proportion of each heir in the proceeds would exceed $300 if the property were disposed of in a lump.

No Sale Can Be Had under a Bill for the Assignment of Dower.—When the single object of a suit in the county court is the assignment of the widow's dower, but the court not only directs the dower to be assigned, but, apparently *sua sponte*, decrees a sale of the residue of the land, the heirs being infants at the time and the interest of each party by the record exceeds $300, Code Va. 1860, p. 581, § 3, such a decree is void for want of jurisdiction, and when the cause is afterwards removed to the circuit court and the petition of the infants denying the jurisdiction of the county court is dismissed, the rights of the infants are not rendered *res judicata* by such decree of the circuit court. Seamster v. Blackstock, 83 Va. 232, 2 S. E. Rep. 36.

GREEN, J., in Hull v. Hull, 26 W. Va. 1, said: "My conclusion therefore is, that the court in this case, all the heirs being infant defendants, and the suit having been brought by the widow for an assignment of her dower, had no power to decree a sale of any of the lands, when the legal title of the lands was in the husband in his lifetime. And it was not proper for the court to decree the sale of any of the lands, which the husband had purchased and paid for in part during his lifetime: first, because there were no peculiar circumstances stated in the bill, which would justify such a decree of sale; and, second, because there was not a particle of proof, that the interest of the infant heirs would be promoted by a sale; and lastly, because there was no answer filed in the cause by their guardian *ad litem*, without which answer the court had no power or authority to sell any of the lands of these infants, whether their title to them was legal or only equitable."

Except Where Dower Is in an Equity of Redemption.—A widow, who has dower in an equity of redemption may file a bill to have the land sold, though some of the heirs are infants. The fact that she prays for a certain investment of the proceeds, or asks for alternative relief, will not invalidate the proceedings as to the infant heirs. Daniel v. Leitch, 13 Gratt. 195.

The conclusion of GREEN, J., in Hull v. Hull, 26 W. Va. 1, was that in a suit by a widow for the assignment of her dower, the court might order a sale of the land even though the heirs were infants, where the husband had merely an *equitable* title, *e. g.*, an equity of redemption, or a contract entitling him to a deed upon the payment of the purchase money if the interests of the infant heirs would be benefited thereby, since in these cases, the other party, mortgagee or vendor has a right to have the land sold. But where the husband had the legal title, *e. g.*, if the land in the hands of the husband were subject to a vendor's lien, the land cannot be sold even if to the advantage of the infants.

Sale Cannot Be Had on a Bill to Surcharge and Falsify a Guardian's Account.—A sale or partition of infants' lands cannot be procured by a bill filed by the infants by their next friend against their guardian to surcharge and falsify his account and to have him removed. They must proceed under the statute, Va. Code 1873, ch. 124, §§ 2-8; Va. Code 1887, § 2616. Snavely v. Harkrader, 29 Gratt. 112.

Proper Parties.

Infants May Be Parties Plaintiff Instead of Defendant.—The fact that the infants are plaintiffs with their mother, instead of being made defendants, is no objection to the proceedings in a suit for the sale of their land. Quesenberry v. Barbour, 31 Gratt. 491.

"Those Who Would Be His Heirs if Infant Were Dead."—Where a bill is filed by a father and mother, who are trustees of certain lands for their infant children, to sell these lands, it is a sufficient compliance with § 2616, Code Va. 1887, providing that if there is an infant defendant, all those who would be his heirs, if he were dead, should be made parties, that the infants should be made parties defendant, their parents being already parties plaintiff, these being the persons who would be the heir of each infant if he were dead. Lancaster v. Barton, 92 Va. 615, 24 S. E. Rep. 251.

Service of Process on Infants Not Necessary.—The practice of serving infant defendants with process after they are 14 years of age answers merely as a useful safeguard; but such service is not necessary and is practised only because the infant may furnish some aid in the selection and appointment of his guardian *ad litem*, and formerly he could not be appointed until the infant had in some manner been brought before the court, but that is no longer necessary. The acceptance of the guardian *ad litem* is also necessary, to be shown by filing or adopting an answer. Alexander v. Davis, 42 W. Va. 465, 26 S. E. Rep. 291; Parker v. McCoy, 10 Gratt. 594.

In Condemnation Proceedings.—In condemnation proceedings under the statute, ch. 42, Code W. Va., it is not necessary for infant owners to be served with notice of the application; but the court may so order. Charleston, etc., Bridge Co. v. Comstock, 36 W. Va. 263, 15 S. E. Rep. 69.

In Proceedings under Statute for the Sale of Small Inheritances.—Under the statute providing for the sale of small inheritances it is not necessary to

serve process on the infant defendants. Parker v. McCoy, 10 Gratt. 594.

Order of Publication.—Where infant defendants are proceeded against as nonresidents by order of publication, they can attack the validity of the decree by showing the falsity of the affidavit of their nonresidence in a *direct* proceeding for the purpose; but they cannot attack it collaterally in another forum when the record states that they were nonresident. Lawson v. Moorman, 85 Va. 880, 9 S. E. Rep. 150.

Verification of Bill.—Under section 2616 of the Code Va. 1887, which provides that the bill filed to sell infants' lands shall be verified by the oath of the plaintiff, it is not necessary for the affidavit to show *on its face* that it was sworn to by the plaintiff, if that fact is proved by the evidence, though the former is the better practice. Lancaster v. Barton, 92 Va. 615, 24 S. E. Rep. 251.

Infant over Fourteen Must File an Answer in Proper Person.—Where one of the infant defendants is over fourteen years of age, it is error for her not to file an answer in proper person. Code Va. 1887, § 2616; Cooper v. Hepburn, 15 Gratt. 551.

Signature and Verification.—Where the personal answer of an infant over fourteen years of age, required by the statute, though, in fact, neither signed nor sworn to by *her*, yet appears by the record to have been duly signed and sworn to by the infant; and it appears that the suit was brought at the solicitation of the infant, that she was twenty-one, six months after the suit was brought and sixteen months before the sale, and she made no objection to the confirmation of the sale, she is estopped from afterwards objecting to the sale on the ground that she had not signed or sworn to her answer. Lancaster v. Barton, 92 Va. 615, 24 S. E. Rep. 251.

Presumption That Answer of Guardian Ad Litem Was Sworn to.—Though it does not appear that the answer of the guardian *ad litem* was sworn to, it will be presumed to have been done in accordance with the maxim, *omnia praesumuntur rite esse acta.* Durrett v. Davis, 24 Gratt. 302.

Answer of Guardian Ad Litem Erroneously Purporting to Be That of Infant by Guardian Ad Litem.—Where the answer filed by the guardian *ad litem* purports to be the infant's by his guardian *ad litem*, but is signed by the guardian *ad litem* and is in fact his answer, it is to be considered his answer. Durrett v. Davis, 24 Gratt. 302.

Substantial Compliance Sufficient.—Where the proceedings for the sale of infants' lands are in substantial if not literal conformity with the requirements of the statute they are binding on the parties thereto and the sale made, under the decree rendered therein, is a valid sale and confers a good title on the purchaser. Quesenberry v. Barbour, 31 Gratt. 491.

Error Must Be Palpable and Substantial.—JUDGE STAPLES, in Zirkle v. McCue, 26 Gratt. 517, in summing up the result of the Virginia authorities on the subject, said: "These extracts, and others that might be given, show, that while this court has never gone as far as the courts of other states in favor of purchasers at judicial sales, it has, on all occasions, manifested a very strong disinclination to interfere with the rights of such purchasers, unless upon palpable and substantial errors in the proceedings and decrees under which such titles are acquired."

West Virginia Doctrine—Answer Must Be Filed by the Guardian Ad Litem.—In a suit to sell infants' lands there must be an answer filed by their guardian, and the court expressly disapproved of the extent to which the Virginia court had carried the presumption of regularity in the proceedings in Durrett v. Davis, 24 Gratt. 302, and other cases, and held a paper purporting to be an answer of the guardian *ad litem* in which neither the name of the guardian *ad litem* nor that of any of the infants appear and which is not signed by said guardian or any attorney in his behalf, no answer at all, and that the decree was void for want of jurisdiction. Hull v. Hull, 26 W. Va. 1.

Infants Cannot Consent to a Decree.—Infant defendants are incompetent to consent to a decree of sale of their lands, and no one can consent for them. They can select no attorney and a guardian *ad litem* to defend the infants cannot consent away their inheritance. Daingerfield v. Smith, 83 Va. 81, 1 S. E. Rep. 599; Cralle v. Meem, 8 Gratt. 496, 530.

Necessity for Construction of Will.—The statute does not require as a prerequisite that the will under which infants hold lands shall be construed before a sale is ordered. Lancaster v. Barton, 92 Va. 615, 24 S. E. Rep. 251.

Report of Commissioner.—The report of a commissioner upon an order of reference merely to take evidence as to the propriety of the sale of infants' lands, is not such a report as is required by the statute to lie ten days before being acted on, and the failure to do so will not affect the validity of the sale. Lancaster v. Barton, 92 Va. 615, 24 S. E. Rep. 251.

Conduct of Sale.—Where the decree directs that the sale be made upon the premises, the commissioner acts irregularly in making it at a different place; especially after advertising that it would be made on the premises. He should report to the court that it could not be made there for want of bidders, and obtain instructions for his future action. A sale having been thus irregularly made, as the purchasers could not enforce their contracts, if resisted by the parties in the cause, they ought not to be compelled to perfect them if they object. Talley v. Starke, 6 Gratt. 340.

Power of Commissioner of Sale.—Where a commissioner by one decree is authorized to sell the lands of infants and under a second decree is authorized to rent them out on such terms and for such time as he may deem most advantageous to the estate, upon the termination of the lease it is not necessary for him to apply again to the court for authority to sell. Dixon v. McCue, 21 Gratt. 373.

Sales for Confederate Currency.—In view of the fact that confederate currency was the only currency in circulation in March 1863, all decrees pronounced for the sale of infants' property at so late a period of the war, and all judicial sales made under such decrees must be taken to be rendered and made for the currency which then constituted the only circulating medium of the country, unless such decree in plain terms directed otherwise. Walker v. Page, 21 Gratt. 636; Dixon v. McCue, 21 Gratt. 373.

Liens Should Be Ascertained.—The real estate of an infant should not be decreed for sale until the liens thereon are ascertained and fixed. White v. Straus (W. Va.), 35 S. E. Rep. 843.

Presumption When Records Have Been Destroyed.—Where the records have been destroyed, it will be presumed that the evidence was sufficient to satisfy the court that the interest of the infants would be promoted by the sale. Walker v. Page, 21 Gratt. 636.

Rights and Duties of Purchaser.—LEE, J., in a dictum

in Parker v. McCoy, 10 Gratt. 594, said: "There are strong authorities to show that a fair purchaser under a decree will not be affected by any error or irregularities in the proceedings; he is not bound to go through all the proceedings and look into all the circumstances and see that the decree is right in all its parts. * * He cannot of course be protected against a title not in issue in the cause, nor against the claims of persons not parties to the cause, and therefore not bound by the decree; but it would seem that he has the right to presume the court has taken the necessary steps to investigate the rights of the parties, and upon such investigation has properly decreed the sale." As, *e. g.*, the fact that a lot was omitted which would have raised the share of each heir above $300 and so takes the inheritance out of the statute allowing the sale of small inheritance.

It is the business of a purchaser at a judicial sale to see that all the persons who are necessary to convey the title are before the court, and that the sale is made according to the decree. But, "He will not be affected by error in the decree, such as not giving an infant a day to show cause, in cases in which a day ought to be given; or decreeing a sale of lands to satisfy judgment debts without an account of personal estate." *A fortiori* he will not be affected by any imperfection in the frame of the bill, if it contain sufficient matter to show the propriety of the decree. Daniel v. Leitch, 13 Gratt. 210.

Failure of Purchaser to Comply with the Terms of Sale.—When it does not appear that the purchasers were guilty of any fraud, imposition or other unfair conduct, and they purchased at a sale publicly and fairly made; and complied with all the terms by the prompt payment of the first three instalments of the purchase money and when the fourth and last instalment became due, one of them was in the army and the other a prisoner in the federal lines, and the appellants sustained no loss or damage by the failure of said purchasers to comply with this part of the contract, the purchase will not be set aside. Dixon v. McCue, 21 Gratt. 373.

Payment to Unbonded Commissioner Good, Where Proceeds Are Lost without His Default.—Although no bond was given by the commissioner, before he proceeded to collect the purchase money for the land, yet, inasmuch as he was authorized by the decree, to collect the money as it fell due, and to pay it to the receiver of the court, in the event of the refusal of the parties to receive it, the money having been paid by the purchasers, and deposited by said commissioner in a bank, acting as receiver, to the credit of the cause, in consequence of such refusal of the parties interested, and said fund having been lost without the default of said commissioner, the purchasers cannot be in any manner prejudiced by his failure to execute the bond required by law and the payment to him is good. Dixon v. McCue, 21 Gratt. 373.

Position of Bona Fide Purchaser from Purchaser at Sale.—Where infants, on coming of age, attempt to show cause against a sale of their lands by alleging that, though a receipt was given, no money was in fact paid, and, their guardian and his sureties being insolvent, attempt to charge a purchaser for value and without notice from the purchaser at the sale; *held*, that the *bona fide* purchaser is not responsible. Pierce v. Trigg, 10 Leigh 406.

Bill to Confirm Sale. -Where, in a bill to confirm a sale of infants' lands, there was an interlocutory decree, and the proceedings are irregular on their face, the bill not being sworn to, nor the purchaser made a party, nor it appearing that the testimony was taken in the presence of the guardian *ad litem* or on interrogatories agreed to by him, an appeal will not be allowed the infant on his coming of age, but plaintiff will be allowed to amend his bill in the above respects and if it shall appear that the sale was necessary under the facts existing at the time, and was fairly made and at full price it will not be set aside on account of such irregularities. Hughes v. Johnston, 12 Gratt. 479.

Infant Coming of Age or Marrying during Pendency of Suit.—Where an infant party to a suit comes of age or marries during the pendency of a suit for the sale of her lands, it is her duty to make the fact known to the court if she desires to become a party as an adult, and her husband must likewise communicate the fact of the marriage to the court if he wishes to become a party. If they fail to do so the validity of the subsequent proceedings cannot be impugned. Lancaster v. Barton, 92 Va. 615, 24 S. E. Rep. 251.

Presumption Is That They Continued under Disability.—When it is assigned as error that the decree ought to have been reheard because some of the parties had been proceeded against merely by the answer of a guardian *ad litem*, when, in point of fact they had come of age and hence were *coram non judice*, but it is not alleged *when* they came of age, the presumption is that they were still under disability when the decree of sale was entered, and, it not being alleged that they attained their majority within six months next preceding the filing of the petition, the assignment is bad. Woodson v. Leyburn, 83 Va. 843, 3 S. E. Rep. 873.

Effect of Sale on Character of Property.

Proceeds Remain Realty.—A judicial sale of land, as a general rule, converts it into personalty. But if land, belonging to an infant, be sold, under chapters 79 or 83 of the Code of West Virginia, 1891, the sale does not at once convert into personalty, but the proceeds remain realty until the infant comes of age, when they are to be regarded as personalty. Findley v. Findley, 42 W. Va. 372, 26 S. E. Rep. 433.

Until They Come into the Hands of Someone Sui Juris.—Where infants' lands are sold under a decree of court, the proceeds retain the character of realty and pass as real estate to her infant child and on its death during infancy, and the husband surviving, the property will go to the child's heirs on the part of his mother, subject to the life estate of the husband; the impress of realty never having been removed. Code Va. 1887, § 2626; Vaughan v. Jones, 23 Gratt. 444.

Rights of Creditors in Resulting Fund Must Be Protected by the Decree.—The fund resulting from the sale of the lands continues charged with the debts which were chargeable on the land before the sale. Garland v. Loving, 1 Rand. 396.

Application of Proceeds to Infants' Maintenance, etc.—Until the 19th day of March, 1873, there was no law in Virginia which permitted any part of an infant's real estate to be appropriated to his maintenance, education, or support. On that day the legislature passed an act (Acts 1872-73, page 178), giving the circuit courts the power to apply the proceeds of his real estate, *beyond* the income, to the infant's maintenance and education, and declaring that, to the extent such proceeds were so applied, and no further, they should be deemed personal estate. This court, in the case of Rinker & Wife v. Streit, 33 Gratt. 667-8, decided that this

act is not retroactive and that the order of the court for the sale of infants' lands and application of the proceeds must be made anterior to the advancements or the court has no power to sanction it. Gayle v. Hayes, 79 Va. 542.

See *note* on "Guardian and Ward" appended to Barnum v. Frost, 17 Gratt. 398.

Obligation to See to the Application of the Purchase Money.—Where the power of sale is to pay debts generally and not according to a schedule, purchaser will not be obliged to see to the application of the purchase money. Spotswood v. Pendleton, 4 Call 514.

Where property was conveyed to a trustee to sell for cash or on credit, whenever he could obtain a fair price and to pay over the proceeds to certain infants on their respectively coming of age, a purchaser is not bound to see to the application of the purchase money, whether the sale is made before or after any of the *cestuis que trustent* come of age. Woodwine v. Woodrum, 19 W. Va. 67.

Effect of Confirmation.

Purchaser Can Only Demand a Good Title.—When a sale of infants' lands has been confirmed, the purchaser has no right to demand an absolute discharge from his purchase even if the title be defective; the utmost such purchaser can demand is that he be discharged if the defect in the title cannot be remedied or be not remedied in a reasonable time. Daniel v. Leitch, 13 Gratt. 195.

Sale Beneficial to Infants Not Set Aside at Suit of Purchasers.—Though a sale of infants' lands is prematurely made, yet if the sale is made and confirmed, the court will not set the sale aside on the petition of the purchasers, if, upon the hearing, it appears that the sale is beneficial to the infants. Cralle v. Meem, 8 Gratt. 496; Daniel v. Leitch, 13 Gratt. 195.

Interlocutory Decree of Sale Should Be Set Aside by a Petition in the Cause.—Where the proceedings of sale and confirmation are interlocutory merely, an application by the purchasers to set them aside on the ground that they were disadvantageous to the infants, should be by petition in the cause, and if they proceed by a *bill*, the bill should be treated as such a petition and brought to a hearing with the original cause. Cralle v. Meem, 8 Gratt. 496.

Where Only Part of the Purchasers Object.—The appellate court having set aside the sale of certain parcels of the land at the instance of the purchasers, who were the appellants in the cause, and the grounds of the objection to the sale being such as the infant parties may make to all the sales, the court will set aside the whole decree confirming the sale of all the parcels, though the other purchasers are satisfied with their purchases, and are not parties to the appeal; and will send the cause back, for the court below to determine whether these last-mentioned sales ought to be set aside, or confirmed, with the consent of the purchasers, and for the benefit of the infant defendants. Talley v. Starke, 6 Gratt. 340.

Effect of Reversal of Decree on Purchaser's Title before the Statute.—In a dictum in Durrett v. Davis, 24 Gratt. 302, STAPLES, J., said, "While the question may be regarded as an open one in Virginia, to some extent, yet the tendency of opinion has been that the title falls with the reversal of the decree, except so far as the sale is within the influence of the statute."

But in Hull v. Hull, 26 W. Va. 1, GREEN, J., approved the doctrine that if the court has jurisdiction of the parties and of the subject-matter, and the sale has been confirmed, the title of the purchaser will be protected independently of statute, but he acknowledged that the Virginia authorities had not gone so far.

Since the Statute.—Where the sale was made more than six months after the date of the decree, and was duly confirmed, the purchasers are fully protected by the provisions of the 8th sec. of ch. 178, Code of 1860, Code of 1887, § 3425, which declare, that if a sale of property be made under a decree or order of a court, after six months from the date thereof, and such sale be confirmed, though such decree or order be afterwards reversed or set aside, the title of the purchaser at such sale shall not be affected thereby; but there may be a restitution of the proceeds of sale to those entitled. Dixon v. McCue, 21 Gratt. 373; Quesenberry v. Barbour, 31 Gratt. 491.

Where the sale was made less than three months after the date of the decree, the statute does not apply. Hull v. Hull, 26 W. Va. 1.

Statute Applies to Sales of Infants' Land.—§ 3425 of the Va. Code 1887, providing that the title of a purchaser at a judicial sale, made six months after a decree of court directing it, and duly confirmed, should not be affected by a subsequent setting aside of such decree, applies to the judicial sale of infants' lands had under proper proceedings for the purpose. Lancaster v. Barton, 92 Va. 615, 24 S. E. Rep. 251; Cooper v. Hepburn, 15 Gratt. 551.

The fact that the sale is made by means of written proposals, made by those desiring to purchase, to the commissioner and by him reported to the court for acceptance and confirmation, works no exception to the statute, on the ground that the purchaser could not know whether his bid was accepted, before it was confirmed. ROBERTSON, J., dissenting on the ground that where the acceptance and confirmation are simultaneous, an opportunity for objection should be given. Cooper v. Hepburn, 15 Gratt. 551.

Illustration.—Where one of the infants is over fourteen years of age it is error for her not to file a bill in proper person. Code 1887, § 2616. But a purchaser cannot ask that the sale be set aside on that account, after the confirmation of a sale made six months after a decree of court. 1 Rev. Code 1819, ch. 178, § 8; Code 1887, § 3425. The most that he could ask is that he should be protected against any future assertion of claim by the infant over fourteen years of age, which was effectually done by § 3425 of the Code. The court in its discretion might have ordered such answer to be filed, for the sake of regularity. Cooper v. Hepburn, 15 Gratt. 551.

But Court Must Have Jurisdiction.—It was held in a dictum by GREEN, J., in Hull v. Hull, 26 W. Va. 1, that where no answer was filed by the guardian *ad litem* of infant defendants, the statute, declaring that the title of a purchaser should not be affected by a reversal of the decree when the terms of the statute had been complied with, Va. Code 1860, ch. 178, § 8, then in force in West Virginia, W. Va. Code ch. 132, § 8, had no application, since the decree was void for want of jurisdiction in the court, the infants not being before the court, the court saying: "In order to protect a purchaser at a judicial sale of infants' lands, which has been confirmed, the court making the decree of sale must have competent jurisdiction over the parties whose lands are to be sold, if they have not, *e. g.*, by reason of the failure of the guardian *ad litem* to file an answer, the decree will not protect a purchaser under it, and, if the decree is reversed, the title of the

purchaser will fall with it. Hull v. Hull, 26 W. Va. 1.

Everyone Bound with Notice of Want of Jurisdiction.—A purchaser from a purchaser under a decree, void for want of jurisdiction, will not be regarded as a *bona fide* purchaser without notice. He is bound to know the want of jurisdiction in the case. Hoback v. Miller, 44 W. Va. 635, 29 S. E. Rep. 1014.

Rights of Purchaser under Void Decree, Who Has Paid Liens against the Land.—A purchaser of land under a void decree, whose money has been applied to the payment of liens on the land, valid against the owner of the land, will be entitled to charge such money upon such land, by substitution to the right of the creditor, upon disaffirmance of the sale. Such purchaser may maintain a bill to enforce such right, and, as incident to his relief, make his bill a creditor's bill. Hull v. Hull, 35 W. Va. 155, 13 S. E. Rep. 49.

Validity of Sale Cannot Be Questioned in a Collateral Proceeding, if Court Had Jurisdiction.—The court having had jurisdiction of the case, being the sale of a trust estate in which infants were interested, under the statute, the validity and propriety of the decree for the sale of the land cannot be questioned in a collateral proceeding. Quesenberry v. Barbour, 31 Gratt. 491; Lawson v. Moorman, 85 Va. 880, 9 S. E. Rep. 150.

Exchange of Infants' Lands.—An exchange of infants' lands in 1884 could only be valid if made in accordance with the provisions of the Va. Code 1873, ch. 124, § 2, Va. Code 1887, §§ 2616, 2625, providing for the sale of infants' lands; this statute must be strictly followed, and where, as in the principal case, the bill was filed by a person who was neither guardian, trustee nor anyone interested in the estate, and the trustee was not a party and the depositions were taken without a guardian *ad litem* for the infants, the sale is void, and is not validated by the subsequent act (Act 1887, p. 501) providing for exchange.

D. EFFECT OF DECREES ON INFANTS.

Infant Defendants.—It is well settled that an infant, as a general rule, is as much bound by a decree against him as a person of full age. He is not permitted to impeach such decree, except on the same grounds as a person of full age might have impeached it, such as fraud, collusion or error. Zirkle v. McCue, 26 Gratt. 517; Harrison v. Wallton, 95 Va. 725, 30 S. E. Rep. 372; Pennybacker v. Switzer, 75 Va. 671, 688; Lafferty v. Lafferty, 42 W. Va. 785, 26 S. E. Rep. 263.

Absolutely Binding if Beneficial to the Infants.—Although it is a general rule that an infant *defendant* is not bound by a decree, if, when he arrives at age, *he can show error in it*, yet, it seems that, where the decree is obviously for his benefit, his rights may be absolutely bound by it, as where the vendee is trying to set aside a sale, advantageous to the infant, on the ground that the infants are not bound. Harman v. Davis, 30 Gratt. 461; Brown v. Armistead, 6 Rand. 594.

Infant Plaintiffs.—An infant *plaintiff* is as much bound by a decree as an adult, if the decree is beneficial to him. Harman v. Davis, 30 Gratt. 461; Brown v. Armistead, 6 Rand. 594.

Consent Decrees against Infants Binding if Beneficial.—Although infants are incapable of consenting to a decree, it will be binding on them, if for their benefit, and if the infant plaintiffs are satisfied with the decree and seek to enforce it, the defendant cannot be released from it on the ground that it is not binding on the infants. Harman v. Davis, 30 Gratt. 461.

Otherwise if to Their Prejudice.—Where, in accordance with the provisions of sec. 53, ch. 167, Code Va. 1873, a cause, in which there are infant defendants, is submitted to the court by consent of all parties (the infants being represented by guardian *ad litem*) and a decree *beneficial* to the infants is rendered, on a bill of review filed by the infants on coming of age, such decree will not be set aside on the ground that infants cannot consent; *aliter* if the decree were to the *prejudice* of the infant. Morriss v. Va. Ins. Co., 85 Va. 588, 8 S. E. Rep. 383.

A Fortiori if Infants Are Not Consulted.—Where land, subject to a deed of trust, descends on the heirs, some of them being infants, a court of equity has no authority to decree a conveyance of the interests of the infant heirs, in accordance with a compromise to which they are not parties, and as to which they were not consulted, to the grantees of the deed of trust in satisfaction of the debt, although the transaction enures to the benefit of the infants; but if the infants think proper to set aside the transaction, their interest will in the end be subjected to the payment of a proportional amount of the debt secured by the deed of trust. Tracey v. Shumate, 22 W. Va. 474.

Attorney of Opposing Interest Cannot Consent for Them.—The attorney for parties whose interests are adverse to those of infant parties, will not be allowed to consent to a decree in behalf of the infants. Walker v. Grayson, 86 Va. 337, 10 S. E. Rep. 51.

Submission by Infants to Arbitration Not Binding.—Although infants are bound by judgments had under the superintendence and protection of the court, yet, where the case is referred to arbitrators, whereby they are deprived of that protection, a submission by infants, even by rule of court, ought not to be sanctioned. For, as awards are in the nature of judgments, and are to be final and conclusive, which cannot be, where one party has a right to avoid them, it follows that a submission by infants, although with adults, cannot be obligatory on either party. Britton v. Williams, 6 Munf. 453.

Infant Must Formerly Have Been Given a Day to Show Cause.—It was error to decree against an infant, without giving him a day, after he came of age, to show cause against it. The proper form was as follows: "And this decree is to be binding on the said infant, unless he shall, within the time of six months after he shall attain his age of twenty-one years (being served with process for that purpose), show unto this court good cause to the contrary." The process is by way of subpœna to be served on the defendant on his coming of age. If he shows no cause the decree is made absolute upon him. But if he comes forward to show cause, he may put in a new answer and make a new defence. Tennent v. Pattons, 6 Leigh 196.

Applied to Suits for Partition.—The right of an infant to a day in court applied as well to suits for partition as to other suits. Zirkle v. McCue, 26 Gratt. 517.

When Unnecessary.—Whenever an infant was decreed to do an act, he must have six months, after full age, allowed him to show cause against the decree, as where he was foreclosed. But, where lands were decreed to be sold for the payment of debts, there was no necessity to allow a day, unless he was decreed to join in the conveyance, as the commissioners of sale would execute the deed. Wilkinson v. Oliver, 4 H. & M. 450.

Interlocutory Decree Need Not Give the Infant a Day.—But where the decree was *interlocutory* it was not

necessary to give the infant a day to show cause, as this omission might be cured later. Pickett v. Chilton, 5 Munf. 467.

Remedy, Where No Day Was Given.—For such error he might seek redress against the decree, without waiting till he came of age, and he might do this either by bill of review, rehearing, or by original bill, alleging specially the error of the former decree. Tennent v. Pattons, 6 Leigh 196; Jackson v. Turner, 5 Leigh 127; Braxton v. Lee, 4 H. & M. 376. And the leave of court was not necessary to file a bill of review in such a case, and if refused, an appeal would lie to the court of appeals. Lee v. Braxton, 5 Call 459.

Not Necessary in Any Case Since Revisal of 1850.—Since the revisal of 1849 and '50 it is unnecessary to insert in the decree a provision allowing the infant a day to show cause, but in any proper case he may, within six months after he arrives at maturity, show such cause in like manner as if the decree contained such provision. Zirkle v. McCue, 26 Gratt. 517; Code Va. 1887, § 3424; Code W. Va. ch. 132, sec. 7; Blackwell v. Bragg, 78 Va. 529; Lafferty v. Lafferty, 42 W. Va. 783, 26 S. E. Rep. 262; Alexander v. Davis, 42 W. Va. 465, 26 S. E. Rep. 291.

No "Tacking" of Disabilities Allowed.—One disability cannot be "mounted" upon another, so as to bar the running of the statute of limitations, so that if an infant feme marries before coming of age, she will have only six months after *coming of age*, in which to show cause against a decree against her. Blackwell v. Bragg, 78 Va. 529; Parsons v. McCracken, 9 Leigh 495.

Infant May Show Cause before He Comes of Age.—Section 3424 of the Code allowing an infant, within six months after he becomes of age, to show cause against a decree or order in certain cases, does not prevent him from asserting his rights, whilst an infant, by a next friend as soon as he sees fit to do so. Harrison v. Wallton, 95 Va. 723, 30 S. E. Rep. 372; Lockhart v. Vandyke, 97 Va. 56, 33 S. E. Rep. 613.

Causes Which an Infant May Show.—CHRISTIAN, J., in Walker v. Page, 21 Gratt. 636, said: "Certainly the infant, upon arriving at age, can show no such cause as this, *i. e.*, that the sale was made for confederate money, to entitle him to vacate a decree made against him while an infant. He may show error upon the face of the record; or he may show that the court had no jurisdiction to enter the decree; or if it had jurisdiction, that the proceedings were irregular and not binding upon the parties; or he may show that the case made by the record did not warrant the decree. But whatever cause he may properly show, he certainly cannot reopen the case, and introduce evidence to contradict that already given and acted upon by the court that entered the decree. If the court which pronounced the decree had jurisdiction of the subject and the parties; if its proceedings were regular and in accordance with the requirements of law; and the decree is sustained and justified by the evidence *then introduced*, the infant will not be allowed, as against a *bona fide* purchaser, to go out of the record to show that, upon facts and events arising subsequent to the rendition of the decree, his interests were not promoted by a sale of his real estate.

"To establish a contrary doctrine would in effect defeat the very object of the law, and effectually prevent the sale of any real estate belonging to infants." Lancaster v. Barton, 92 Va. 615, 24 S. E. Rep. 251; Durrett v. Davis, 24 Gratt. 302; Zirkle v. McCue, 26 Gratt. 517; Hughes v. Johnston, 12 Gratt. 479; Frazier v. Frazier, 26 Gratt. 500.

Given as a Shield to Infants, Not as a Sword.—The privilege given to infants to show cause against a decree, is given to enable them to set aside that which is done to their prejudice and not to overthrow what has been justly done, because of some technical objection to the proceedings. But if relief can be given without disturbing a sale rightfully had under a decree, it will be given as where the land was sold for an inadequate price on account of supposed incumbrances; the difference between the price paid and a fair price will be decreed to be paid for the benefit of the infants. Pierce v. Trigg, 10 Leigh 406.

Proper Proceedings to Show Cause.—"The infant, if his cause against a decree be error of law in the case, may proceed by bill of review, or supplemental bill in the nature of a bill of review, showing error of law; and in such bill of review, I do not think the infant would be confined to merely such matters, to show error, as appear on the face of the decree, as in ordinary cases; and he need not have leave of court to file it, as in ordinary cases of bill of review. He may proceed by original bill, not only for fraud, but for error of law. He may proceed by petition, which is but another name for a bill. He may introduce new matter against it, so it existed at the date of decree. He is given the broad right to show cause against it, and under any of these pleadings he is given relief coextensive with the right." Lafferty v. Lafferty, 42 W. Va. 783, 26 S. E. Rep. 262; Ewing v. Winters, 39 W. Va. 489, 20 S. E. Rep. 572. On an application to show cause against a decree, for error of law, the court of appeals can look into the pleadings and evidence, just as on an appeal, in order to see whether there is error. Lafferty v. Lafferty, 42 W. Va. 783, 26 S. E. Rep. 262.

Court of Appeals Has No Jurisdiction.—But an infant cannot file his petition under sec. 7, ch. 132, Code W. Va. in the court of appeals, since that court has no original jurisdiction in such a case. Ewing v. Winters, 39 W. Va. 489, 20 S. E. Rep. 572.

Interlocutory Decrees.—Where an interlocutory decree has been rendered against an infant, he will be allowed upon coming of age, to amend his answer upon notice. Winston v. Campbell, 4 H. & M. 477.

Decrees Absolutely Binding on Infants.

Decree under Statute for the Sale of Small Inheritances.—In Parker v. McCoy, 10 Gratt. 594, it was held that the sale of the lands of infant heirs, where the dividend of each heir, in the opinion of the court should not exceed the value of $300 is one of those special cases in which, by statutory provisions, authority is given to the court, for special reasons, to order the immediate conveyance of an infant's estate and in which he is bound by the order, and entitled to no day, after he attains his age, to show cause against it. LEE, J., extends this doctrine, in a dictum, to the statutory provisions for the conveyance of estates vested in infants, in trust or by way of mortgage, also for making or taking on behalf of an infant, the surrender of a former lease, or the making or taking a new one. The fact that the decree gives the infant his day makes no difference; such order is void.

Judgment of the Board of Commissioners.—By the Act of Assembly, Chanc. Rev. 93 (May, 1779, ch. 12, 10 Stat. Larg. 35, 42-6), the judgment of the board of commissioners, is conclusive even on an infant

when he sues by his next friend, and cannot be impeached. Stephens v. Cobun, 2 Call 440.

E. WAIVER BY INFANTS.

Attorney of Infants Cannot Bind Them by His Waiver.—Where infants sue in equity by a *prochein ami* to compel an administrator to settle his accounts as administrator of an estate in which they are interested as distributees, and such *prochein ami* employs an attorney to represent their interests, such attorney cannot bind the infants by an agreement signed by himself or by another attorney authorized by him, to waive proof of the vouchers and accounts presented by such administrator in the settlement of his administration accounts, or to allow commissions to such administrator which are not allowed by statute. Crotty v. Eagle, 35 W. Va. 143, 13 S. E. Rep. 59.

No Waiver by Adult Codefendant Binding on Infant.—Where the record does not show that the summons was ever served on an infant defendant, though this defect be waived by an adult defendant, it cannot be held to have been waived by the infant, when no guardian *ad litem* has been appointed for him. Hays v. Camden, 38 W. Va. 109, 18 S. E. Rep. 461.

Presumptive Admissions Do Not Apply to Infant Parties.—The rule, that, "where exceptions are taken to certain parts of a commissioner's report, the other parts, not excepted to, are admitted to be correct both as regards the legal principles and the evidence on which they are based," can only apply to adult parties, and not to infants. Kester v. Hill, 46 W. Va. 744, 34 S. E. Rep. 798.

Likewise the rule that the plaintiff having failed to file exceptions to the commissioner's report before the cause was taken to the supreme court, admits that the portions of the report to which they afterwards file their exceptions are correct, does not apply to infant plaintiffs, since, as infants, they can admit nothing and the court may receive exceptions to the report. Kester v. Hill, 46 W. Va. 744, 34 S. E. Rep. 798.

F. STATUTE OF LIMITATIONS.

Saving in Favor of Infants.

Rights to Personal Property.—Persons claiming rights of personal property, being under disability of infancy or coverture when their rights accrue, may prosecute any remedy in equity they are entitled to, by *prochein ami*, at any time while the disability continues, no matter how long; or, in their proper persons, within five years after the disability removed; the right to such remedy being within the saving of the statute of limitations, 1 Rev. Code, ch. 128, § 12; Code 1887, § 2931. Hansford v. Elliott, 9 Leigh 79; Hudsons v. Hudson, 6 Munf. 352; Mortimer v. Brumfield, 3 Munf. 122.

Where by a marriage settlement property is conveyed to the use of the wife, and, after her death, to the use of the husband, and on his death to the use of the children of the marriage, if the parents are deprived of the property in their lifetime, the statute of limitations does not begin to run against the children till they reach twenty-one, since their right does not vest till the death of their parents. Baird v. Bland, 3 Munf. 570.

Right to Make Entry on, or Bring Action for Realty.—The statute, allowing an infant to make entry or bring action within ten years after the removal of the disability of infancy, notwithstanding the fifteen years' limitation may have expired, Va. Code 1873, ch. 146, §§ 4 and 5, Va. Code 1887, § 2917, does not curtail the time allowed the infant for the assertion of his right from ten to fifteen years, but enlarges this time, giving him fifteen years in any event, and ten years after disability removed, in which to bring the action, and it is immaterial which period shall first expire. Birch v. Linton, 78 Va. 584.

When Not Applicable to Action of Ejectment.—The saving in favor of infants, married women or insane persons in the 36th section of ch. 135 of the Code 1873, Code 1887, § 2757, in relation to actions of ejectment does not apply to actions of ejectment, brought by the lessee to recover possession of the leased premises, which had been recovered by the landlord under the 16th section of ch. 138 of the Code 1873, Code 1887, § 2796 that "any person having a right of re-entry by reason of rent being in arrear may serve a declaration in ejectment on the tenant, etc.," when the lessee was an infant when the premises were recovered. Leonard v. Henderson, 23 Gratt. 331.

Probate of Wills in Which Infants Are Interested.—Under the Rev. Code of 1819, vol. 1, ch. 104, § 13, one who was an infant when a will was probated had seven years after the removal of his disability to contest its validity, the Code 1849, ch. 122, § 35, allows him one year; this latter provision is held retroactive and applicable to a will probated in Code 1840, § 18, ch. 149, not applying, so that an infant who comes of age in 1856 cannot file a bill in 1859 to contest its validity. BROWN, J., dissenting. McClintic v. Ocheltree, 4 W. Va. 249.

Right of Redemption.—If real estate is sold for the nonpayment of taxes thereon, and the right of redemption, under the statute, belongs to, or accrues to an infant by reason of title vested, whether before or after the sale, such right may be exercised in behalf of such infant during infancy, and by himself personally within one year after he becomes twenty-one years of age. White v. Straus (W. Va.), 35 S. E. Rep. 843.

Where Land Was Improperly Listed.—The land of an infant being, by mistake, listed by the commissioner of revenue as the property of another person, and sold, as such, for taxes, in December, 1786; being bought by the deputy sheriff, who sold it; conveyed to him by the high sheriff in February, 1795; and afterwards sold by the deputy sheriff; the right of the infant was established against the last purchaser (who bought with full notice of all the circumstances); notwithstanding the suit was not brought until six years after plaintiff attained his full age, JUDGE TUCKER saying that he was of opinion that a court of equity was the proper place of resort to set aside the deed. Yancey v. Hopkins, 1 Munf. 419.

Running of Statute Not Stopped by Supervening Infancy.—If the possession of defendant began in the lifetime of the plaintiff's ancestor, the statute will run over all mesne acts, such as the supervening infancy of plaintiff. Hudsons v. Hudson, 6 Munf. 352; Fitzhugh v. Anderson, 2 H. & M. 289; Parsons v. McCracken, 9 Leigh 495.

If, after the right of action has accrued and the statute of limitations has begun to run, an ousted cotenant dies, leaving infant heirs, the statute continues to run, and their rights are barred, notwithstanding their disability, in the same number of years as would bar their ancestor. They do not inherit the land, but a mere limited right of action, with days already numbered; and, unless they or their friends take the necessary legal steps to save the same within the period fixed by statute, their

right of action is forever lost. Talbott v. Woodford (W. Va.), 37 S. E. Rep. 580; Wilsons v. Harper, 25 W. Va. 179.

Construction of Statute.—Under the provisions of Sess. Acts 1836-7, p. 11, § 10, that entry on lands must be made within seven years after such right accrued, saving to such as are infants, etc., when such right accrued and his or her heirs, three years after the removal of such disability; if such a right accrued to a feme covert, on her death, her heirs, though infants, must assert their right within the three years allowed to the heirs of persons under disabilities and are not to be regarded as infants "at the time when such right accrued to them" so as to entitle them to three years after the removal of their disability. Caperton v. Gregory, 11 Gratt. 505. See Code 1887, § 2917, affirming this doctrine.

Application of Laches to Infants While Infancy Continues.—It is true that delay in the assertion of a right, unless satisfactorily explained, operates in equity as evidence of assent, acquiescence or waiver; and laches and neglect are always discountenanced by a court of equity. Yet an infant or lunatic ought not to be prejudiced because of the failure of a next friend to institute a suit, if such suit is brought promptly after there is some one, upon whom the law imposes the obligation to guard the interest of the infant or lunatic. Knight v. Watts, 26 W. Va. 175.

After Termination of Infancy.—Delay in the assertion of a right, unless satisfactorily explained, even when it does not constitute a positive statutory bar, operates in equity as an evidence of assent, acquiescence or waiver; and especially is such the rule in suits to set aside transactions on account of infancy. Trader v. Jarvis, 23 W. Va. 100.

G. POWERS OF A COURT OF CHANCERY, ELECTION.

Infant Cannot Elect.—An infant cannot make a binding election to take land instead of money to which she was entitled and which has been invested in the land. Shanks v. Edmondson, 28 Gratt. 804.

Neither Guardian nor Trustee Can Elect for Him.—An infant is incapable of making an election, nor can his guardian or trustee elect for him. Carr v. Branch, 85 Va. 597, 8 S. E. Rep. 476.

Court of Chancery May Elect for Him.—Where land is devised to be sold, and the proceeds paid to an infant, the infant has an election to take the land or money; and if his guardian sells the land and the vendee has notice of the trust, and the sale does not appear to be advantageous to the infant, a court of equity can elect for him, and bind him by such election. Turner v. Street, 14 Am. Dec. 792, 2 Rand. 404; Carr v. Branch, 85 Va. 597, 8 S. E. Rep. 476.

Court of Chancery May Appoint Another Trustee for Infant Cestui Que Trust.—The only trustee appointed by a will to manage the estate of infants having died, and there being no provision in the will for the appointment of a successor, a court of equity will appoint one. Dunscomb v. Dunscomb, 2 H. & M. 11.

Powers over Estate of Infant Cestuis.—In Markham v. Guerrant, 4 Leigh 279, CABELL, J., and TUCKER, P., concurred in the opinion of CARR, J., holding that the prospective profits of property conveyed to a trustee for the support of a family could only be charged for *necessaries*, even by authority of a court of chancery, with the express proviso that such decision did not deny the power of a court of chancery to authorize the sale of personal property of infant *cestuis que trustent* in cases where such sale *should* be absolutely *necessary* for their support.

Power of County Courts.—In 1872 the county courts had power to authorize a trustee of infants' personalty to execute a mortgage thereof to secure a loan, effected in order to free it from liens. Carr v. Branch, 85 Va. 597, 8 S. E. Rep. 476.

VI. SUCCESSION TO INFANT'S ESTATE.

Under the Act of 1792.—Under the 5th, 6th, and 7th sections of the Act of 1792, "to reduce into one the several acts directing the course of descents," where an infant, having title to real estate of inheritance derived by purchase or descent immediately from the father, dies without issue, and with no brother or sister, or descendant of either; the father being dead, but the *mother living*; the right of inheritance is not in abeyance, but goes in parcenary to the brothers and sisters of the father, or their lineal descendants; neither the mother nor any issue she may have had by any person other than his father can inherit any part thereof: and, *vice versa*, such estate being derived immediately from the mother; and she being dead, but the father living, it goes in parcenary to the brothers and sisters of the mother, or their lineal descendants. Templeman v. Steptoe, 1 Munf. 339; Tomlinson v. Dillard, 3 Call 105; Addison v. Core, 2 Munf. 279; Dillard v. Tomlinson, 1 Munf. 183.

The personal estate belonging to an infant will follow the same rules of distribution and go to the same persons as the realty. Tomlinson v. Dillard, 3 Call 105; Dillard v. Tomlinson, 1 Munf. 183.

The true construction of the 7th section of the act of 1792 "reducing into one the several acts directing the course of descents," as to the case of an infant, is, that if there be no mother, etc., and the estate was derived from the father or mother, the inheritance shall not be divided into moieties, but the whole shall go to the kindred of that parent from whom the estate was derived. Addison v. Core, 2 Munf. 279.

The Grandmother Excluded.—Under the 5th section of the Act of Descents of 1792, where an infant died without issue, having title to certain real estate derived by descent immediately from the father; leaving no relations in the paternal line, but a grandmother and uncle, the grandmother was not entitled to inherit any part of such estate, but the paternal uncle was entitled to the whole. But see Rev. Code of 1819, ch. 96, sec. 11, 12, vol. 1, p. 356; Liggon v. Fuqua, 6 Munf. 281.

Profits Follow the Corpus of the Estate.—The profits of the estate of an infant dying intestate (including the increase of slaves) accruing to such infant in his lifetime but not applied to his use or otherwise lawfully disposed of ought to go to the person inheriting such estate generally. Dillard v. Tomlinson, 1 Munf. 183.

Acts Do Not Apply Where Property Is Not Derived Immediately from Father to Mother.—But neither the mother nor her issue is excluded, where the property is derived, not immediately, but by intervening succession, from the father. Dillard v. Tomlinson, 1 Munf. 183.

Present Statute.—Under the present statute the real estate of an infant dying without issue under twenty-one passes to his heirs on the part of the parent from whom the estate was derived. Vaughan v. Jones, 23 Gratt. 444; Code Va. 1887, § 2556.

VII. ESTOPPEL.

Estoppel Binding on Infants but Mere Silence Not Sufficient.—BRANNON, J., said obiter in Williamson v. Jones, 43 W. Va. 562, 27 S. E. Rep. 411, that, by the

weight of authority, an infant of years of discretion, by intentional fraudulent misconduct, sufficient to raise an estoppel, if unconnected with contract, will be barred, under the doctrine of estoppel *in pais*, from asserting his title to either real or personal property against one misled thereby. But it was held in that case that mere silence or acquiescence would not be sufficient.

VIII. COMMITMENT OF INFANT TO REFORMATORY.

Under the general provision of the statute (Acts 1895-96, p. 658), the hustings court has power, in its discretion, to commit the accused to the Prison Association before conviction, and the proviso only limits that power in the case of those minors who have a parent or legal guardian to consent; in such cases, their consent must be obtained in order to commit before conviction. Where it appears, however, as in the case at bar, that there is neither parent nor legal guardian to consent, the general provision of the act prevails, and the court has authority, in its discretion, to commit before conviction. Napier v. Prison Ass'n, 95 Va. 431, 28 S. E. Rep. 598.

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516 *Hobbs v. Shumates.

July Term, 1854, Lewisburg.

1. **Tax Titles—Deed from Deputy Sheriff—What Party Claiming under It Must Show.***—A party claiming title under a deed from a deputy sheriff for land sold for nonpayment of taxes under the act of February 9th, 1814, must show that the person described as high sheriff was such, and the grantor in the deed was his deputy.
2. **Same—Same—Recital of Insufficient Advertisement—Effect.**†—Though such deed recites an insufficient advertisement of the property conveyed, it is not thereby vitiated; but is valid to convey such title as by law the sheriff was authorized to convey.
3. **Depositions—Authentication of—Case at Bar.**‡—A deposition purporting in the caption to have been taken in the state and county designated in the commission and notice, and certified by a person who adds to his name the letters J. P., is duly authenticated.

This was a writ of right brought in the Circuit court of Giles county by Thomas J. Hobbs against Thompson and Wilson Shumate, for the recovery of a tract of land containing fifty acres. On the trial the demandant having first proved that Michael Erskine was deputy sheriff of Monroe county, Virginia, at the time he sold and conveyed to William Vawter under whom the demandant claims, the land which is alleged by the demandant to be the land in controversy, then proposed to offer in evidence the deed executed by Erskine to Vawter. This deed bore date the 30th day of August 1815, and purported to be by Michael Erskine, deputy for William Haynes, high sheriff of the county of Monroe, of the one part, and William Vawter of the other part; and recited that Erskine as deputy of Haynes, sheriff, "after having given notice by advertisement as well in the Virginia Argus, a public paper, as at the court-house door of the said county, agreeably to law, previous to the August court of said county, did expose to sale at said court-house whilst the court was
517 in session, at the August term *aforesaid, the lands heretofore returned delinquent for the nonpayment of taxes due thereon in the county aforesaid; whereupon William Vawter became the purchaser of a tract of land containing fifty thousand acres, which formerly belonged to and was returned delinquent in the name of, Andrew Beirs for the years," &c.: And it then proceeded to convey the land to Vawter. The tenants objected to the introduction of the evidence; and the court refused to permit the deed to go in evidence before the jury as anything or for any purpose, save that of color of title, until the demandant should first establish that all the requirements of the law as to the sale had been complied with: And the demandant excepted.

The demandants further offered in evidence the deposition of Erskine, who lived in Texas. The commission under which this deposition was taken, was directed to any commissioner appointed by the governor of Virginia, or to any justice or notary public of Guadaloupe county, in the state of Texas. The deposition purported on its face to have been taken in that county; and the certificate was headed, "State of Texas, Guadaloupe county, to wit:" and was signed, "S. B. Moore, J. P. (Seal.)" The court refused to admit the evidence: and the demandant again excepted.

There was a verdict and judgment for the tenants, whereupon the demandant applied to this court for a supersedeas, which was awarded.

N. Harrison, for the appellant.
Caperton, for the appellees.

***Tax Titles—Deed from Deputy Sheriff—What Must Be Shown.**—Where land is sold by a deputy sheriff for his principal for nonpayment of taxes, and a conveyance made by the deputy, it is indispensably necessary to prove, that the one is sheriff and the other his deputy. Rockbold v. Barnes, 3 Rand. 473. See also, Flanagan v. Grimmet, 10 Gratt. 429; Miller v. Williams, 15 Gratt. 225.

Same.—On this subject, see the principal case cited in Burlew v. Quarrier, 16 W. Va. 162; McQuain v. Meline, 16 Fed. Cas. 345; Hays v. Heatherly, 36 W. Va. 631, 15 S. E. Rep. 229; *foot-note* to Flanagan v. Grimmet, 10 Gratt. 421.

†**Same—Advertisement of Sale.**—In Va. Coal Co. v. Thomas, 97 Va. 539, 34 S. E. Rep. 486, it is said: "In Flanagan v. Grimmet, 10 Gratt. 421, it was held that a tax deed acquired under the act of 1814 could not be questioned by parol proof of a failure to advertise the sale as the law prescribes, section 38 of that act providing that after the time of redemption allowed by the law had elapsed, the regularity of the proceedings under which the purchaser at the sale claims title, shall not be questioned, unless such irregularity appears on the face of the proceedings. See also, *Hobbs v. Shumates, 11 Gratt. 516.*"

‡**Depositions.**—See, in accord, Pollard v. Lively, 2 Gratt. 216.

The principal case is cited in Quesenberry v. People's Building, etc., Association, 44 W. Va. 515, 30 S. E. Rep. 74.

See generally, monographic *note* on "Depositions" appended to Field v. Brown, 24 Gratt. 74.

ALLEN, P. This was a writ of right, in which there was a verdict and judgment for the tenant. On the trial the demandant filed two bills of exceptions to decisions of the court against him. By
518 the first bill *of exceptions it appears, that the demandant having first proved that Michael Erskine was deputy sheriff of Monroe county at the time he sold and conveyed to William Vawter under whom the demandant claimed the land alleged by him to be the land in controversy, proposed to offer a deed in evidence which is set forth in the bill of exceptions. It purports to be a deed executed by said Erskine, deputy for William Haynes, high sheriff of Monroe county, to said Vawter, and recites that pursuant to the act concerning taxes on land, passed on the 9th of February 1814, the said Erskine, as such deputy, after having given notice by advertisement in the Virginia Argus, a public paper, and at the court-house door of said county, according to law, previous to August court, exposed to sale at said court, the lands theretofore returned delinquent for the nonpayment of taxes in said county; and thereupon William Vawter became the purchaser of a tract of fifty thousand acres, which formerly belonged to, and was returned delinquent in the name of, Andrew Beirs, for the sum of five hundred and ninety-four dollars and twenty-four cents, &c. But the court refused to permit the deed to go in evidence as anything or for any purpose, save that of color of title, until the demandant should first establish that all the requirements of the law as to the sale had been complied with.

This court decided in the case of Flanagan v. Grimmet, 10 Gratt. 421, that a deed containing such recital of the circumstances of the sale, if shown to have been executed by a duly qualified officer authorized by the law to sell lands returned delinquent for nonpayment of taxes, and to execute a conveyance to the purchaser, furnished prima facie evidence of the transfer of such title to the purchaser as, at the time the land was returned delinquent, was vested in the person in whose name it was re-
519 turned, his heirs, &c. *But that said deed was liable to be impeached, after the time for redemption allowed by the law had elapsed, by proof of irregularity appearing on the face of the proceedings; or by the fact appearing on the face of the proceedings, that the arrearage of taxes, for the nonpayment of which the land was sold, did not exist, according to section 38 of the act of February 9th, 1814. The onus probandi is cast upon the contesting party, to show by the face of the proceedings, such irregularity as affected the validity of the deed.

A similar principle has been established in the state of Kentucky, although it does not appear that their law contained any provision similar to the 38th section of the act of February 1814. By the law of that state the register was directed to sell such lands at the state-house, after advertising the sale, &c.; and he was empowered to execute deeds for the lands sold. Under this law it has been held in numerous instances, that the deed of the register, purporting to have been made for the sale of land for taxes, implies prima facie, a compliance with the requisitions of the laws under which the land was sold and the deed executed, liable to be repelled by proof that the law was not regularly pursued in making the sale; and that it is not necessary to the validity of the register's deed that it should recite that the land had been advertised according to the statute. Allen v. Robinson, 3 Bibb's R. 326; Graves v. Hayden, 2 Litt. R. 62; Hickman v. Skinner, 3 Monr. 210; Terry v. Bleight, Id. 271; Currie v. Fowler, 5 J. J. Marsh. R. 145. The statute in Virginia gives the same effect to the sheriff's deed which the courts of Kentucky ascribed to the deed of the register, because he was an officer of government presumed to do his duty; and the 38th section of the act of February 9th, 1814, limits the proof to repel this prima facie presumption, to irregularities, &c., appearing on the face of the proceedings.

520 *The decision of the court excluding the deed, until the party offering it established that all the requirements of the law as to such sale, had been complied with, reversed this rule, and cast the onus probandi on the grantee, instead of the contesting party. In this case it is stated that the demandant having first proved that said Michael Erskine was deputy sheriff at the time of said sale and conveyance, offered the deed in evidence. The bill of exceptions does not state in so many words, that he had proved that William Haynes was high sheriff. In Rockbold v. Barnes, 3 Rand. 473, it was held that where land was sold and a deed made by the deputy sheriff, it was indispensably necessary that there should be proof that one was sheriff and the other was deputy. In Flanagan v. Grimmet it did not appear from the bill of exceptions taken to the decision of the court rejecting the deed, that any such proof had been offered. This court held under the authority referred to, that such proof was necessary. But as the bill of exceptions did not purport to set out all the evidence, and as it appeared that the court, when the deed was first offered, rejected it as evidence, for objections appearing on the face thereof, thereby precluding any further proof in relation thereto, if such proof had not been offered or waived; the court below deciding upon the invalidity of the deed alone, and the bill of exceptions intending to present for revision the single question so decided; this court considering that decision erroneous, reversed the judgment, and remanded the cause for a new trial, with instructions to admit the deed as prima facie evidence of such title as, according to the 37th section of the said act, it purported to vest in the purchaser, upon proof that the person therein named as sheriff, was sheriff, and the other

was deputy sheriff. In this case, perhaps by a liberal construction of the bill of exceptions, it might be considered there was such proof, as it sets out that there was proof that Michael Erskine
521 *was deputy, from which it might be inferred there had been proof that William Haynes was high sheriff. But be that as it may, the bill of exceptions shows that no objection was made to the deed on that account. The proof may have been offered, or have been waived, or probably if required, could readily have been supplied, if the deed had not been rejected for the purpose for which it was offered, on other grounds. Those grounds are set forth, and the bill of exceptions was designed to present for revision in the appellate court the correctness of that decision. In the judgment of the court, upon the question thus raised there was error, according to the decision of this court in the case referred to: it not being incumbent on the purchaser holding under such a deed to do more to entitle himself to the benefit thereof, than prove its execution and the official characters of the sheriff and deputy sheriff.

I think the court erred also, in excluding the deposition set forth in the second bill of exceptions upon the ground that it was not properly authenticated. The case falls within the principle decided in Pollard's heirs v. Lively, 2 Gratt. 216, which held that a certificate such as is found in this case, headed with the state and county, and signed by the party taking the deposition with his name and the letters J. P. is sufficient evidence of the fact that the deposition was taken by a justice of the peace.

The other judges concurred in the opinion of ALLEN, J.

Judgment reversed.

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522 *Hill v. Manser & al.

July Term, 1854, Lewisburg.

1. **Forthcoming Bonds—Rights of Sureties—Subrogation.***—A surety in a forfeited forthcoming bond is a surety for the debt; and when he pays it as such surety, he is entitled to all the rights of the creditor against the original debtor, subsisting at the time he became bound for the debt: And the judgment, for the benefit of the surety so paying, is not extinguished but transferred with all its obligatory force against the principal, and constitutes a legal lien upon his real estate owned at the date of the judgment or afterwards acquired.

2. **Same—Same—Same—Evidence—Receipt from Creditor.**—The surety in the forthcoming bond pays to the creditor a sum certain on the execution issued, on the bond, against the principal and himself, and takes a receipt as for money paid by him. The evidence of payment afforded by the receipt will not be repelled by proof of loose declarations that he had loaned the money to the principal debtor, who was his brother, so as to deprive him of the right to be substituted to the rights and remedies of the creditor.

3. **Same—Same—Same—Case at Bar.**—The creditor having taken a deed of trust from the principal debtor to secure his debt; and the debtor having subsequently given another deed of trust upon the same and other property to secure debts due to a third party, one of which was for money loaned to pay a balance due upon the judgment, of which this third party had notice, the surety in the forthcoming bond is entitled to have the property embraced in the first deed of trust applied to satisfy the amounts he has paid, with interest on so much thereof as went to discharge the principal of the debt; and if that property does not discharge it, to have the land embraced in the second deed subjected to discharge the balance.

In October 1840 Samuel McD. Moore recovered a judgment in the Circuit court of Fayette county against John Hill, for one thousand six hundred dollars, with interest. On this judgment an execution was issued, on which Hill executed a forthcoming bond with Hiram Hill and Pleasant Hawkins as his sureties. This forthcoming bond was forfeited, and execution was awarded against all the parties in August 1841: And the execution was returned levied, and the property sold for want of bidders.
523 *By deed bearing date the 12th of May 1842, John Hill conveyed to Hudson M. Dickenson two tracts of land, some slaves and other personal property, in trust, that if Hill did not pay the debt due to Moore by the 15th of the next August, the trustee should sell the property upon ten days' notice, for cash, and apply the proceeds to the payment of the debt.

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*Forthcoming Bonds—Right of Surety to Subrogation.—A surety in a forthcoming bond is a surety for the debt, and, when he pays it, he is entitled to all the rights of the creditor against the original debtor subsisting at the time he became bound for the debt; thus he is subrogated to the benefit of the lien of the original judgment against the land of a judgment debtor. On this specific point the principal case is cited in Neal v. Buffington, 42 W. Va. 330, 26 S. E. Rep. 173; Cooper v. Daugherty, 85 Va. 350, 7 S. E. Rep. 387. The principal case cites Garland v. Lynch, 1 Rob. 545; Powell v. White, 11 Leigh 309; Robinson v. Sherman, 2 Gratt. 178, and Leake v. Ferguson, 2 Gratt. 419, as authorizing this proposition. For further information as to the rights of sureties in forthcoming bonds to subrogation, see monographic *note* on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

The rule above laid down grows out of the more general proposition—than which none seems better settled—that where a security pays a judgment (or other debt) for another he is entitled to be substituted to all the rights and remedies of the creditor against the principal debtor, subsisting at the time he became so bound for the debt. For this proposition, the principal case is cited as authority in Dent v. Wait, 9 W. Va. 44; Myers v. Miller, 45 W. Va. 615, 31 S. E. Rep. 983. See, in accord, Kendrick v. Forney, 22 Gratt. 748, and *foot-note*; Watts v. Kinney, 3 Leigh 273, 23 Am. Dec. 266; McClung v. Beirne, 10 Leigh 394; Enders v. Brune, 4 Rand. 438. See also, collection of cases, on the subject of subrogation in regard to sureties, in *foot-note* to Buchanan v. Clark, 10 Gratt. 164.

On the 2d of September Moore received from Hiram Hill in money, fee bills and bonds, the sum of five hundred dollars, and he gave to him a receipt of that date, for that sum received on account of Moore's execution against John Hill and others, issued from the Circuit court of Fayette county. On the same day John Hill and wife conveyed to Dickenson and William Tyree a number of tracts of land, including the two previously conveyed to Dickenson, and the slaves included in said deed, to secure a large amount of debt for which Miles Manser was bound, and also the sum of five hundred dollars, which Manser had agreed to pay to Moore in part satisfaction of his debt. And on the 16th of March 1844 John Hill and wife conveyed to the same trustee, other lands and some personal property to secure some of the same and other debts, which were due to Manser, or for which he was bound, one of which was the five hundred dollars which Manser had paid to Moore.

In June 1849 Hiram Hill filed his bill in the Circuit court of Fayette county, in which he stated the foregoing facts; and insisted that he was entitled to be substituted to the rights and remedies of Moore, to the extent of the sum of five hundred dollars, which he had paid upon the debt due from John Hill to Moore. And making John Hill, Manser and the trustees Dickenson and Tyree, parties defendants, he prayed that the court would enforce the judgment lien and other securities of Moore, by a sale of the incumbered property, or a sufficiency thereof, to pay off the
524 debt due *to Moore; and that he might be substituted to the benefit of the same to the full amount he had paid, with interest; and for general relief.

Manser answered the bill; and denied that the plaintiff had paid five hundred dollars, or any other sum, as the security of John Hill. He said that the money, fee bills and bonds mentioned in the receipt of Moore, were advanced by the plaintiff not as a payment, but to accommodate his brother, and to get some foreign fee bills settled; and hence he made the arrangement, not as a payment as surety, but as an advance to his brother by way of loan: And therefore, he insisted, the doctrine of substitution did not apply to the case. That at the time he took the securities from John Hill mentioned in the bill, he had no notice of any claim upon the property by lien of any kind held by the plaintiff. And that he had paid off the debt to Moore, and therefore on that account he would be entitled to substitution to all the securities of said Moore which he had at the time of payment.

Witnesses were examined, who spoke of conversations with Hiram Hill, in which they understood him to speak of the five hundred dollars he had paid to Moore, as a loan to his brother John Hill; but the money was in fact paid by Hiram Hill to Moore, and it seems to have been considered by both John Hill and Moore to have been a payment by Hiram Hill.

The cause came on to be heard in September 1851, when the court dismissed the bill with costs.

And thereupon Hiram Hill applied to this court for an appeal, which was allowed.

Caperton, for the appellant.
Price, for the appellee.

ALLEN, P., delivered the opinion of the court:

The court is of opinion that the
525 appellant as surety *for John Hill in a forthcoming bond which was forfeited, became thereby surety for the debt; and when he paid the same as such surety, he became entitled upon the principles of a court of equity, to all the rights of the creditor against the original debtor, subsisting at the time he became so bound for the debt; and that the judgment for the benefit of the surety so paying, is not regarded as extinguished, but transferred with all its obligatory force against the principal, and constituting a legal lien upon his real estate owned at the date of the judgment, and thereafter acquired. Garland v. Lynch, 1 Rob. R. 545; Powell's ex'ors v. White, 11 Leigh 309; Robinson v. Sherman, 2 Gratt. 178; Leake v. Ferguson, 2 Gratt. 419.

The court is further of opinion, that the receipt of the creditor dated the 2d of September 1842, shows that the appellant on that day paid the sum of five hundred dollars to the creditor on account of the execution issued on said forfeited bond, against his principal and himself; and the evidence in the record, of loose declarations that he loaned his principal that sum, or that the witnesses understood it was a loan, do not show any intention on the part of the appellant, to waive any legal right, or that in fact he knew at the time of such payment, that the law raised any such right of substitution for his benefit.

The court is further of opinion, that it fully appears that the appellee had full notice of said judgment when he took from the said John Hill the deed of trust of the 2d day of September 1842; as by the terms of said deed, provision was made thereby to indemnify the appellee for the sum of five hundred dollars, which he had bound himself to pay on said judgment, for said John Hill at a future day.

The court is further of opinion, that the appellee is not entitled to priority on account of the payment of said last mentioned sum: no such claim is set up in
526 *the answer; and the appellee not being surety, if he intended or contemplated relying on previous liens, should have taken a transfer thereof; his was a loan to John Hill, for the security of which, together with other claims against said John Hill, he took his deed of trust aforesaid, and upon which alone he must rely.

The court is further of opinion, that as it appears the said John Hill by a deed of trust duly executed, and acknowledged, and recorded on the 12th day of May 1842, conveyed sundry lands, together with per-

sonal property, to a certain Hudson M. Dickenson, in trust for the security and payment of said debt, the appellant is entitled to be substituted to the rights of the creditor under said deed of trust, and to require a sale by the trustee of the property conveyed by said deed of trust, or so much thereof as may be forthcoming, and the application of the proceeds thereof, or so much as may be necessary to pay said sum of five hundred dollars, with interest from the 2d of September 1842, on so much thereof as at the time of payment was applicable to the principal of said execution. And if the property described in said deed of trust of the 12th of May 1842, or so much thereof as may be forthcoming, should prove insufficient to pay said sum of five hundred dollars, with interest as aforesaid, then that the appellant should be at liberty to resort to any other lands owned by said John Hill at the date of said judgment, or afterwards acquired, for satisfaction.

The court is therefore of opinion, that said decree is erroneous, and it is reversed with costs against the appellant; and the cause is remanded to be further proceeded in according to the principles of the foregoing opinion and decree, in order to a final decree.

DANIEL and MONCURE, Js., dissented.

Decree reversed.

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527 *Harrison v. Middleton.

July Term, 1854, Lewisburg.

(Absent ALLEN, P.)

1. **Unlawful Detainer—Removal of Cause.**—If a case of unlawful detainer has been pending in a County court for more than twelve months without a final decision, it may be removed, on motion, to the Circuit court.
2. **Civil Actions—Removal of Cause.***—All civil causes of which the Circuit court has either original or appellate jurisdiction, may be removed from the County to the Circuit court, upon motion, after they have been pending in the County court for one year.
3. **Unlawful Detainer—Removed—Order of Hearing.**—An unlawful detainer case removed to the Circuit court is properly placed on the docket at the head of the civil causes in the court.
4. **Evidence—Witnesses—Refreshing Memory—Use of Paper.**†—A witness may refresh his memory by reference to a paper, whether an original or a copy, and whether written by himself or another; but he must then speak from his own recollection thus refreshed.
5. **Same—Same—Surveyors—Use of Diagram.**‡—But a surveyor who made a survey from a diagram handed him by the plaintiff, and which he has in court, may refer for the courses and distances to the diagram, though he may not be able to remember them independent of the diagram. The diagram is itself evidence, and he may point out on it what lines he ran.
6. **Same—Same—Same—Extract of Field Notes.**—An extract or copy taken by a surveyor from his field notes, is not evidence; and he can only use it to refresh his memory; and must then speak from his recollection.
7. **Same—Same—Interest—Case at Bar.**—A witness is offered to be introduced, who is objected to as being interested, and proof *aliunde* of his interest is introduced. He is then examined by the party offering him, on his *voir dire* to show that he has no interest, and this is objected to by the other party; but before he is sworn in chief, a deed is produced which shows he has no interest. If it was error to examine him on his *voir dire* it was cured by the introduction of the proof of his want of interest, before he was sworn in chief.
8. **Landlord and Tenant—Agreement to Surrender Possession When Desired—Effect.**—An agreement under seal by a tenant that he will surrender possession whenever a purchaser from the landlord requires it, constitutes him a tenant at will or at sufferance; and he is not entitled to six months' notice to quit.
9. **Same—Tenant Holding Adversely—Right to Notice of Suit.**—If a tenant claims to hold adversely to his landlord, he is not entitled to notice.
10. ***Same—Unlawful Detainer—Who Should Bring Suit.**§—A landlord sells land in possession of his tenant, by agreement under seal, and the tenant refuses to deliver possession; the landlord is the proper party to institute a proceeding of unlawful detainer, to obtain possession.

***Civil Actions in County Court—Removal after Pending Twelve Months.**—The principal case holds that all civil causes (of which unlawful detainer is one) of which the circuit court has either original or appellate jurisdiction, may be removed from the county to the circuit court, upon motion, after they have been pending in the county court for one year. For the above proposition the principal case is cited and approved in the following cases: Hale v. Burwell, 2 P. & H. 610; Kincheloe v. Tracewells, 11 Gratt. 598; Gas Co. v. Wheeling, 7 W. Va. 25. See generally, monographic *note* on "Unlawful Detainer" appended to Dobson v. Culpepper, 23 Gratt. 352.

†**Evidence—Witnesses—Refreshing Memory—Use of Paper.**—For the proposition that a witness may refresh his memory by reference to a paper, whether an original or a copy, and whether written by himself or another; but he must then speak from his own recollection thus refreshed, the principal case is cited and followed in Vinal v. Gilman, 21 W. Va. 307.

‡**Same—Same—Use of Diagram Made by Witness.**—For the proposition that a map or a diagram made by a witness, and shown by him to be correct, may be given in evidence and shown to the jury for their consideration, see in accord with the principal case, Poling v. Ohio River R. Co., 38 W. Va. 645, 18 S. E. Rep. 782.

§**Unlawful Detainer—Who Should Bring Action.**—In Hawkins v. Wilson, 1 W. Va. 121, where the vendee in an executory contract for the purchase of land brought unlawful detainer against the vendor for the possession of the land, the court said: "In *Middleton v. Harrison, 11 Gratt.*, it was held that 'a landlord who sells land, in the possession of his tenant, by agreement under seal, and the tenant refuses to deliver possession, the landlord is the proper party to institute a proceeding of unlawful detainer to obtain possession.' This affirms the right of the vendor, in an executory contract for the sale of land, to bring the suit to obtain the possession. And the inference would seem fair that the converse of the proposition was equally true,

11. **Evidence—Deeds Collaterally Introduced—How Non-execution May Be Shown.**—If a deed of a defendant is introduced collaterally upon the trial, as evidence, he may show that it is not his deed, without making oath to the fact: And for this purpose may introduce a subscribing witness to it, to prove that it was misread to the defendant.

12. **Same—Proof That Deed Misunderstood—Admissibility—Case at Bar.**‖—Proof that the deed when read was understood in a very material respect as different from what it is, may tend to show that it was misread, and therefore is competent evidence. But if the deed was correctly read, the misunderstanding of it by a party cannot affect its validity as a deed.

This was a writ of unlawful detainer brought in the county of Jackson, by Henry O. Middleton against Josiah Harrison, to recover possession of a tract of seven thousand nine hundred and twenty-three acres of land. The case was docketed in the County court of Jackson in June 1847, and was continued on the docket of that court without a trial until August 1848, when the court being about to adjourn, on the motion of the plaintiff, it was ordered that the case be removed to the Circuit court of Jackson county. And in September of the same year, the plaintiff produced in that court the original papers, and the orders made in the cause, and on his motion it was docketed, and was placed at the head of the civil causes on the docket.

At the August term 1850 of the Circuit court, when the cause was called, the defendant by his counsel, moved the court to strike it from the docket, on the ground that it was not one of the cases contemplated by the act of March 28th, 1843. Sess. Acts 1842-43, ch. 9. But the motion was overruled by the court: And he excepted. The defendant then moved the court to place the cause on what he insisted was its proper place on the docket, viz: only before such cases as had been brought in that court after the cause had been docketed there. But the court overruled the motion, because the case occupied the place on
529 the *docket which it had occupied ever since it had come into the court; and had priority over all civil causes in the County court, and was entitled to the same priority in the Circuit court that it had in that court. And the defendant again excepted.

On the trial of the cause the plaintiff introduced in evidence an agreement between himself and the defendant, bearing date the 22nd of February 1847, in relation to the land in controversy. This agreement recited that Harrison lived on a tract of land of seven thousand nine hundred and twenty-three acres, patented to Thomas A. Taylor, under Taylor's representatives, as tenant; that Middleton had become the owner of the tract, and had sold it, and wished immediate possession: And then Harrison agreed to surrender the plantation and houses by the 10th of April 1847, and to surrender the farm at any time that William Fisher (the purchaser from the said Middleton) may think proper to take possession. And in consideration of Harrison's agreeing to give up as aforesaid, Middleton agreed to refer it to arbitrators to say what Harrison should be allowed for his improvements beyond the use of the plantation for the time he had enjoyed it. And it was agreed that on signing that agreement, all controversy between the parties was to be at an end; and that Harrison was to give up to Middleton all claims and leases theretofore set up by him. The agreement was under seal and attested by three witnesses, of whom Alexander Harrison was one. The plaintiff also introduced the patent under which he claimed, which was a grant in 1786 to Thomas A. Taylor. He then called a witness, who stated that some years previous to the trial he surveyed two or three of the lines of the survey on which the defendant Harrison lived. That when he ran these lines he had no authentic document to run them by; and only had a
paper with a diagram of the seven
530 thousand nine *hundred and twenty-three acre tract, which paper had an endorsement on it in the handwriting of the plaintiff, stating that it was the tract on which defendant lived; and which diagram was made by the plaintiff. To this diagram the witness referred for courses and distances, and admitted that he did not remember how far he had run or what courses he had run, without reference to said paper, and did not remember either course or distance independent of the paper. To the witness refreshing his memory from said paper, the defendant objected, which objection was overruled by the court; and the witness often referred to the paper to refresh his memory; the court directing the witness not to state anything set out in the paper; but only to state what acts he did in running the lines aforesaid, and what he found on the ground. To this the defendant again excepted.

The same witness, in order to answer

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that the vendee in an executory contract for the purchase of land, could not bring the suit to obtain the possession.

"But when the case of *Middleton v. Harrison* is carefully considered, it will be found to embrace both propositions, substantially. For the learned and able judge of the circuit court of Jackson county, who tried the cause in the court below, instructed the jury substantially to that effect. And JUDGE MONCURE, in delivering the opinion of the court of appeals, says expressly that, 'in regard to the instructions, I think the court did not err in refusing to give those which were asked for by the parties, or in giving those which were given by the court.'"

‖**Evidence—Proof That Deed Misunderstood—Admissibility.**—In the last headnote of the principal case it is held that, proof that the deed when read was understood in a very material respect as different from what it is, may tend to show that it was misread, and therefore is competent evidence. In a long quotation from the principal case on this point, the court, in Morrow v. Bailey, 2 W. Va. 329, says that this is certainly the settled law in this state.

other questions propounded to him by the plaintiff, referred to a memorandum made by himself but two days before the trial, copied by him from his field notes of the survey before spoken of; the said field notes being then at his home; but he did not pretend to say that he recollected the courses or distances deposed to from said memorandum independent thereof. This evidence was also objected to by the defendant, because the original field notes from which the copy was taken, were not produced: But this objection was also overruled; and the witness was permitted to refer to said paper to refresh his recollection of the running of the lines done by him. And to this the defendant again excepted.

In the further progress of the trial William Fisher was offered as a witness, and was objected to by the defendant; who offered the agreement between the plaintiff and the defendant, before mentioned, to prove his interest. This agreement stated that the land in controversy had been sold by the plaintiff to Fisher.

531 *The plaintiff then proposed to examine Fisher on his voir dire, to show that the agreement for the sale to him had been rescinded; and that he had no interest in the controversy. To this the defendant objected, because he had shown the interest of the witness otherwise than by his own oath. But the objection was overruled; and the witness was sworn on his voir dire, and stated that he had no interest, because he and the plaintiff had, by a contract made on the 5th of August 1847, rescinded the previous contract between them: And this contract of the 5th of August was produced, and provided especially for the rescission of the previous contract for the sale of the land in the possession of the defendant. To this the defendant again excepted. This witness being sworn in chief, stated that previous to his purchase from the plaintiff he had heard the defendant say that he had no title to the soil on which he lived, and did not claim the land. And that in the spring of 1847 he was with the defendant, but not on or near the land, and asked him if he would give up its possession, to which the defendant replied that he would not.

In the further progress of the trial the defendant offered Alexander Harrison as a witness. He was a subscribing witness to the agreement aforesaid of the 22d of February 1847, between the plaintiff and defendant, and had been previously sworn and examined as to that fact by the plaintiff. This witness was offered by the defendant to prove that at the time of the execution of that agreement, both the witness and the defendant, who was the father of the witness, understood said paper, which is in the handwriting of the plaintiff, as referring the title to the land to the arbitrators therein named; and that the witness was present when it was read to the defendant; and that both the witness and the defendant did not understand or believe that the said paper made the

532 defendant the tenant *of the plaintiff, nor did they know that such a thing was in the paper. And further that both the witness and the defendant understood said paper as it was read to them, as simply referring to the arbitrators the question of right to the land; and not that the defendant had thereby given up his right to it, and referred to the arbitrators the defendant's title to compensation for his improvements to be set off against the rents of the land. To the admission of this evidence the plaintiff objected, and the court sustained the objection: And the defendant again excepted.

After the evidence in the cause had been introduced, the plaintiff moved for an instruction to the jury, "that if they believed all the evidence before them, the plaintiff had a right to maintain his suit at the time of its institution, and was entitled to recover in this action." The court thereupon enquired whether the defendant intended to ask for any instructions; when he by his counsel objected to the instruction asked for by the plaintiff as being too broad and general, and asked the court to instruct the jury as follows:

1. That if they believed, from the evidence before them, that the defendant was, at the time of the institution of this suit, a tenant of the plaintiff, he was entitled to six months' notice to quit before he could be turned out as unlawfully detaining the land under the contract of February 1847; and that the language of said contract, "to surrender the farm at any time that William Fisher the purchaser of Middleton might think proper to take possession," was not a certain time either in contemplation of law, or by the true interpretation of the contract.

2. If the jury were satisfied from the evidence before them, that before the institution of this suit, William Fisher had purchased the land in controversy of the plaintiff, and that such purchase, at the time this suit was instituted, was in

533 force and not rescinded, *the plaintiff had no right to the possession of said land, and could not maintain this suit against the defendant.

There was a third instruction asked by the defendant substantially the same as the second.

The court refused to give the instruction asked for by the plaintiff, because it was too general, and because it called on the court to decide upon the sufficiency of the evidence before the jury; and declining to give the instructions asked for by the defendant in the form in which they were asked, proceeded to instruct the jury, "that if they believed from the evidence, that the defendant was at the time of the institution of this suit, a tenant from year to year of the plaintiff, he was entitled to six months' notice to quit; and he would not be liable to be turned out of possession of the land in controversy without such notice: But if they should believe from the evidence, that the tenant was a tenant to the plaintiff,

and that his time was to end at a certain time, that then no notice to quit would be necessary. The court further instructed the jury, that that part of the contract of the 22d of February 1847, which provides for the surrender of the farm at any time that William Fisher might think proper to take possession, would not necessarily create a tenancy from year to year, and entitle the defendant to six months' notice; and that if the evidence satisfied the jury that a demand of the possession had been made of the defendant by the said Fisher, and the defendant had refused to surrender such possession, it was not necessary to give the defendant six months' notice before the institution of this suit.

The court further instructed the jury, that they must be satisfied from the evidence, before they could render a verdict for the plaintiff, that at the time of the institution of this suit the plaintiff had the right of possession to the premises in controversy in this suit, and that the contract of the 22d of February
534 *1847, between the plaintiff and the defendant, did not in the opinion of the court, of itself furnish such evidence of a transfer of the right of possession from the plaintiff Middleton to Fisher, as to disable the plaintiff from maintaining this action in his own name, provided he has shown himself otherwise entitled to maintain it; or that the said contract so transferred to or vested in the said Fisher such right of possession as would have enabled him to maintain this action against the defendant. To the refusal of the court to give the instructions asked by him, and to the giving the instructions given by the court, the defendant excepted. There was then a verdict and judgment for the plaintiff; and on the application of the defendant, a supersedeas was awarded by this court.

Fisher, for the appellant, insisted:

1. That this was not a case which could be removed from the County to the Circuit court. That the case having arisen before the 1st of July 1850, the question was to be determined under the act of March 28th, 1843, Sess. Acts of 1842-43, ch. 9, § 4, p. 17. That from the time when the constitution of 1829 went into operation, the County and Circuit courts had concurrent jurisdiction in chancery causes; and in 1838 the act was passed authorizing the removal of such causes from the County to the Circuit courts; but that this act only applied where the Circuit court had original jurisdiction of the subject matter involved in the cause. In March 1843 the act was passed allowing the removal of common law causes "upon the same terms and in the same manner in all respects as if it were a suit in equity;" and therefore this act must be construed to apply to the same class of cases as the act of February 1838; which were cases in which the Circuit court might have taken original jurisdiction. This construction was confirmed by the act of Feb-
535 ruary *7th, 1849, Sess. Acts 1848-49, ch. 75, § 1, p. 42, in relation to the removal of causes where the amount in controversy was under fifty dollars. And he insisted that this being indisputably a cause of which the Circuit court could not have taken original jurisdiction, it was therefore illegally removed to the Circuit court, and was therefore coram non judice, and all the proceedings were null and of no effect.

2. That although a case of unlawful detainer has priority in some cases, yet that there is no law which gives it this priority where the special court fails to meet, and the cause goes regularly on the docket of the County court.

3. That the court erred in permitting the witness to refer to the diagram and a copy of his field notes, and to state facts from them, of which he could not speak of his own recollection. 1 Greenl. Evi. § 436; 1 Stark. Evi. 128; Doe ex dem. Church v. Perkins, 3 T. R. 749.

4. That the court erred in swearing the witness Fisher to ascertain his want of interest, after the defendant had proved his interest. Vincent v. Huff's lessee, 4 Serg. & Rawle 298; 2 Stark. Evi. 756; Offutt v. Twyman, 9 Dana's R. 43.

5. That the court erred in excluding the evidence to prove that the agreement of the 27th February 1847 had been misread to the defendant. If the paper had been the foundation of an action of covenant, the evidence would have been admissible: And it was a fortiori admissible when the paper was offered collaterally. 1 Chitty's Plead. 479; Van Valkenburgh v. Rouk, 12 John. R. 337; Taylor v. King, 6 Munf. 358. This last case is conclusive of the question. It decides that if a paper is misread to a party, he may plead non est factum.

6. That the court erred in refusing to give the instructions asked for by the
536 defendant. The contract *under which the plaintiff claims bears date in February 1847; and that shows he had sold the land to Fisher. The proceeding was commenced in June of that year; and the contract with Fisher for the rescission of the sale bears date in August. Not the plaintiff but Fisher was entitled to the possession at the time this proceeding was commenced. Or if Fisher was not the party to bring this action, neither can the plaintiff do it. Fisher had purchased from him, and he claimed as purchaser from Taylor's heirs under whom Harrison had been in possession for years. If Fisher's purchase from the plaintiff did not authorize him to sue, neither could the plaintiff's purchase from Taylor's heirs, it not appearing that he had received a conveyance, entitle the plaintiff to sue.

But further: A tenant is entitled to six months' notice to quit. It is true this law does not apply to a tenancy which is to determine at a fixed period, nor where there is an express agreement to dispense with notice. But the only time fixed, and the only agreement, is when Fisher shall think

proper to take possession; which is neither certain as to time, nor does it dispense with notice: Nor indeed is there satisfactory proof of any demand of possession by Fisher.

7. That the instructions given by the court were improper and erroneous: Improper, because the instructions were not asked for by either party; and because it referred the construction of the written agreement to the jury, when it should have been construed by the court: And it was erroneous, in so far as it varied from the instruction asked for by the defendant.

Price, for the appellee:

The first point made by the appellant's counsel must depend upon the construction of the act of March 28th, 1843. That
537 act says, "Whenever any civil *action in a court of law shall have been, or shall hereafter be, pending in a county court for the space of one year without a final decision thereof having been made, it shall be lawful," &c. Is this a civil action? If it is, and who doubts it, it is embraced within the terms of the law. It is equally embraced within the spirit and object of the act. The object is to obviate the delays of the county court. It is true the act refers to the act of 1838, but that relates to the time and manner of removing the cause. The object of the statute and its language apply to all cases in which the Circuit court has either original or appellate jurisdiction.

Upon the second point made by the appellant's counsel, the court allowed the witness to refer to the papers to refresh his memory, but he was only to state what he then remembered. And this seems to be the settled rule on the subject. 1 Greenl. Evi. § 436. This author says, it is not necessary that the paper referred to should have been written by the witness, or should be an original paper. It matters little how the memory is refreshed; but the witness is to speak from his then recollection.

As to the competency of the witness Fisher: It was a question before the court; and, not only his competency was shown by the evidence, but by the contract for the rescission of his purchase.

Upon the fifth point made by the counsel for the appellant, it is to be observed that the evidence was not offered to prove that the agreement was not correctly read, but that it was not correctly understood. The design of this evidence was to invalidate the deed; and if it was not sufficient for that purpose, it was not admissible.

But further: The evidence, if competent, was not admissible without the affida-
538 vit of the defendant that *the paper was not his deed. The court is referred to 3 Bac. Abr. title Fraud, letter A, p. 294–95.

Upon the instructions given or refused, it is enough to say that the objection that the court should have construed the agreement is not well taken, as the court does in fact construe it in the instruction given. That this was not a tenancy from year to year, so that the law in relation to notice does not apply; and there was in fact a positive agreement to give up the premises whenever required by Fisher, which of course dispensed with notice. As to Fisher's right, his was a mere executory contract, giving him neither title or right of possession, which still remained in Middleton: and it was for him to enforce it, that he might execute his contract with Fisher.

MONCURE, J. I am of opinion that the Circuit court did not err in overruling the motion of the defendant to strike this case from the docket. I think the case was properly removed from the County court to the Circuit court, under the fourth section of the act of March 28, 1843; Sess. Acts, p. 18; which declares "that whenever any civil action in a court of law shall have been, or shall hereafter be, pending in a county or corporation court for the space of one year, without a final decision thereof having been made, it shall be lawful for any party in any such civil action, or his or her legal representatives, to obtain, by motion, without notice, an order of such court for the removal of such cause to the Circuit superior court of law and chancery of the same county or corporation, upon the same terms, and in the same manner in all respects, as if it were a suit in equity, and the same proceedings shall be had in reference to the removal and trial of such causes as are directed by the act passed the 18th (12th) of February 1838, (Sess. Acts,
p. 61,) entitled "An act to authorize
539 the removal of *causes in equity from the inferior to the superior courts." The case at the time of its removal was a civil action in a court of law, and had been pending in the County court for the space of one year, without a final decision thereof having been made. It was, therefore, within the literal terms of the statute. Was it not within its spirit and meaning also? I think it was. The manifest object of the statute was to avoid the great evil of delay in the trial of causes in the County courts. This evil existed in regard both to chancery suits and civil actions; but in a greater degree, to the former. The act of 1838 was intended to remedy the evil in regard to chancery causes, and the act of 1843 in regard to civil actions. The action of unlawful detainer is peculiarly and especially within the scope of the policy of the legislature, as indicated by these acts. It is a remedy for a wrong which requires immediate redress. The law has, therefore, provided that it shall be prosecuted in a most summary way, and have precedence for trial over all other civil causes. It was probably not contemplated by the legislature that such a proceeding for the redress of such a wrong would ever "be pending in a County court for the space of one year, without a final decision thereof having been made." But if it would, surely the legislature intended that it might be removed to the Circuit court, in the same manner in which any other civil action, under similar circum-

stances, might be so removed under the act of 1843.

The ground on which the counsel of the plaintiff in error contended that the action of unlawful detainer is not a civil action within the meaning of the act of 1843, is that that act applies only to civil actions of which the Circuit court has original jurisdiction; and the Circuit court has not original jurisdiction of an action of unlawful detainer. It is true that the Circuit court has not original jurisdiction of
540 an action of *unlawful detainer. The only reason for not giving such jurisdiction is, that the nature of the wrong for which the remedy lies, requires a more speedy redress than could well be afforded by that court, sitting as it does but twice in a year.

Formerly the County court, though holding a session every month, was not considered by the legislature as affording the means of a sufficiently speedy redress of the wrong; and, therefore, a tribunal composed of at least two justices, and meeting not less than ten nor more than twenty days after the date of the warrant, was provided for the trial of actions of unlawful detainer. They are now triable by the County court; but at any term whether monthly or quarterly: and are still tried in a summary way, and have precedence over all other civil causes on the docket. But while the Circuit court has never had original, it has always had appellate jurisdiction in actions of unlawful detainer; and I think the act of 1843 was not intended to be confined to civil actions of which the Circuit court has original jurisdiction, but was intended to embrace all civil actions of which that court has jurisdiction, whether original or appellate. I can see no good reason for the restrictive meaning contended for, contrary to the literal terms and obvious policy of the act. It was contended that as the act of 1843 declares that the same proceedings shall be had in reference to the removal and trial of causes under that act, as are directed by the act of 1838 in regard to causes in equity; and as the act of 1838 declares that the Circuit court shall have the same jurisdiction of a cause in equity removed under that act, and shall proceed therein in all respects as if the cause had been originally instituted in that court; therefore, no civil action of which the Circuit court has not original jurisdiction can be removed under the act of 1843, because no case
541 in equity of which the *Circuit court has not original jurisdiction can be removed under the act of 1838. In other words, it was contended, if I rightly understood the argument, that the act of 1843, in consequence of its reference to the act of 1838, is to be read as if the words, "and the Circuit superior court shall have the same jurisdiction thereof, and shall proceed therein in all respects as if the cause had been originally instituted in the Circuit superior court," which are contained in the act of 1838, had been repeated in the act of 1843. And that as an action of unlawful detainer could not be originally instituted in the Circuit court, therefore that court could have no jurisdiction thereof, if removed from the County to the Circuit court. This argument, though plausible, is, I think, unsound. The words referred to were not used in the act of 1838 for the purpose of excluding from its operation any causes in equity of which the County court had jurisdiction and the Circuit court not; for there were no such causes. If the jurisdiction of the two courts in such causes was not entirely concurrent, certainly the Circuit court had jurisdiction of every cause in equity of which the County court had. The words could only have been used for the purpose of giving to the Circuit court the same jurisdiction of a cause in equity removed to it as of a cause instituted therein. Different words might and probably would have been used if there had been any causes in equity cognizable in the County, and not in the Circuit, court: but as there were not, the words used conveyed the idea intended as well as any that could have been selected. The act of 1843 refers to the act of 1838 merely to avoid repetition; and the legislature could not have intended, by the implied adoption of ambiguous words, to exclude from the operation of the former, the action of unlawful detainer, which, as I have already said, is embraced both by the letter and the spirit of the act.
542 *The act of February 7th, 1849, Sess. Acts, p. 42, though passed after the removal of this case, was referred to in the argument as serving to show that prior to that act a civil action, in which the Circuit court had not original jurisdiction, could not have been removed from the County to the Circuit court under the act of 1843. The act of 1849 is somewhat of the nature of a declaratory law. At all events, while it adopts a rule for the future, it does not even express the opinion of the legislature as to what had been the true rule before. It recites that different constructions had been put upon the 30th section of the act of April 16th, 1831, Sup. Rev. Code, p. 146, and the 4th section of the act of March 28th, 1843, and that it was desirable to have uniformity in the construction of the said sections. It then declares that the Circuit courts shall have power to award a writ of error and supersedeas to any judgment, &c., of the County courts in which the latter have original jurisdiction; and to order the removal of any civil action pending in such courts in the manner provided in the fourth section of the last recited act, notwithstanding that the amount in controversy in such judgment &c. may be less than fifty dollars.

When the act of 1849 was passed, the Circuit court had no original jurisdiction in pecuniary actions, in which the amount in controversy was less than fifty dollars; and it seems to have been supposed by some that the Circuit court had no appellate jurisdiction in such cases. Those who entertained that supposition, as a natural consequence, also supposed that as the Circuit court had neither original nor appellate

jurisdiction in such cases, they could not therefore be removed from the County to the Circuit court under the act of 1843. And hence the act of 1849 was passed to remove all doubt on the subject, by declaring that the Circuit court should have jurisdiction of such cases, whether removed to it by writ of error &c. under
543 *the act of 1831, or an order of removal under the act of 1843.

The act of 1849 indicates the sense of the legislature that the jurisdiction of the Circuit court under the act of 1843 should be coextensive with its appellate jurisdiction. The words "notwithstanding that the amount in controversy in such judgment &c. may be less than fifty dollars," were certainly not designed to exclude the jurisdiction of the Circuit court in an action of unlawful detainer removed to it under the act of 1843. It would be strange indeed, if the legislature intended by the act of 1849 to confer jurisdiction on the Circuit court under the act of 1843, in cases in which it had not original, and was supposed by some not before to have had appellate jurisdiction, and at the same time to exclude its jurisdiction under that act in a case in which it always had appellate jurisdiction.

I am further of opinion that the Circuit court did not err in overruling the motion of the defendant to change the place of the case upon the docket; and that the reason assigned by the court, to wit, "because this case occupied the place on the docket which it has occupied ever since it came into this court, and had priority over all civil causes in the County court, and was entitled to the same priority here that it had in that court," was well founded, and a good reason for overruling the motion. If, however, there had been any error in this respect, I do not see how it could have prejudiced the parties, or been any ground for reversing the judgment.

In regard to the exceptions of the defendant to opinions of the court permitting a witness who had surveyed, or partially surveyed, the land in controversy for the plaintiff, to refresh his memory by referring to certain papers which he had in his hand: The law on this subject is thus
544 laid down in Greenl. on *Evidence, § 436: "Though a witness can testify only to such facts as are within his own knowledge and recollection, yet he is permitted to refresh and assist his memory, by the use of a written instrument, memorandum or entry in a book, and may be compelled to do so if the writing is present in court. It does not seem to be necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak to the facts from his own recollection." "And it is not necessary that the writing thus used to refresh the memory, should itself be admissible in evidence." Numerous authorities are cited by the author, which, I think, fully sustain his view of the law; though there is certainly some conflict, at least in the dicta of some of the judges.

The doctrine established by the authorities seems to be that if a witness, after looking at the paper to recall the facts, can speak from his own recollection of them, and not merely because they are stated or referred to in the paper, his evidence will be admissible, notwithstanding the manner in which his recollection was revived, and no matter when or by whom the paper was made, nor whether it be original, a copy, or an extract, nor whether referred to by the witness in court or elsewhere. 4 Philips' Evi.; Cowen & Hill's Notes, part 2, p. 734. This kind of testimony is liable to abuse; the chief objection to it being that the paper referred to operates on the mind of the witness like a leading question: but it is rendered necessary by the frailty of the human memory; and the abuse to which it is liable must be guarded against by the vigilance of the court. If after looking at the paper the witness cannot speak from his recollection merely, his testimony, so far as he cannot speak from his recollection, is inadmissible; and the paper itself, if admissible evidence, either alone, or so far as it may
545 *be supported by the recollection of the witness or other testimony, must be produced. In Jacob v. Lindsay, 1 East's R. 460, the witness was permitted to refer to a paper which itself was not admissible evidence. In Henry v. Lee, 2 Chitty's R. 124, 18 Eng. C. L. R. 273, a witness was allowed to refresh his memory from a document though not written by himself. "It is sufficient," said Lord Ellenborough, C. J., in that case, "If a man can positively swear that he recollected the fact, though he had totally forgotten the circumstance before he came into court; and if upon looking at any document, he can so far refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference that the memorandum was written by himself, for it is not the memorandum that is the evidence, but the recollection of the witness."

I see nothing in Starkie on Evidence, nor in the case of Doe ex dem. Church v. Perkins, 3 T. R. 749, so much relied on by the counsel for the plaintiff in error, which is in conflict with the doctrine as laid down by Greenleaf. On the contrary, the case of Doe v. Perkins is one of the cases cited by that author, and tends to support the doctrine. The point decided therein, as stated in the marginal abstract, was that a witness may refresh his memory by any book or paper, if he can afterwards swear to the fact from his own recollection. But if he cannot swear to the fact from recollection, any further than as finding it entered in a book or paper, the original book or paper must be produced. Mr. Justice Buller in Doe ex dem. Church v. Perkins, referred to a case of Tanner v. Taylor, in which, being an action for goods sold, "the witness who proved the delivery, took it from an account which he had in his hand, being a copy, as

he said, of the day book, which he had left at home: and it being objected that the original ought to have been produced, Mr. Baron Legge said that if he would
546 swear *positively to the delivery from recollection, and the paper was only to refresh his memory, he might make use of it. But if he could not, from recollection, swear to the delivery, any further than as finding them entered in his book, then the original should have been produced; and the witness saying he could not swear from recollection, the plaintiff was nonsuited."

This doctrine is of easy application to the case under consideration. The witness was permitted to refer to two papers to refresh his memory. The first was an original paper; being a diagram made by the plaintiff of the tract of land claimed by him, which paper had an endorsement thereon in the handwriting of the plaintiff, stating that it was the tract on which the defendant lived. The witness stated that some years before, he surveyed two or three lines of the survey on which the defendant lived, and when he run the lines he had no authentic document to run them by, and only had the paper with the diagram and endorsement aforesaid. To this diagram the witness referred for courses and distances, and admitted that he did not remember how far he had run or what courses he had run, without reference to said paper; and did not recollect either course or distance independent of said paper. To the witness refreshing his memory from said paper, the defendant objected; but the court overruled the objection, directing the witness not to state anything set out in the paper, but only to state what acts he did in running the lines aforesaid, and what he found on the ground. I think there is no error in this ruling and direction of the court.

The witness had run certain lines, at the request of the plaintiff, and according to a paper containing a diagram, which the plaintiff placed in his hands. The fact that such lines were run, was a link in the chain of the plaintiff's evidence. Whether
547 they were lines *of the patent under which he claimed, depended upon a comparison with the patent which was before the jury, and the evidence of the surveyor as to the appearances upon the ground, &c. There was no objection to the fact as irrelevant evidence, but only to the use made of the paper, on the ground that not having been written by the witness, and he not recollecting what course or distance he had run independently of the said paper, it could not be referred to by him to refresh his memory. It was an original paper; was in court; was identified by the witness; and, in connection with his testimony, was the very best evidence of the lines he had been requested by the plaintiff to run. The witness might have recollected the courses and distances of these lines; and if so, might have given evidence of them, without reference to the paper. But it could hardly be expected, after the lapse of several years, that he could remember them without such reference, or even with it. All that he could reasonably be expected to be able to say, was, that, at the plaintiff's request, he ran certain courses and distances set forth in the paper which he had in court, and held in his hand. This he did say, and it was admissible evidence to prove the fact accordingly. In this and the like cases, the paper itself, being a part of the evidence, must be produced.

The other paper, to which the witness was permitted to refer, was an extract or copy from his field notes of the survey before mentioned, which notes were at his home. He said that the copy was accurately made by him, but did not pretend to say that he recollected the courses or distances deposed to from said copy, independently thereof. The defendant objected to the evidence, because the original field notes were not produced. The court overruled the objection, and permitted the witness to refer to the copy to refresh his recollection of the running done by him. If the witness,
548 *after referring to the copy, had said that he had no recollection of the facts therein contained, and could only say they were true, because they were therein contained, I think, according to the authorities before cited, it would have been necessary to have produced the original. There may be some ambiguity on this subject in the bill of exceptions, which might produce some difficulty, if the question were material; but in this case it is not. Understanding the court as permitting the witness to refer to the paper merely to refresh his recollection of the running done by him, or of the facts therein set forth, I think there was no error in so doing.

In regard to the objection that the court permitted the witness Fisher to be sworn on the voir dire after his interest had been shown by evidence aliunde: It is sufficient to say that the error of the court, if any, was cured by the fact, that before the witness was sworn in chief a deed was produced and proved, which terminated his interest.

In regard to the instructions: I think the court did not err in refusing to give those which were asked for by the parties, or in giving those which were given by the court. The agreement of the parties, which was by deed exhibited and proved to the jury, if it did not terminate the defendant's right to hold the land in controversy on the 10th of April 1847, at least made him a tenant at will or at sufferance after that day; and such a tenant is not entitled to six months' notice, to which a tenant from year to year is entitled. The most that he can require is reasonable notice, and he is entitled to no notice if he claims to hold adversely, or attorns to some other person, or does some other act disclaiming to hold as tenant. 1 Lom. Dig. 165. In this case there was evidence that the defendant refused to surrender possession of the land to Fisher according to the agreement. I think
549 that the plaintiff, *being invested

with the legal title, had a right to maintain the action at the time it was instituted, notwithstanding his executory contract with Fisher.

In regard to the only remaining question: I think the court erred in excluding the evidence of the witness Alexander Harrison, offered by the defendant. In a suit brought upon a deed, the plaintiff is not required to prove it without a plea of non est factum, verified by oath. But when, as in this case, a deed is introduced collaterally as evidence, it must be proved by the party introducing it, according to the rules of law; and the other party, without any denial of the deed on oath, may assail it by any evidence which shows, or tends to show, that it is not his deed; indeed, by any evidence which would be admissible on the plea of non est factum. He may, therefore, introduce evidence tending to show that there was fraud in the execution of the instrument, as that it was misread to him, or his signature obtained to a different instrument from the one he intended to sign. Taylor v. King, 6 Munf. 358; Dorr v. Munsel, 13 John. R. 430; Van Valkenburgh v. Rouk, 12 Id. 337.

In the last case, the court said, "If a deed be misread or misexpounded to an unlettered man, this may be shown on non est factum, because he has never assented to the contract. So, if a man be imposed upon, and signs one paper while he believes he is signing another, he cannot be said to have assented, and may show this on non est factum." It does not certainly appear whether the defendant in this case was unlettered or not. His signature to the deed purports to have been made by himself, and the presumption therefore is, that he was not. But the admissibility of evidence tending to prove fraud in the execution of an instrument does not depend upon the fact that the party whose deed it purports to be, was unlettered; though the weight of the evidence is materially increased thereby.

550 *In this case, the defendant offered to prove by one of the subscribing witnesses to the bond, that he and the defendant both understood the agreement (which is in the handwriting of the plaintiff) as referring the title to the land to the arbitrators named in said paper; that said witness was present when it was read to the defendant, and neither the witness nor the defendant understood or believed that said paper made the defendant the tenant of the plaintiff; nor did they know that any such thing was in said paper; and further, that both the witness and the defendant understood said paper as read to them, as simply referring to the arbitrators the right to said land, and not that the defendant had by that paper given up his right to the land, and referred to arbitrators his right to pay for improvements, to be set off against the annual rents of said land. If the paper was correctly read to the defendant at the time of its execution, his misunderstanding of it could not affect its validity as a deed: And so far as the evidence offered tends to show a mere misunderstanding of the paper, it is wholly immaterial and irrelevant to the issue. But if it tends, in any degree, however slightly, to show that the paper was materially misread to the defendant at the time of its execution, and that he was thus induced to execute it, the evidence is admissible. I think it has such tendency, and ought to have gone to the jury, to be weighed by them with the other evidence in the case. It may be of little weight in itself to prove fraud in the execution of the paper, and of less or none when taken in connection with the other evidence. But of that the jury are the exclusive judges. The witness was selected by the parties to attest the instrument; and it was his duty to notice the circumstances attending its execution. He did not say that the paper was misread, nor how it was read to the defendant at the time of its execution. He may not have remembered particulars, or been able to state

551 *more than his understanding of the substance of the paper as read to the defendant. That understanding was materially different from the plain meaning of the paper itself; and it is difficult to conceive that he could have so understood it, if he is a man of ordinary intelligence, and heard the paper correctly read. But these are matters for the consideration of the jury, and are adverted to here only to show that at least the evidence is relevant and admissible; which is the only question the court has to decide in regard to it.

I am of opinion that the judgment should be reversed, the verdict set aside, and the cause remanded for a new trial to be had therein.

LEE and SAMUELS, Js., concurred in the opinion of Moncure, J.

DANIEL, J., dissented.

Judgment reversed.

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552 *Johnston v. Zane's Trustees & als.

July Term, 1854, Lewisburg.

(Absent DANIEL, J.)

1. **Deeds—Subsequent Creditors—Fraud.***—To avoid a deed at the suit of a subsequent creditor, actual fraud must be shown.
2. **Same—Securing Creditors—Settlement on Grantor's Family—When Valid.**—A deed which provides in the first place amply for all the then existing debts of the grantor; and then settles the balance of the property on the grantor's family, in the absence of actual fraud, is a valid deed.

***Deeds—Subsequent Creditors—Evidence of Fraud.**—Although fraud in fact must be shown to impeach a conveyance as to subsequent creditors, it is not required that the express fraudulent intent appear by direct and positive proof; circumstantial evidence is not only sufficient, but in most cases is the only proof that can be adduced. Fraud is to be legally inferred from the facts and circumstances of the case, when those facts and cir-

3. **Same—Settlement on Grantor and Wife—Liability for Subsequent Debts.**†—A settlement which gives to the grantor a bare maintenance with his wife, for his life, and provides that the property shall not be subject to his debts thereafter contracted, does not vest him with such an interest in the property as can be subjected to satisfy such after contracted debts.

4. **Same—Valid Provisions.**—What provisions in a deed will not avoid it.

5. **Same—Voluntary—Rights of Subsequent Creditors.**‡—QUÆRE: If a subsequent creditor can file a bill to set aside a deed on the ground that it is voluntary and therefore void as to prior creditors; no prior creditor complaining of it.

6. **Pleading and Practice—Bill against Trustee and Cestui Que Trust—Effect of Answer by Trustee.**—Upon a bill against a trustee and *cestui que trust* in a deed, the trustee answers and puts the allegations of the bill in issue, but the bill is taken for confessed as to the *cestui que trust*. The answer of the trustee protects the *cestui que trust*, and the plaintiff must prove his case as to both.

7. **Note—Debt—Contemporaneous Origin.**§—A note does not import a debt existing previous to the period of its execution; but its effect is to give the debt and the note a contemporaneous origin.

In March 1848 James C. Johnston filed his bill in the Circuit court of Ohio county against Jacob S. and William W. Shriver, trustees of Platoff Zane and Eliza Jane his wife and their children, and others, in which he alleged that Platoff Zane of Wheeling in his life time being indebted to A. J. Prentiss in the sum of one thousand two hundred and seventy-five dollars, on the 9th of March 1837 at Wheeling, executed to him his note payable on demand for
553 that sum. That at *the urgent request of said Zane, who was the brother of plaintiff's wife, the plaintiff bought the note; and that in October 1841 he recovered a judgment thereon against Platoff Zane.

He alleged further, that two days before the said note was made, Zane executed two deeds of trust to Charles D. Knox and Samuel Sprigg, copies of which he exhibited with his bill, by one of which he conveyed a part of his property, with the professed purpose of securing the payment of his debts; and by the other, he conveyed all the residue of his property in trust for himself and his wife. These conveyances the plaintiff charged were made to delay, hinder and obstruct his creditors in the collection of their just debts. He insisted that his judgment was a lien on the lands conveyed in said deeds. That Platoff Zane retained an interest in said lands, which ought to be subjected to the payment of the plaintiff's debt. He stated the death of Sprigg and the substitution of the Shrivers as trustees in the place of Knox; and that there was a large amount of the trust property in the hands of the trustees, much more than sufficient to pay his debt; and he prays that they may be subjected for that purpose; and for general relief.

The children of Platoff Zane, all of whom were infants, answered by a guardian ad litem; and the bill was taken for confessed as to Mrs. Zane. The acting trustee William W. Shriver answered. He said that he could not admit or deny the existence of the note spoken of in the bill, as a valid debt of Platoff Zane, he having no personal knowledge of its existence, nor of the consideration for which it was given. Nor could he admit or deny that the plaintiff bought the note at the urgent request of Platoff Zane, he having no knowledge on the subject; and he called for full proof of the same.

The defendant admits the judgment

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cumstances are of such a character as to lead a fair-minded man to the conclusion that the conveyance was made with intent to hinder, delay or defraud existing or future creditors, and to prevent them from subjecting the property to the payment of their debts. Lockhard v. Beckley, 10 W. Va. 107, citing, among others, the principal case; Chamberlayne v. Temple, 2 Rand. 384; Hutchison v. Kelly, 1 Rob. 123; Hunters v. Waite, 3 Gratt. 26. See also, the principal case cited in this proposition in Johnson v. Wagner, 76 Va. 591, citing also, Pratt v. Cox, 22 Gratt. 330; Scott v. Rowland, 82 Va. 497, 4 S. E. Rep. 600. For further information on this subject, see monographic *note* on "Fraudulent Conveyances" appended to Cochran v. Paris, 11 Gratt. 348.

†**Blended Trust—Subjection to Payment of Debts.**—In a *note* to Thom v. Thom, 3 Va. Law Reg 729, 733, Mr. M. P. Burks says, "Nearly all of the Virginia cases which have refused to subject equitable life estates to the payment of the debts of the life tenant have been cases of blended trust—where the life tenant had no separate, distinct interest or estate which he could alien, or subject to the payment of his debts. Such were Markham v. Guerrant, 4 Leigh 279; Nickell v. Handly, 10 Gratt. 336; *Johnston v. Zane, 11 Gratt. 552*, and Brown v. Lambert, 33 Gratt. 256, 264-5." At the close of this note, the writer cites the principal case as an interesting and instructive case of blended trust. On the subject of blended trust, see *foot-note* to Nickell v. Handly, 10 Gratt. 336.

See principal case cited in French v. Waterman, 79 Va. 625; Zane v. Fink, 18 W. Va. 758; Armstrong v. Pitts, 13 Gratt. 243.

‡**Fraudulent Conveyances—Rights of Subsequent Creditors.**—If the conveyance is in fact fraudulent as to existing creditors although no existing creditor attempts to impeach it, it may nevertheless be done by the subsequent creditor, on the ground that it makes no difference against whom the fraud was directed if fraud was in the mind of the party at the time the conveyance was made, and the actual fraudulent intent was directed against any creditor, prior or subsequent, it is impeachable at the suit of the subsequent creditor. Lockhard v. Beckley, 10 W. Va. 102, citing the principal case; Hutchison v. Kelly, 1 Rob. 123; Bank v. Patton, 1 Rob. 500; Hunters v. Waite, 3 Gratt. 26; Pratt v. Cox, 22 Gratt. 330. This proposition is also sustained by Johnson v. Wagner, 76 Va. 591; McCue v. McCue, 41 W. Va. 156, 23 S. E. Rep. 690. For further information on this subject, see monographic *note* on "Fraudulent Conveyances" appended to Cochran v. Paris, 11 Gratt. 348.

§**Note—Debt—Contemporaneous Origin.**—See monographic *note* on "Bills, Notes, and Checks."

554 and the execution *of the deeds, and the substitution of himself and Jacob S. Shriver as trustees; but he denies that they were intended to delay, hinder or defraud his creditors; on the contrary, they were intended in good faith to provide for and secure the payment of all his just debts as then existing; and to provide for and secure a comfortable support for himself and wife and children out of the residue of his estate after the payment of all his just debts then existing, and to protect such as remained of his estate from his own improvident and reckless waste. That Noah Zane, the father of Platoff Zane, died in 1833, leaving to said Platoff, then a minor, a large estate. That Platoff Zane attained to the age of twenty-one years in February 1836, when he took possession of his estate, and between that time and the making of said deeds, a period little over a year, he contracted debts and liabilities to the amount of between fifty and seventy thousand dollars. His friends seeing this reckless waste of his estate, and foreseeing that unless it was secured beyond his control, in a very little time the whole would be squandered, and himself and his family reduced to want or dependence, procured him to execute the said two deeds of trust, for the purpose, first, of paying all his and his wife's debts then existing; and second, to provide for himself and his wife and family. He insisted that the deeds were valid against all subsequent creditors of Platoff Zane; and that no such creditor could claim from said trust subject any interest beyond what was reserved to said Platoff Zane out of the rents and profits, after the support of himself and wife and children: and he alleged that more than the whole rents and profits were so expended during the life of Platoff Zane, and upon his wife and children since his death.

The deeds which were assailed by the plaintiff, are dated the 6th day of March 1837; they were acknowledged

555 *by Platoff Zane and his wife before two justices on the next day; and were admitted to record, one on the 7th and the other to secure creditors on the 11th of the same month. The deed to secure creditors does not set out any specific debt due from the grantors, but recites that whereas the said Platoff Zane is largely indebted to sundry persons, and is desirous to provide a fund for the payment thereof; and then proceeds to convey a large amount of property, principally real estate; the personal property was his interest in the store and store concern kept in Wheeling by Zane & Pentoney, which had been bequeathed to him by his father Noah Zane. The trustees were authorized to proceed to sell the real estate and reduce to money the interest of Platoff Zane in the said store; and in selling the real estate, they were authorized to sell for cash or on a credit, and divide the lots or sell each as a whole, as they might think would best promote the interest of the fund. The trustees were to have immediate possession of the property, and to take the rents and profits until a sale, and these rents and profits were to be applied to the payment of debts and other objects and purposes contemplated by the deed. In collecting debts, the trustees were authorized to compound or compromise doubtful or disputed claims, if they thought it judicious. And it was further provided that the trustees should pay no debt before a judgment, to which Platoff Zane objected; nor should they be bound to pay a debt until after judgment which they might think Platoff Zane was not legally bound to pay; but if he should request a debt to be paid, and the trustees paid it, the payment thereof was not afterwards to be questioned. The trustees were to be allowed a fair and liberal compensation for their services, and to be authorized to employ, at the cost of the trust fund, agents, servants and clerks; they being responsible for the acts of

556 the *same; but in such case, the compensation was to be no more than what was reasonable, considering the employment of such agents, &c. And after all the debts then due of Platoff Zane and his wife, and all charges and expenses of the trust were paid, the moneys arising from the sale of the real property aforesaid, and from the said store concern, were to be applied, first, in purchasing a residue for Platoff Zane and his wife; and the balance was to be invested in bank stock or other good securities; and the residence was to be occupied by Zane and wife for their lives and the life of the survivor, and the interest and profits arising from the stocks and other securities were to be received by the trustees, and applied to the support of Zane and his wife during their lives and the life of the survivor of them. And it was further provided that if Platoff Zane should have children or descendants, in life at the death of the survivor of him and his wife, that said residence, stocks and securities should then go to them, the descendants taking per stirpes; and if there were no such children or descendants, then to his right heirs. But a power of appointment among his children was reserved to Platoff Zane.

The other deed conveyed to the same trustees other real estate, a part of which was the property of Mrs. Zane. The trustees were to manage the property, rent it out and receive the rents. The said rents and profits were not to be assigned or transferred by either Zane or his wife, and were not to be liable for any debt which either of them might contract. The trusts were in favor of Platoff Zane and wife, and the survivor of them, for their lives, except of so much of the property as belonged to Mrs. Zane, of which the trusts were for her separate use; and then for the children and descendants of Platoff Zane; and on failure of children, to his right heirs;

557 with a power of appointment *in him among his children, substantially the same in all these respects as were the trusts of the other deed.

It is stated in the answer of the trustee

Shriver that Platoff Zane died in May 1846, leaving his wife surviving him, and leaving six infant children. There was no parol testimony; and the cause came on to be heard upon the pleadings and the documentary evidence, consisting of copies of the plaintiff's note and judgment and the two deeds of trust; when the court below dismissed the bill with costs. From this decree the plaintiff obtained an appeal to this court.

Bibb and Baxter, for the appellants.
Fry, for the appellees.

LEE, J. Three grounds have been assigned by the appellant's counsel, upon some one of which it is insisted he is entitled to the relief sought by his bill. These are:

First, that the deeds of the 7th of March 1837 are fraudulent and void as to the creditors of Platoff Zane, and that the appellant is entitled to impeach them as such, whether he is to be regarded as a prior or subsequent creditor, in reference to the time of their execution.

Secondly, that in point of fact his debt was a pre-existing debt, and is, therefore, in terms provided for by the deeds.

Thirdly, that under the provisions of said deeds Platoff Zane took such an interest in the subject thereby conveyed as would be liable to subsequent creditors, and that the appellant is entitled as such to subject the same to satisfaction of his debt.

As to the first ground: Nothing is better settled than that a voluntary conveyance, which interferes with or breaks in upon the rights of existing creditors,
558 *will not be permitted to take effect to the prejudice of their just demands: and this according to many of the cases, without regard to the amount of the debts, or the extent of the property settled, or the circumstances of the party. Fitzer v. Fitzer, 2 Atk. R. 511; Taylor v. Jones, 2 Atk. R. 600; Chamley v. Lord Dunsany, 2 Sch. & Lef. 690, 714; Reade v. Livingston, 3 John. Ch. R. 481; Thomson v. Daugherty, 12 Serg. & Rawle 448; Howe v. Ward, 4 Greenl. R. 195; Hopkirk v. Randolph, 2 Brock. R. 132; Backhouse v. Jett, 1 Brock. R. 500, 511; Ridgway v. Underwood, 4 Wash. C. C. R. 67; Jackson v. Seward, 5 Cow. R. 67; O'Daniel v. Crawford, 4 Dev. Law R. 197.

On the other hand, numerous cases are to be found, which in effect maintain the doctrine, that a conveyance, although voluntary, may be good, under circumstances, even as against existing creditors; and that a party's being indebted at the time is but an argument of fraud, the question still being in every case, whether the conveyance is a bona fide transaction, or a mere device to delude and defeat creditors. Cadogan v. Kennett, Cowp. R. 432; Doe v. Routledge, Ibid. 705; Richardson v. Smallwood, 1 Jac. R. 552, 4 Cond. Eng. Ch. R. 202; Gale v. Williamson, 8 Mees. & Welsb. 405; Verplank v. Sterry, 12 John. R. 536; Wicks v. Clarke, 8 Paige's R. 161; Seward v. Jackson, 8 Cow. R. 406; Hinde's lessee v. Longworth, 11 Wheat. R. 199.

The subject is one involving the enquiry into the relations which the two great classes of creditors, prior and subsequent, occupy in relation to a voluntary settlement. And the question is whether they occupy a common ground, so that a conveyance which would be adjudged fraudulent as to the former, would also be held to be fraudulent as to the latter; or will a discrimination be made, the effect of which will be to withdraw from enquiry in the case of a prior creditor the various circumstances at-
559 tending the execution of *the conveyance, such as the nature of the consideration, the value of the property settled compared with that, if any, retained, the extent of their indebtedness, &c., &c.; all of which are in the case of a subsequent creditor, most proper to be considered; and upon which, in order to succeed, he must be able to fix the imputation of fraud in the absence of direct and positive proof of the intent. Chancellor Kent clearly recognizes a distinction between the two classes. In the case of the prior creditor, he considers that any enquiry into the amount of debts existing at the time would be embarrassing if not dangerous; and he regards it as wholly unnecessary, considering the debtor as absolutely disabled from making any voluntary settlement to the prejudice of any existing debts; and such, he says, is the clear and uniform doctrine of the cases. Reade v. Lovingston, 3 John. Ch. R. 481, 500. Judge Story, on the other hand, evidently considers him as carrying the doctrine too far. He thinks that mere indebtedness would not per se, avoid a voluntary conveyance even as to subsisting creditors, unless the other circumstances are such as justly to create a presumption of fraud. 1 Story's Eq. Jur. § 360 to 365, inclusive. The opinion of Chancellor Kent is supported by that of Mr. Atherley, in his work on Marriage Settlements, at p. 212; and numerous authorities are cited, which he regards as fully sustaining it. In support of his views, Judge Story refers to many cases which he regards as necessarily tending to maintain them; which will be found in the notes to the sections above cited.

The question has been the subject of a most animated and elaborate discussion between two of the former judges of this court in the cases of Hutchison v. Kelly, 1 Rob. R. 123; Bank of Alexandria v. Patton, Ibid. 499; and Hunters v. Waite, 3 Gratt. 26. Judge Baldwin strenuously combats the opinion of Chancellor Kent.
560 *He maintains that prior and subsequent creditors stand upon common ground; and that although indebtedness at the time of a voluntary settlement may create a legal presumption against its validity, yet such presumption is only prima facie, and not conclusive, depending upon the particular circumstances of the case. Judge Stanard takes the opposite grounds; he maintains the correctness of

Chancellor Kent's opinion, and argues that prior and subsequent creditors stand upon different grounds; that their rights have different degrees of merit, and that a voluntary settlement might well be held invalid and ineffectual as against the claims of existing creditors, which would be entirely impregnable to any assault made by a subsequent creditor. The subject is most fully explored in the opinions of these eminent jurists, and the whole store of argument and authority that might be brought to bear upon it well nigh exhausted. But while I have formed for myself an opinion on the point, I yet deem it one not material to be decided in this cause. I understand both these judges as agreeing that in the case of a subsequent creditor, a settlement cannot be impeached on the mere ground of its being voluntary, if there be no actual fraudulent view or intent at the time it is made. To let in such a creditor, it must be shown that there was mala fides or fraud in fact in the transaction. And if this be shown, whether the actual fraudulent intent relate to existing creditors or (as it may) be directed exclusively against subsequent creditors, the effect is the same, and the subsequent creditor may upon the strength of it successfully impeach the conveyance. Such is, I think, the clear result of all the authorities. Stileman v. Ashdown, 2 Atk. R. 477; Walker v. Burrows, 1 Atk. R. 93; Russell v. Hammond, 1 Atk. R. 12; White v. Sansom, 3 Atk. R. 410; Kidney v. Coussmaker, 12 Ves. R. 136; Holloway v. Millard, 1 Madd. R. 414; Shaw v. Standish, 2
561 Vern. R. 326; *Richardson v. Smallwood, 1 Jacob's R. 552, 4 Cond. Eng. Ch. R. 262; Sexton v. Wheaton, 2 Wheat. R. 229, 246; Hinde's lessee v. Longworth, 11 Wheat. R. 199; Reade v. Livingston, ubi supra; Hutchison v. Kelly, ubi supra; Hunters v. Waite, ubi supra; Bennett v. Bedford Bank, 11 Mass. R. 421; Salmon v. Bennett, 1 Conn. R. 525.

But though fraud in fact must thus be shown, it is not required that the actual or express intent be shown by direct proof. This would be unattainable in many cases, and if it cannot be given, it may be supplied by just legal implication from the evidence where the circumstances are such, or such marks or badges of fraud are present, that the vicious intent may and must be inferred. Lord Townsend v. Winham, 2 Ves. sen. 1; per Baldwin, J., in Hutchison v. Kelly, 1 Rob. R. 123, 134; and per Stanard, J., in Hunters v. Waite, 3 Gratt. 26, 72.

Where the grantor is not indebted at the time of making a voluntary conveyance, no fraudulent intent can of course be shown as against existing creditors; and yet it might be thoroughly vicious because prompted by a fraudulent purpose aimed at such as might become creditors thereafter. If the grantor, however, be indebted at the time, but due provision be made for all existing debts, it is clear that all just imputation of fraud in respect of them is out of the question. In Stephen v. Olive, 2 Bro. C. C. 90, a settlement had been made in favor of a wife and child, by a party who was indebted at the time in about the sum of five hundred pounds, but the debt was amply secured by a mortgage on all the estate embraced by the settlement. The master of the rolls maintained the validity of the settlement; thus in effect placing a settlement made by a party indebted at the time, but whose indebtedness was duly provided for, upon the same footing as
562 one made by a party not indebted *at all. In George v. Milbanke, 9 Ves. R. 189, 194, Lord Chancellor Eldon clearly recognizes this as the modern doctrine. He says that a provision in a voluntary settlement for payment of existing debts, would make such a settlement good against all future creditors. In Reade v. Livingston, 3 John. Ch. R. 481, 501, Chancellor Kent says, the presumption of fraud as to subsequent creditors arising from the circumstance that the party was indebted at the time of the settlement, is repelled by the fact of those debts being secured by a mortgage or by a provision in the settlement. And in the case of Hester v. Wilkinson, 6 Humph. R. 218, this doctrine was carried still further. That was a case of a voluntary settlement on a wife and children, by a party indebted at the time, and the deed contained no provision for the payment of the debts, nor was there any mortgage or other security given by which they were provided; but the trustee admitted that it was the understanding and agreement of the parties that he should pay all existing debts by the sale of so much of the property as might be necessary for that purpose. The court held this to be sufficient, and declared that a voluntary settlement on a wife and children, if fair at the time, will be good against subsequent creditors of the party making it.

I think, therefore, that the case of a voluntary settlement upon a wife and children, although by a party indebted at the time, will, according to most approved authorities, stand on the same footing with such a settlement by a party not indebted, provided due and ample provision be made for the payment of such subsisting debt; and that in either case, to assail such a settlement successfully, an actual fraudulent intent must be manifested, or must be collected from the circumstances of the case. Now it would seem at most a solecism to say of a conveyance, a primary object of
563 which is to secure all existing debts, and for *which full provision is made, that it is fraudulent as to the creditors existing at the time. I agree, however, that a conveyance might purport to secure all existing debts, and yet by reason of terms and stipulations which it contained, intended or serving to hinder, embarrass or delay the creditors in the receipt of their respective debts, it might be held to be fraudulent and void as to them. But there is nothing of that kind in this case. The deeds contain no terms or stipulations which are unusual or unreasonable. Their

provisions are such as might well be called for by the character of the subjects conveyed, the nature and amount of the heavy debts which it secured, and the circumstances under which they were contracted, the situation of the grantor and the condition of his family at the time they were executed. There is no such arbitrary power reserved to Platoff Zane to direct the management of the trust subject as is supposed by the counsel. He was not authorized to require any debt to be paid before judgment, nor were the trustees forbidden to pay any other debts than such as he might direct to be paid, before judgments were rendered upon them. This is an entire misapprehension of the true meaning of the provision alluded to, but it is not difficult to understand it. The debts to be provided for were numerous and heavy, amounting as it would seem, to a sum between fifty and seventy thousand dollars, and all contracted by an indiscreet, inexperienced and extravagant young man, within a period of a little over one year after he attained his majority. Many or some of these debts might be such as from an utter want of consideration, or because contracted under the influence of fraud or imposition, or for some other cause, he might not feel himself bound or willing to pay. Hence it was provided that if he objected to the payment of any debt claimed, the trustees
564 against his will should not pay it *till a judgment was recovered upon it. And though he might direct a debt to be paid, yet if the trustees thought it was one which he was not legally bound to pay, they were not bound to pay until a judgment should be recovered upon it; though if he requested a debt to be paid, and the trustee did pay it, the payment was not to be afterwards called in question; meaning of course by Zane or those claiming under the settlement, the fund being confessedly more than adequate to the payment of all the debts. To these provisions no just exception can be taken: they were obviously intended to protect the trust subject against unfounded pretensions, and at the same time to give a reasonable assurance to the trustees of exemption from personal liability for the acts done by them in discharge of the trust.

As to the matters relied on as badges of fraud, they are either inapplicable or without significance. That the grantor was largely indebted and the conveyance one of his whole estate, and that the creditors were hindered from their ordinary remedies by judgment and execution, would only be of force where no provision or an inadequate one is made for the payment of the debts. Here it is full and ample, and no creditor provided for is complaining. That the deeds were voluntary and by one largely indebted, is a point I have already fully considered. That neither of the trustees was a creditor, that the consideration named was the inadequate and indeed nominal one of five dollars, and that the creditors are not named and were not consulted nor consenting to the terms of the deeds at the time of their execution, are matters which under the circumstances of this case, cannot be entitled to the slightest weight. Nor is the absence of any antenuptial agreement for a settlement, a circumstance that will affect the validity of the settlement made, if it be otherwise free from objection.
565 This is *sufficiently apparent from the cases already cited for other purposes; to which numerous others to the same effect might be added.

In what has been just said it has been assumed that a subsequent creditor may come with a fishing bill charging indebtedness to others at the time of the settlement; and upon proving the same, obtain relief directly against the subject. Yet this would seem for a long period not to have been a settled point. Chancellor Kent expresses the opinion that he will be entertained, and that his rights will not depend on the mere pleasure of the prior creditors whether they will or will not impeach the prior settlement. Reade v. Livingston, 3 John. Ch. R. 481. And such Judge Baldwin seems to think is the fair conclusion from the current of decisions. Hutchison v. Kelly, 1 Rob. R. 123. Sir William Grant was of a different opinion in Kidney v. Coussmaker, 12 Ves. R. 136; and the opinion of Lord Rosslyn, referred to by him, in the case of Montague v. Lord Sandwich, is adopted as the precedent which he professes to follow. In Lush v. Wilkinson, 5 Ves. R. 384, a bill of this kind was dismissed; the master of the rolls (Lord Alvanley) saying, "it is very extraordinary for a subsequent creditor to come with a fishing bill in order to prove antecedent debts." He however gave the party liberty to file another bill. Of this case, Sir William Grant remarked in Kidney v. Coussmaker, 12 Ves. R. 136, 155, that the only surprise he felt at Lord Alvanley's decree was, that his lordship did not dismiss the bill absolutely without giving leave to file another. And indeed in a recent case decided in 1843, the vice chancellor remarked that a deed (of voluntary settlement) can only be set aside as fraudulent against creditors at the instance of a person who was a creditor at the time; though when it shall have been set aside, subsequent creditors may be let in. Ede v. Knowles, 2 Younge & Collyer 177, 21 Eng. Ch. R. 177.
566 *In Virginia, according to the opinions of Judges Stanard and Baldwin, it would seem that subsequent creditors will be let in upon a fund fraudulently alienated wherever the conveyance has been or might be successfully assailed upon the ground of actual fraud by prior creditors. Hutchison v. Kelly, 1 Rob. R. 123; Bank of Alexandria v. Patton, Ibid. 499.

There is certainly no proof in this case of any actual or express fraudulent intent on the part of Platoff Zane in executing these deeds. Nor is such intent to be fairly deduced from the circumstances of the transaction. The provision for all existing

creditors, ample and complete as it is, puts an end to all question so far as they are involved. The consideration of the settlement upon his wife and children, arising out of the natural duty to provide for their support, is one of the most meritorious character, entitled to the respect and support of the court of chancery, rather than to its frown and reprehension; and especially so, when we see the utterly improvident and wasteful habits of the grantor, and that their ruinous consequences to himself and his family were already beginning to cast their shadow before. Under the circumstances, there was nothing unreasonable in the settlement. On the contrary, it was perhaps the most judicious and prudent measure which he consummated during his brief but eventful career, after he attained his majority. Possession of the property was not reserved to nor retained by him. He did not continue to exercise acts of ownership over it, nor was he entitled to receive the rents or otherwise enjoy the proceeds. In short, not one of the usual marks or badges of fraud appears to be present. The only circumstance which can with any plausibility be relied on as evincive of a fraudulent intent, is the fact that the debt to the assignor of the appellant was contracted so shortly after the execution of the deeds. It is true, this may be looked to as evidence of the
567 intent *of the party at the time. Walker v. Burrows, 1 Atk. R. 93. It is, however, but a circumstance to be considered in connection with all the others surrounding the transaction; nor do I understand Lord Hardwicke as intending anything more by the remarks made by him in the case just cited. So viewed, I regard it as insufficient to bring home the evil intent which will stamp the transaction with the character of meditated fraud. No attempt to deceive is manifested; no suggestion of falsehood or suppression of truth. The deeds were duly admitted to record upon the same day on which they were executed. Such notice as the public records can furnish was thus given to the world. The note was executed in Wheeling, where Platoff Zane with his family and the trustees all resided, and where the deeds were recorded. The appellant was the brother in law of Platoff Zane, and it must be presumed was fully aware of all that had taken place. The bill does not aver ignorance of the existence of the deeds on the part of Prentiss when he took the note, nor on the part of the appellant when he bought it of him. Considering the wild, extravagant and improvident habits of Platoff Zane, as evinced by the history of the preceding thirteen months, his giving a note for one thousand two hundred and seventy-five dollars two days after the execution of the deeds, or upon any day, could excite neither surprise nor suspicion. It might have been for a good or a bad consideration, and upon a transaction wholly originating after the execution of the deeds.

In every view, I think the attempt of the appellant to assail these deeds on the ground of fraudulent intent either as it respects existing creditors, or those who might thereafter become such, must be held to be ineffectual.

We come now to the second ground
568 assumed, that *the note of Zane to Prentiss was for a pre-existing debt; and that it may, therefore, be regarded as provided for by the terms of the deeds. But the bill contains no such allegation. It does not set out the consideration or the origin of the note. It simply avers that Zane, being indebted to Prentiss in the sum of one thousand two hundred and seventy-five dollars, on the 9th of March 1837 executed his note for the payment of the same. This is but the usual and formal mode of stating the execution of a note in pleading. It is not understood to import the existence of the debt at a previous period, but only at the time of, and just before, the execution of the note. Its effect is to give the note and the debt which it evidences a contemporaneous origin. But if a prior existence of the debt had been formally alleged, the answer of Shriver the trustee, sufficiently puts it in issue to require the appellant to support it by proof. He says that he can neither admit nor deny the existence of the note, having no personal knowledge of it or of the consideration for which it was given, but calls for full proof touching the same. No proof whatever is furnished as to the origin or the consideration of the note. If it were for a pre-existing debt, that fact and the commencement of the debt might have been shown in evidence; and in the absence of any such proof, I think it clear that the origin of the debt must be referred to the date of the note.

It is said though that Mrs. Zane has not answered, and the allegations of the bill are as to her to be taken for confessed, and that therefore the pre-existence of the debt being admitted, the appellant is entitled to relief to the extent of any interest she may have in the subject. I have, however, already shown that there is no such allegation in the bill: and if there had been, the answer of Shriver the trustee, would serve to put it in issue for her benefit,
569 and that of all *others claiming under the deeds. For this purpose, he may properly be regarded as representing the cestuis que trust, and his answer will enure alike to the benefit of all.

The last ground upon which the pretensions of the appellant have been rested is, that under the provisions of the deeds Platoff Zane took such an interest and property in the subject conveyed as may and should be subjected to satisfaction of such debts as he might afterwards contract. The extent of the interest secured to Platoff Zane was the right to occupy, jointly and in common with his wife and family, the residence and homestead to be purchased by the trustees for their benefit out of the trust funds, after satisfaction of the debts, and to a support and maintenance during his life, with a

power of appointment to such of his children or descendants, and in such proportions as he might name; the fund to go, in default of such appointment, to his children or descendants, and failing them, to his right heirs. His interest is for a bare maintenance, and continues during his life only. Beyond his own support, he can claim nothing from the fund. If the profits were more than adequate to the necessary wants of the whole family, including himself, and a surplus accrued for investment, he would be entitled to no benefit from it whatever. Upon his death every vestige of interest, which he could be said to have in the subject, would absolutely cease and determine, and there would be nothing which could be made the subject of pursuit by a creditor. The bill here was not filed until after the death of Platoff Zane; and this is a sufficient answer upon this point. Were he in full life, however, a not less sufficient answer to the pretension could be readily given. The interest of Platoff Zane under the deeds imports no such notion of property as involves a liability to his debts.

570 This would violate the plain intention and provisions *of the deeds, and would utterly disregard the exigencies of the occasion which led to their execution. Their purpose was to arrest a thoughtless, inexperienced and prodigal young man in the headlong career of extravagance and folly to which he would seem to have committed himself, the disastrous results of which to himself and his wife and children could be too readily foreseen by his friends. They induce him to make these deeds, conveying away his whole estate, making full provision for all his then existing debts, but intentionally and formally disabling him from in any manner charging the property thus conveyed with any debts thereafter to be contracted. This he had a right to do, no creditors existing at the time being in any way injured, and no fraudulent intent being fairly to be imputed to the transaction. 1 Story's Eq. Jur. § 356, and authorities cited in the note; Markham v. Guerrant, 4 Leigh 279. And although a support is reserved to him in common with his wife and children, out of the surplus, after paying all subsisting debts, yet it is a leading idea of the deeds that the entire subject is to be preserved by the trustees free from the control of the cestuis que trust, or any of them, and exempt from liability for any debts they might thereafter contract; and thus all idea of a property in Platoff Zane in the subject, is utterly excluded by the very terms of the deeds. The interest which he possessed, such as it was, by virtue of his right to a subsistence out of the fund, in common with his wife and children, and joint and inseparable from theirs, is not such a property as can be reached in any form by his creditors. The case is fully within the principles of several cases which have been decided in this court, and which may be regarded as settling the law upon the subject. Scott v. Gibbon, 5 Munf. 86; Markham v. Guerrant, 4 Leigh 279; Roanes v. Archer, Ibid. 550; Perkins v. Dickenson, 3 Gratt. 335.

571 The case of Markham *v. Guerrant will be found to be marked by circumstances very similar to those we find in the case under consideration.

Upon none of the grounds assigned do I think the pretensions of the appellant can be maintained; and I am of opinion to affirm the decree.

The other judges concurred in the opinion of Lee, J.

Decree affirmed.

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572 *Levasser v. Washburn.

July Term, 1854. Lewisburg.

1. **Nullum Tempus Occurrit Regi.***—Time does not run against the commonwealth.
2. **Adversary Possession—Forfeiture of Land to State—Effect.**†—Though an adversary possession of land had commenced to run against the true owner, yet upon the forfeiture of the land to the commonwealth, under the delinquent land laws, the possession, until the land is sold by the commonwealth, is no longer adversary against her, or her grantee claiming under a conveyance from a commissioner of delinquent lands.
3. **Tax Titles—Forfeiture—Effect of Statute.**‡—The forfeiture of land for the failure to enter it upon the commissioner's books and pay the taxes and damages due upon it, was effected by the statute, and required no judicial proceeding to complete it. The forfeiture was, therefore, complete at the time fixed by the statute.

***Nullum Tempus Occurrit Regi.**—For the proposition that, time does not run against the commonwealth, the principal case is cited and followed in the following cases: Calwell v. Prindle, 19 W. Va. 652; City of Wheeling v. Campbell, 12 W. Va. 67; Witten v. St. Clair, 27 W. Va. 769; Com. v. Ford, 29 Gratt. 688; Hall v. Webb, 21 W. Va. 322. See, in accord, Kemp v. Com., 1 H. & M. 85; Nimmo v. Com., 4 H. & M. 57; Shanks v. Lancaster, 5 Gratt. 110; Gore v. Lawson, 8 Leigh 458; Saunders v. Com., 10 Gratt. 494; Koiner v. Rankin, 11 Gratt. 420, and *note*; Staats v. Board, 10 Gratt. 400.

†**Adverse Possession.**—Upon the subject of adversary possession, see the principal case cited in Taylor v. Philippi, 35 W. Va. 560, 14 S. E. Rep. 132. See generally, monographic *note* on "Adverse Possession" appended to Nowlin v. Reynolds, 25 Gratt. 137.

‡**Tax Titles—Forfeiture—Effect of Statute.**—For the proposition that, for the failure to enter lands upon the commissioner's books and pay the taxes and damages due upon it, such land is forfeited to the commonwealth by force of the statute and it requires no judicial proceeding to complete it, the principal case is cited and approved in McClure v. Maitland, 24 W. Va. 574, 576; State v. Sponaugle, 45 W. Va. 426, 32 S. E. Rep. 288; Wiant v. Hays, 38 W. Va. 683, 18 S. E. Rep. 807; McClure v. Manperture, 29 W. Va. 641, 2 S. E. Rep. 765; Forqueran v. Donnally, 7 W. Va. 123; Schenck v. Peary, 21 Fed. Cas. 682; King v. Mullins, 18 Sup. Ct. Rep. 929, 931, 171 U. S. 404. In Read v. Dingess, 60 Fed. Rep. 27, the principal case is cited as supporting the constitutionality of the forfeiture statutes. But in that case the

4. **Statutes—Relinquishment of Commonwealth's Right to Forfeit Lands—Application of Statute.**—The act of March 18th, 1841, Sess. Acts, p. 31, relinquishing the commonwealth's right to forfeited lands to a junior patentee in possession, only applies to those whose patents bear date previous to the 1st of April 1841.

5. **Forfeited Lands—Effect of Subsequent Patent—Case at Bar.**—A patent for land which had been previously granted by the commonwealth, and had been forfeited under the delinquent land laws, passed nothing to the patentee; and a conveyance of the land forfeited by the commissioner of delinquent lands, passed the title vested in the commonwealth by the forfeiture.

6. **Instructions—Obscurely Expressed.**§—The court may refuse to give an instruction because it is so obscurely expressed as to leave in doubt the meaning intended.

This was an ejectment in the Circuit court of Jackson county. The declaration contained one count on the demise of Honore Girond, another of the president and directors of the literary fund, a third of J. E. Norvell and John De Homergue, a fourth of said Norvell and Eugene Levasser, and a fifth in the name of Eugene Levasser alone. The plaintiff, under the last mentioned count, claimed as derivative purchaser under a sale made by order of the Circuit court of Jackson county, under the acts of assembly in relation to delinquent and forfeited
573 lands. A grant had issued to *one Honore Girond bearing date on the 22nd of March 1786, for ten thousand eight hundred and forty-three and three-quarter acres; and the land thus granted having become forfeited to the commonwealth by reason of the failure of the owners to cause the same to be entered upon the books of the commissioners of the revenue in the proper county, and to be charged with taxes and damages, and to pay the same according to law, the same was reported to the court, and on the 13th of September 1841, a decree was entered, directing the land to

court did not find it necessary to pass upon that question. In Hornbrook v. Elm Grove, 40 W. Va. 543, 21 S. E. Rep. 852, citing the principal case, it is admitted that it is not necessary, under the forfeiture statutes in regard to lands, to have a judicial proceeding to vest the title to such land in the commonwealth, but it is held that the forfeiture of the charter of a municipal corporation must be by judicial proceedings.

See, in accord with the principal case, *foot-note* to Martin v. Snowden, 18 Gratt. 100, where the cases are collected. See also, Smith v. Tharp, 17 W. Va. 221; Tebbetts v. Charleston, 33 W. Va. 705, 11 S. E. Rep. 23; Strader v. Goff, 6 W. Va. 257. In Morrill v. Scott, 61 Fed. Rep. 770, it is said: "It appears from the evidence in this case that the lands now in controversy were forfeited under the act of 1835, and that the forfeiture became absolute the 1st day of November, 1836, whereby the title to them vested in the commonwealth. During the time the lands were held by the commonwealth, Thomas Coleman and Henry Sherman, two of the defendants, obtained grants from the commonwealth on the 29th of June, 1844, upon entries and surveys made in 1843. Charles Smith, another defendant, obtained his grant for the land he claimed September 20, 1844. But before the defendants obtained their grants, and while their title was in an inchoate condition, the legislature, by a private act passed February 12, 1844, authorized the previous owners to redeem the lands by the payment into the treasury of the commonwealth of all taxes due thereon on or before the 1st day of June, 1845. It is conceded that this act was complied with by the payment of all back taxes into the treasury of the state before that time. There was, however, a saving in the act to any person having legal or equitable title to any of the lands by virtue of subsequent grant or otherwise.

"This brings me to the consideration of the legal effect of this act; and the first question that presents itself is, were these lands liable to entry and survey, and subject to grant? As we have before seen, they were granted by the commonwealth of Virginia in 1786, when the title passed out of the state, and so remained until she was reinvested with it under the act of 1835, holding them as forfeited and delinquent lands; and she so held them down to the time she relinquished her right to them by the act of February 12, 1844. At no time since the grant of 1786 were they ever held as waste and unappropriated lands, and as such liable to survey, entry, and grant. It is evident that they could not be granted as waste and unappropriated lands; and, if liable to entry, it must be because the state held them as forfeited lands, and, by legislative enactment, made them subject to entry and grant after

the forfeiture. But since the lands became forfeited, and during the time the title was in the state, there was no act of the legislature in existence that authorized the entry of forfeited lands. In fact, a grant for land forfeited for nonpayment of taxes was unauthorized by any law prior to the Code of 1849. Atkins v. Lewis, 14 Gratt. 30. It is true that forfeited and delinquent lands have been in some, possibly in a number of, instances, surveyed, entered, and carried into grant; but in no instance were these grants ever held valid by the courts except where the legislature relinquished the right of the state to the land. Such was the effect of the decision of the court in the case of *Levasser v. Washburn, 11 Gratt. 572.* If this position be correct, it must follow that the lands granted to the defendants by their patents passed no title to them, in the absence of any law either authorizing them to enter the lands, or confirming their title to them."

The principal case is also cited and followed in Carter v. Ramey, 15 Gratt. 346, and *note*; Atkins v. Lewis, 14 Gratt. 37, and *note*; Trotter v. Newton, 30 Gratt. 598; Holly River Coal Co. v. Howell, 36 W. Va. 489, 15 S. E. Rep. 223. See, in accord, Whittington v. Christian, 2 Rand. 353; Hannon v. Hannah, 9 Gratt. 146.

§ **Instructions—Obscurely Expressed.**—For the proposition that, where an instruction which is so obscurely expressed as to leave in doubt the meaning intended, the court may refuse to give it, the principal case is cited and followed in Gas Company v. Wheeling, 8 W. Va. 371; Clarke v. Ohio R. R. Co., 39 W. Va. 746, 20 S. E. Rep. 701. See, in accord, Carrico v. West Va., etc., R. Co., 35 W. Va. 389, 14 S. E. Rep. 12; Boswell v. Com., 20 Gratt. 860, and *note*; Va. Cent. R. R. Co. v. Sanger, 15 Gratt 230 and *note*; Rosenbaums v. Weeden, 18 Gratt. 785, and *note*. See monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192.

be sold by the commissioner. The sale took place on the 4th Monday in November 1841, and was confirmed by the court on the 15th of April 1842. A deed was executed to the purchaser in pursuance of such confirmation on the 25th of December 1843. The declaration in ejectment was filed on the 10th of April 1847; and on the same day the defendant appeared and pleaded the general issue. The defendant Thomas Washburn claimed under a patent to himself for one hundred acres of land bearing date the 1st day of April 1841, and under a written contract which he had made for the purchase of four hundred and eighty acres of land, embracing the premises in controversy, of one James Hector, in the spring of 1836. This contract was proven to have been lost, and evidence was given of its contents. He also proved that he went upon the land in the spring of 1836, claiming title to the same, and had continued in possession down to the institution of the suit. He also proved that one Smith had settled upon the land in 1833, had held it until he took possession in 1836; claiming under one Watson, who claimed under a grant founded on an inclusive survey, which issued to one Samuel M. Hopkins on the 1st of July 1796; but he gave no evidence of any connection between his claim and that of Smith.

The grant to Girond and the proceedings of the Circuit court of Jackson county
574 in the matter of the *forfeiture for nonentry and nonpayment of taxes, the deed from the commissioner to De Homergue, the purchaser, and a conveyance from him to Levasser, one of the lessors of the plaintiff, were given in evidence to the jury. A plat and report made in the cause under the order of the court, were also exhibited, and it appeared that the land claimed by the defendant lay within the boundaries of the tract claimed by the plaintiff.

The defendant gave in evidence the grant to Hopkins in 1796, and a conveyance from one Oliver Walcott to the said Watson, dated 22nd June 1808. After the evidence had been closed on both sides, the plaintiff moved the court to exclude the defendants' grant from the jury; but the motion was overruled. He then asked the court to instruct the jury:

First. That the decree of the court of Jackson was conclusive as to the forfeiture of the land and the quantity forfeited; and that it was not competent for the defendant to contradict it by alleging that the land embraced by his grant for one hundred acres, was not forfeited.

Secondly. That if said one hundred acres had been before granted by the commonwealth to Girond, the grant to defendant passed nothing.

Thirdly. That the statute of limitations did not run against the state, and that it only commenced running against the plaintiff on the purchase at the commissioner's sale in the fall of 1841.

Fourthly. That the purchaser at said sale was entitled to the land purchased by him, and that when the sale was confirmed and the deed made, the latter related back to the sale, and that he was entitled to a deed at the time of the sale.

The court declined to give the instructions in the form and terms in which they were asked for; but instructed the jury, that the decree and proceedings in forfeiture adduced in evidence by the plain-
575 tiff, were *conclusive to show that the title under the grant to Honore Girond had been regularly forfeited to the commonwealth, and that the rights and interests acquired by the commonwealth or the literary fund had been passed to the purchaser at the sale made by the commissioner under said decree; and that it was not competent to contradict such forfeiture: But that the commonwealth took nothing by the forfeiture aforesaid, other than the right, title and interests which existed in those in whose name and for whose defaults such forfeiture accrued, and as the same were at the time of the forfeiture; and she took the same in the plight and condition in which it stood at the time of the forfeiture.

The court further instructed the jury, that in as much as the patent for one hundred acres to the defendant, bore date on the 1st day of April 1841, that he could not be in a condition to take the benefit of the act of March 18th, 1841, which only applied to patents issued previous to the 1st day of April 1841, if even in other respects he had shown himself within the provisions of that statute, by the payment of taxes, &c.; that the purchaser at the sale aforesaid, became entitled to all the rights which had vested in the commonwealth or literary fund, by the forfeiture aforesaid, and that his deed from the commissioner, when made, related back to the time of the sale of the said land.

The court further instructed the jury, that if the statute of limitations had commenced to run by reason of the adversary possession of the defendant against the said Honore Girond, under whom the plaintiff claims, by the forfeiture, sale and conveyance aforesaid, prior to the said forfeiture, that then and in that event the statute would continue to run, notwithstanding said forfeiture; and that if such adversary possession of the land in controversy was held by the defendant and those under whom he claimed, under a
576 *claim of title, legal or equitable, commencing before such forfeiture, and continuing for seven years uninterruptedly, before the institution of the suit, that it would bar a recovery in this action.

The court also, in reply to an enquiry of the defendant's counsel, expressed the opinion that the forfeiture of the land granted to Girond did not accrue or become complete "until the decree of forfeiture was entered declaring the land to be forfeited."

To all these opinions of the court the plaintiffs excepted; and the jury having found a verdict for the defendant, he moved

the court to set it aside and grant him a new trial. This motion was overruled, and the defendant again excepted; this bill of exceptions setting out the facts proven in the cause by reference to the first bill of exceptions in which they were fully stated. The court gave judgment for the defendant; and the plaintiff obtained a supersedeas from this court.

Fisher, for the appellant.
There was no counsel for the appellee.

LEE, J. It is a maxim of great antiquity in the English law, that no time runs against the crown, or as it is expressed in the early law writers, "nullum tempus occurrit regi." Magdalen College Case, 11 Coke 68-74; S. C. 1 Roll. R. 151; Bracton, lib. 2, ch. 5, § 7; Britton, ch. 18, p. 29; 8 Bac. Abr. "Prerogative," E, p. 95; 7 Comy. Dig. "Prerog." D, 86, p. 90. And it may be laid down as a safe proposition, that no statute of limitations has been held to apply to suits by the crown, unless there has been an express provision including it. United States v. Hoar, 2 Mason's R. 311.

The reason sometimes assigned why no laches shall be imputed to the king,
577 is, that he is continually *busied for the public good, and has not leisure to assert his right within the period limited to subjects. Coke Litt. 90; 1 Black. Com. 247. A better reason is, the great public policy of preserving public rights and property from damage and loss through the negligence of public officers. Sheffeild v. Ratcliffe, Hob. R. 347; United States v. Hoar, 2 Mason's R. 311; The People v. Gilbert, 18 John. R. 227; United States v. Kirkpatrick, 9 Wheat. R. 720-735. This reason certainly is equally, if not more, cogent in a representative government, where the power of the people is delegated to others, and must be exercised by these if exercised at all; and accordingly the principle is held to have been transferred to the sovereign people of this country when they succeeded to the rights of the king of Great Britain, and formed independent governments within the respective states. Inhab. of Stoughton v. Baker, 4 Mass. R. 522; The People v. Gilbert, 18 John. R. 227; Kemp v. Commonwealth, 1 Hen. & Munf. 85; Nimmo's ex'or v. Commonwealth, 4 Hen. & Munf. 57; Chiles v. Calk, 4 Bibb's R. 554; Commonwealth v. McGowan, Ibid. 62. And though it has been sometimes called a prerogative right, it is in fact nothing more than an exception or reservation introduced for the public benefit, and equally applicable to all governments. Per Story, J. United States v. Hoar, ubi supra.

Independently of the particular reason above referred to, another has been advanced, founded on the presumed legislative intention. In general, legislative acts are intended to regulate the acts and rights of citizens; and it is a rule of construction not to embrace the government or effect its rights by the general rules of a statute, unless it be expressly and in terms included or by necessary and unavoidable implication. United States v. Hoar, ubi supra; People v. Gilbert, 18 John. R. 227.

578 *This exemption from the imputation of laches and the operation of the statutes of limitation is not confined to debts and demands of personal nature in favor of the sovereign, but extends also to lands and real estate held jure coronæ. Bracton, lib. 3, ch. 3, p. 103; Lee v. Norris, Cro. Eliz. 331; Chiles v. Calk, 4 Bibb's R. 554; Johnston v. Irwin, 3 Serg. & Raw. R. 291. And accordingly, we find it treated as a settled maxim, that there can be no adversary possession of lands against the commonwealth, and that no time will bar her recovery, or that of her grantee, against the party holding, except only in the solitary case specially provided by statute, of a settlement of thirty years accompanied by payment of taxes or quit rents within that time. Gore v. Lawson, 8 Leigh 458; Tichanal v. Roe, 2 Rob. R. 288; Shanks v. Lancaster, 5 Gratt. 110. See also Ward v. Bartholomew, 6 Pick. R. 409.

But though the general rule will not be controverted, it may be said that it will not apply in the case of a forfeiture of lands to the commonwealth for failure of the owner to comply with her revenue laws, where an adversary possession had been commenced against the former owner before the forfeiture.

It is true, in a certain sense, the commonwealth takes the land on forfeiture in the same plight and condition in which it stood at the time of the forfeiture. The commonwealth takes the estate and title of the former owner, and no other. If at the time of the forfeiture his title were absolutely bound by the adversary possession of another, it may be no title would vest in the commonwealth, unless it were saved by the existence of her lien on the land for arrears of taxes; a point upon which I express no opinion. But if when the forfeiture accrued the right of entry still remained to the owner, though an adversary possession had been com-
579 menced, the possession as to her *must lose its adversary character, and she must take and hold the subject with the same rights, privileges and immunities which pertain to any other lands held by her in her demesne. I can perceive no good reason why any discrimination should be made, or why she should hold forfeited lands upon different principles and with diminished privileges from the applying to other subjects of similar character. Certainly, the reason for exemption from the effects of laches and inattention on the part of her public officers, is as cogent in such a case as in any other whatever. Nor have I seen any case, so far as my investigation has extended, which warrants any such distinction. The case of Hall v. Gittings, 2 Har. & John. 112, fully supports the contrary doctrine. In that case certain lands, which had escheated to the lord proprietary (under grant of the English crown) were confiscated to and vested in the state

of Maryland under the act of October 1780, ch. 49, without office found or actual entry. Prior to the confiscation, adversary possession of the land had been taken and was held against the proprietary. Yet it was held that upon the passage of the act of confiscation, such possession ceased to operate against the state during the time the title was vested in her, and that the defendant could not, upon the strength of such possession, resist the right of her subsequent grantee to recover. See also Harlock v. Jackson, 1 Constit. R. (S. C.) 135.

The opinion of the court in United States v. White, 2 Hill's N. Y. R. 59, might seem to countenance a different doctrine. It was an action on a promissory note by plaintiffs as endorsees, against defendant as maker. The defendant pleaded actio non accrevit infra, &c., and other pleas; to all of which the plaintiffs demurred. The court said that if the statute had commenced to run before the endorsement, it would continue to run afterwards even against the
580 plaintiffs, and *their privilege would not apply; but upon the pleadings, it held that the plaintiffs became the holders of the note before its maturity; and judgment for plaintiffs. Here then the question did not arise, and what was said by the court was obiter merely. And it might too not be difficult to show a marked difference in reference to the effect of the statute between the case of a state taking a note by contract of endorsement, voluntarily, and that of acquiring title to real estate by act of law under a forfeiture. The case of United States v. Buford, 3 Peters' R. 12, was assumpsit for moneys claimed from the defendant upon a receipt, in which he had promised to account for the same. The plaintiff claimed an assignment to the United States from the original contracting party; more than five years had elapsed after the cause of action arose before the assignment was made, and the statute of limitations was pleaded. The Supreme court held that as the bar of the statute was complete before the assignment, the plaintiffs could not recover; but it appears to be conceded that if the statute had not run its course when the assignment was made, the character of the claim might be so changed that it would be thereafter withdrawn from its operation.

I think, therefore, that as the right of entry of Girond had not been barred at the time of the forfeiture, if that were even fixed at the time assumed by the court, the possession of the defendant after that time ceased to be adversary, and became, as said in Harlock v. Jackson, ubi supra, the joint possession of himself and the other members of the community; and that the court erred in its opinion that the statute continued to run against the commonwealth. And this view I consider is fully sustained by the opinion of this court in the cases of Staats v. Board, 10 Gratt. 400, and Hale v. Branscum, 10 Gratt. 418.

According to the decisions of this
581 court in the cases *just referred to, and also that in the cases of Wild v. Serpell, 10 Gratt. 405, and Smith v. Chapman, Id. 445, the Circuit court also erred in its opinion as to the time at which the forfeiture under the Girond grant occurred or became complete. It appears to have proceeded on the notion that some inquest of office, or decree or other proceeding should have been had in order to declare and perfect the forfeiture. Nothing of the kind was necessary. The act of the 27th of February 1835, Sess. Acts, p. 11, declaring that lands which had been omitted from the books of the commissioners of the revenue should be forfeited unless the owners should cause the same to be entered and charged with taxes, and should pay the same except such as might be released by law, was intended by its own force and energy to render the forfeiture absolute and complete, without the necessity of any inquisition, judicial proceeding or finding of any kind, in order to consummate it. It was perfectly within the competence of the legislature to declare such forfeiture and divest the title by the mere operation of the act itself, and the whole legislation upon the subject of delinquent and forfeited lands, plainly manifests the intention to exercise its power in this form. By the fourth section of the act of March 6, 1827, Supp. Rev. Code 1819, p. 314, the title to lands vested in the literary fund for nonpayment of taxes and not redeemed, is transferred in certain cases to those who may have settled and improved them under title claimed under a grant from the commonwealth. The language of the act is "that all right, title, &c." (of the literary fund) "shall be and the same is hereby relinquished to and vested in such person, &c." By the second section of the act of April 1, 1831, Supp. Rev. Code, p. 345, certain delinquent lands and lands sold and theretofore redeemed by the executive under a previous act, which should not be re-
582 deemed by a *given day, were declared to be forfeited. The language of the act is, "shall be from and after (the day named) absolutely forfeited, &c.;"—"and such lands, &c., shall be thenceforth and the same are hereby absolutely vested in" the literary fund. The eighth, ninth and tenth sections of the same act provide for transferring the title to certain forfeited and escheated lands to persons in possession under other grants in certain cases; and by the eleventh section, a mode is provided by which the occupant is to obtain a decree on petition to the proper court, investing him with the title. But by the act of March 10th, 1832, this proceeding is dispensed with, and the title immediately vested by the operation of the act. Its language is, "all such lands, &c., shall be and the same are hereby declared to be absolutely vested in such holders, and as to those not yet forfeited, immediately after the forfeiture, &c.; and such holder in any action brought against him for the recovery of such land, shall have the full benefit of the commonwealth's right hereby intended to be transferred to him." The act of

February 1835, in similar language, forfeits omitted lands, if not assessed and the taxes paid, after the 1st of July 1836; and the title thus vested in the commonwealth is transferred to and absolutely vested in any person in possession claiming bona fide under a grant bearing date previous to the 1st of April 1831.

All these provisions, and those of similar character in other acts, would seem to be utterly incompatible with the idea of an inquest of office, or any such proceeding, being necessary to consummate or give effect to the forfeiture.

I think there is little aid to be derived in construing these statutes from the common law doctrines in relation to forfeiture of land for crimes to the crown. These acts were designed to remedy certain evils for which prompt, summary and decisive
583 measures were *indispensable. They were intended to perform the office and perfect the remedy proposed by their own mere force and operation. Where by statute a forfeiture of goods is created, the property, by the forfeiture, is divested out of the owner without any proceeding on the part of the state, and becomes vested in the government. Coke Litt. 128; Wilkins v. Despard, 5 T. R. 112; Fontaine v. Phœnix Ins. Co., 10 John. R. 58; Kennedy v. Strong, 14 John. R. 131. Where it is of lands, the same rule should prevail if such is the plain intention of the legislature. See Barbour v. Nelson, 1 Litt. R. 60. Even at common law, though lands or goods forfeited for treason or felony, could not be seized into the king's hands, nor granted by him to another, before attainder, yet the forfeiture of the lands relates to the time of the offence, to avoid all subsequent sales and incumbrances; otherwise as to goods. Coke Litt. 390 b; Hale's Pl. C. 264; 4 Com. Dig. "Forfeiture," (B 6,) p. 412; Ibid. p. 413, and note u; 4 Bac. Abr. "Forfeiture," D. p. 346.

By the act of February 9th, 1814, 2 Rev. Code 1819, p. 545, all previous laws forfeiting omitted lands were repealed, and all previous forfeitures of the same released; and as no provision was made subsequently in relation to such lands until the passage of the act of February 1835, no forfeiture could occur previous to that time. By the act of March 1836, Sess. Acts, p. 7, further time was allowed till the 1st of November 1836, for the owners of omitted lands to enter the same on the books, and have them charged with taxes, and to pay such taxes, as prescribed by the second section of the act of February 1835. But on failure of such owners to perform this duty, the forfeiture became absolute and consummate from and after the 1st of November 1836, and the provisions of subsequent laws giving time for redemption did not re-
584 lease *the forfeiture which had accrued, except in such cases where the owner availed himself of the opportunities of redemption thus afforded.

In this case, therefore, the forfeiture accrued and became complete on the 1st of November 1836, and the Circuit court erred in not so instructing the jury, instead of fixing it at the date of the decree for the sale, or decree of forfeiture, as it is styled in the bill of exceptions.

I think the Circuit court committed no error in instructing the jury, that as the defendant's grant bore date on the 1st of April 1841, he was not in a condition to take the benefit of the act of March 1841, though in other respects he could show himself to be within the provisions of that act, because it only applied to grants issued previous to the 1st of April 1841; and that the purchaser at the commissioner's sale acquired all the right vested in the commonwealth by the forfeiture of the Girond title, and that his deed from the commissioner related back to the sale of the land. But I do not perceive why the court refused to instruct the jury, that if the land embraced by the defendant's grant had been before granted by the commonwealth to Girond, nothing passed to the defendant under his grant. The court very correctly refused to exclude it from the jury, because in doing so it would have undertaken to decide that the boundaries of the grant to Girond did in fact embrace the land covered by the defendant's grant; a matter which it was the province of the jury to determine; but if the jury should be of that opinion, the court should have instructed them that the commonwealth's title passed by the elder grant to Girond; and there remained nothing which could pass by the junior grant to the defendant. That before the grant to the defendant issued, the title under the Girond grant had been forfeited to the commonwealth, will give no
585 strength to the defendant's *grant; because it was for land entered and surveyed by him as waste and unappropriated land, and there was no act then in force authorizing forfeited lands to be entered as waste and unappropriated; the act which at one time had authorized it, having been repealed. And in the absence of such a statutory provision, no title could be acquired to such lands by entry and survey, and a patent obtained for them would be merely void. The law pointed out the mode by which the title to such lands was to be passed, and that was by sale and conveyance by the commissioner of forfeited lands, and any attempt to acquire title to them in any other mode would be utterly ineffectual. When a conveyance should be made in the mode prescribed by law, it would pass the forfeited title and overreach any intermediate grant founded upon an entry and survey; such grant not precluding the commonwealth from making a deed through her commissioner in the appointed mode, which would be effectual to pass the title vested in her by the forfeiture. Wilcox v. Calloway, 1 Wash. 38; Whittington v. Christian, 2 Rand. 353.

In the refusal of the court to give the first and fourth instructions asked for by the plaintiff, in the terms suggested by him, there was no error of which he can com-

plain, because the court did give in substance, if not in the same language, all and so much of said instructions as he could properly require; the portion of the first instruction which seems to have been omitted being so obscurely expressed as to leave in doubt the meaning intended; and it was for that cause, if no other, properly omitted.

With regard to the third instruction: From what I have already said, it will appear that the court erred in refusing to give so much of it as informed the jury that the statute of limitations did not run against the commonwealth upon the facts in
586 this case. Whether, *however the statute only commenced to run against the plaintiff from the time of the sale by the commissioner in November 1841, as the plaintiff contended, or whether the time for which the defendant held the land before the forfeiture accrued to the commonwealth, is to be added to that for which he held it after the commissioner's sale and up to the institution of the suit, with a view to make out a bar under the statute, is a question which will require very grave consideration when it shall be necessary to decide it. In this case no such necessity exists, because giving to the defendant the benefit of his possession from the time he got the title bond from Hector under which he claimed title, until the forfeiture took place, (and he can claim nothing more because he wholly fails to connect himself in any way with the anterior possession held by Smith,) and adding to it the whole period from the sale by the commissioner in November 1841 down to the institution of the suit, it will not amount to seven years' possession, which is necessary to constitute the statutory bar. I leave this, therefore, without further comment.

For the reasons I have thus endeavored to assign, I am of opinion to reverse the judgment, and to remand the cause for a new trial.

The other judges concurred in the opinion of Lee, J.

Judgment reversed.

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587 *Kincheloe v. Tracewells.

July Term, 1854, Lewisburg.

(Absent DANIEL, J.)

1. **Unlawful Entry—Removal of Cause.***—A warrant for unlawful entry, &c., is a civil action, which may be removed, on motion, without notice, from the County to the Circuit court, if it has remained undecided for a year or upwards: And the time is to be estimated from the organization of the court summoned to try it.

2. **Unlawful Detainer—What Plaintiff Must Prove.**—To entitle the plaintiff to recover upon a warrant of unlawful detainer, he must prove that the defendant withheld the possession at the date of the warrant. But if the warrant does not state the withholding of the possession by the defendant, that may be aided by the complaint which states the fact.

3. **Instructions—Partially Erroneous—Court Need Not Modify.**†—Upon a motion by plaintiff to instruct the jury to disregard all the documentary evidence introduced by the defendant, of which some part is legal and other illegal, the court may properly overrule the motion, without undertaking to state to the jury which is legal and which is illegal.

4. **Adversary Possession—Interlock—Case at Bar.**‡—The boundaries of two coterminous owners of land interlock; and the party claiming under the elder patent, enters upon his land outside the

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***Civil Actions—Removal from County to Circuit Court.**—See *foot-note* to Harrison v. Middleton, 11 Gratt. 527, and cases there cited, all of which cite the principal case. See generally, monographic *note* on "Unlawful Detainer" appended to Dobson v. Culpepper, 23 Gratt. 352.

†**Instructions—Partially Erroneous—The Court Need Not Modify.**—In Green v. Crain, 12 Gratt. 254, the principal case and Harvey v. Epes, 12 Gratt. 153, were cited as holding that the courts may decide upon motions to instruct the jury just as they are made, and are under no legal necessity of shifting or modifying such motions so as to separate and withhold the erroneous portions from the jury.

But, though an instruction as asked is not wholly correct, yet, if the general refusal of it may mislead the jury, the court should accompany the refusal with an explanation to the jury, or should give them an instruction stating the correct proposition. *Foot-note* to Peshine v. Shepperson, 17 Gratt. 473.

But see, on the whole subject, monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192.

Evidence—Objection to.—A general objection to evidence, part of which is admissible and part inadmissible, will be overruled by the court; the objection should specifically point out the objectionable part of the evidence in order to have it excluded. Sulphur Mines Co. v. Thompson, 93 Va. 307, 25 S. E. Rep. 232, citing the principal case.

‡**Adversary Possession—Interlock.**—See monographic *note* on "Adversary Possession" appended to Nowlin v. Reynolds, 25 Gratt. 137.

Same—Same—"The Open Question."—When the senior patentee is in actual possession of a part of his grant, but outside of the interlock, at the time of the junior patentee, does the latter, by an actual possession of a small part of the interlock, gain a prescriptive title to his *pedis positio* only, or to all of the land within the interlock? This is known as "the open question" in Virginia. Several articles have been written on this subject in the Virginia Law Registers. See 3 Va. Law Reg. 763; 3 Va. Law Reg. 843; 4 Va. Law Reg. 8; 4 Va. Law Reg. 138; 5 Va. Law Reg. 810.

In Garrett v. Ramsey, 26 W. Va. 376, JUDGE SNYDER, delivering the opinion of the court, said: "I, therefore, conclude that the *quære* or proposition under discussion should be decided in the affirmative; that is, where the elder grantee is in actual possession of the land covered by his grant outside of the interlock and the adverse or junior claimant is in the actual possession of a part of the land in the interlock claiming the whole, he will in contemplation of law and by force of the said statute be treated as being in the actual possession of the whole land embraced within his grant or color of title. The foregoing conclusion is fully sustained

interlock, and cultivates and improves it, holding continued possession thereof. The party claiming under the junior patent, enters on his land outside the interlock, and clears and improves it and lives upon it, the land in the interlock being uncleared; and he exercises such continued acts of ownership over the whole land lying within the interlock as constitutes an adversary possession thereof, though but a part of it is cleared and enclosed; and after thus living on his land and acting for upwards of five years, he dies in possession, and his heirs continue to hold possession, and claim and exercise like acts of ownership over the land within the interlock. HELD:

1. **Same—Same—Same.**—The possession of the heirs is not limited to their inclosure.

2. **Same—Same—Same—Entry Tolled by Descent.**—The entry of the party holding under the senior patent is tolled by the five years' possession and descent cast; and he cannot recover by a warrant of unlawful detainer.

5. **Transfer of Land in Adversary Possession of Another—Effect.**§—A deed conveying land then, and continuing to be, in the actual adversary possession of another, cannot operate to pass the title to the grantee.

588 *6. **Entry on Land—What Possession Necessary to Bar Right.**—In 1831 and until the passage of the act of March 30th, 1837, no possession short of fifteen years, unaided by a descent cast, would bar the entry of one having right or title to the land.

7. **Adversary Possession—Claim of Title Necessary—Color of Title Unnecessary.**‖—An entry upon land in the possession of another, in order to operate an ouster and give a possession to the party entering, must be with claim of title: But the claim of title need not be under a deed or other writing; or if it is under a deed, it is not necessary that his possession shall be restricted to what shall prove to be within the precise boundaries of his deed.

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by the able and instructive opinion of JUDGE BALDWIN in Taylor v. Burnsides, 1 Gratt. 190. It is also sustained by the opinion of JUDGE LEE, as I understand it, in the case of Koiner v. Rankin, 11 Gratt. 424, and by the decision of the court in Cline v. Catron, 22 Gratt. 378, 392, though the question was not directly presented by the record in the two latter cases." In this decision, JOHNSON, P., and WOODS, J., concurred, GREEN, J., dissenting. Thus the question would seem settled as far as West Virginia is concerned.

But the Virginia courts maintain that the cases cited by SNYDER, J. (see preceding paragraph), do not decide this question. In Turpin v. Saunders, 32 Gratt. 38, STAPLES, J., in delivering the opinion of the court, said: "I did not sit in the case of 'Cline's Heirs v. Catron,' having been counsel in the lower court. But I am confident this question (*i. e.*, "The Open Question") did not arise either upon the evidence or upon any of the instructions propounded on either side. It is obvious that JUDGE ANDERSON did not intend to lay down any such doctrine as the reported opinion would seem to indicate. What I take it he intended to say was, that when the junior grantee has actual possession of a part of the interlock, and the senior grantee has actual possession of no part of his tract, then the possession of the junior grantee is not confined to his *pedis positio*, but is coextensive with the boundaries called for in his grant. A proposition of law, sound in itself, and sustained by the authorities. It is, however, a very different matter, where, as in this case, the senior grantee was in possession of a part of the land within the limits of his grant, although outside of the interlock. The question involved in this latter proposition was discussed by JUDGE BALDWIN in Taylor's Devisees v. Burnsides, 1 Gratt. 165, 196; and again alluded to in Overton's Heirs v. Davisson, 1 Gratt. 211, 224; but the judges being divided in opinion, it was not decided. It was also mentioned by JUDGE LEE in *Kincheloe v. Tracewells, 11 Gratt. 587, 603*, and again left undecided. So that it is still an open question in Virginia. As a decision of the point is not required in the case before us, it is better it shall so remain until a thorough discussion can be had before a full bench. What is now said is only said for the purpose of removing an erroneous impression, which has gone abroad with respect to what was actually decided in Cline's Heirs v. Catron."

Adversary Possession.—On the general subject of adversary possession, see the principal case also cited in Brown v. Caldwell, 23 W. Va. 194; Witten v. St. Clair, 27 W. Va. 772; Taylor v. Philippi, 35 W. Va. 560, 14 S. E. Rep. 132; Olinger v. Shepherd, 12 Gratt. 478.

See generally, monographic *note* on "Adversary Possession" appended to Nowlin v. Reynolds, 25 Gratt. 137.

§**Transfer of Land in Adversary Possession of Another—Effect.**—See, in accord, Early v. Garland, 13 Gratt. 1; Carrington v. Goddin, 13 Gratt. 599. See also, Tabb v. Baird, 3 Call 475; Hall v. Hall, 3 Call 488. But, by Code of 1849, it was enacted that "any interest in or claim to real estate may be disposed of by deed or will" (Va. Code 1849, ch. 116, sec. 5; Va. Code 1887, sec. 2418). See Carrington v. Goddin, 13 Gratt. 587.

‖**Adversary Possession—Claim of Title Necessary—Color of Title Unnecessary.**—In Creekmur v. Creekmur, 75 Va. 440, the principal case was cited to the point that an entry to operate as an ouster must be accompanied with claim of title, but that the claim may be wholly independent of any writing; and that, even where the party entering claims under a deed or other writing with a specific boundary, he may go outside of his boundary and acquire adversary possession of land not included in his colorable title. Again, in Va. Midland R. Co. v. Barbour, 97 Va. 122, 33 S. E. Rep. 554, the court (citing the principal case, Creekmur v. Creekmur, 75 Va. 430, and Sulphur Mines Co. v. Thompson, 93 Va. 319, 320, 25 S. E. Rep. 232) said that the question in cases of adverse possession is not whether the claim asserted is good or bad, but whether there has been a hostile claim of title and continuous possession under it for the statutory period; nor is it necessary that such hostile claim should be under color of title, that is under a deed or other writing. See, in accord, the principal case also cited in Oney v. Clendenin, 28 W. Va. 54; *foot-note* to Koiner v. Rankin, 11 Gratt. 420.

On this subject, see further monographic *note* on "Adversary Possession" appended to Nowlin v. Reynolds, 25 Gratt. 137.

Same—Claim of Title—Extent of Possession.—The principal office of a claim or color of title is to define the boundaries and fix the extent of the adverse holding. If it is a *mere* claim of title—that is, a mere assertion of right without any paper title—the adverse holding will be limited to the actual

8. **Unlawful Detainer—The Issue.**¶—Whatever may be the effect in ejectment or a writ of right, of the party in possession having taken that possession under a mistake as to the true boundary of his land; in a warrant of unlawful detainer, the question is whether in fact such entry had been made and possession taken, and how long before the institution of the suit; and the mistake if it existed, is wholly unimportant.

9. **Instructions—Obscure—Misleading—Irrelevant.****—The court should refuse to give an instruction, where it is obscure and calculated to mislead the jury; or where it asks the court to decide upon a fact in issue in the cause; or where it is irrelevant or not applicable to the evidence.

10. **Appellate Practice—Harmless Error of Lower Court.**††—Though the court below should err in deciding upon a proposition submitted to it, yet if it can be seen from the bill of exceptions, that the decision did not and could not affect the merits of the case, it is not ground for reversing the judgment.

On the 26th of May 1849 Nestor Kincheloe made complaint, that Mary, Moses, Aaron and Wesley Tracewell had unlawfully turned him out of, and against his consent withheld from him, the possession of a certain tenement containing by estimation twenty-five acres of land lying in the county of Wood, whereof he prayed restitution. This complaint was accompanied by his affidavit to the truth of the facts stated in his complaint. On the same day a warrant was issued by a justice of the peace for the

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enclosure of the claimant. But, if it is a deed or other paper title, and the possession is exclusive, it will be regarded as coextensive with the boundaries contained in such deed or paper. The color of title however may be good or bad, legal or equitable.

The principal case is cited in support of this proposition—or some portion of it—in Core v. Faupel, 24 W. Va. 245, 247; Storrs v. Feick, 24 W. Va. 609; Oney v. Clendenin, 28 W. Va. 53 (citing also Taylor v. Burnsides, 1 Gratt. 165; Shanks v. Lancaster, 5 Gratt. 110; Overton v. Davisson, 1 Gratt. 211; Koiner v. Rankin, 11 Gratt. 420; Adams v. Alkire, 20 W. Va. 480; Garrett v. Ramsey, 26 W. Va. 345); Congrove v. Burdett, 28 W. Va. 225. See also, the principal case cited in Garrett v. Ramsey, 26 W. Va. 369; Parkersburg, etc., Co. v. Schultz, 43 W. Va. 470, 27 S. E. Rep. 255; Teass v. St. Albans, 38 W. Va. 13, 17 S. E. Rep. 405.

See generally, monographic *note* on "Adversary Possession" appended to Nowlin v. Reynolds, 25 Gratt. 137.

¶**Unlawful Detainer—General Verdict.**—Gorman v. Steed, 1 W. Va. 15, was a case of unlawful detainer in which there was a verdict for the plaintiff as follows: "We the jury find that the defendant unlawfully withholds from the plaintiff, the possession of the premises in the within summons mentioned; and that he has not so held the possession thereof for three years prior to the institution of this suit, and therefore we find for the plaintiff." Objection was made that the verdict was not responsive to the issues, because it failed to find that the defendant unlawfully withheld the premises in question at the time of the institution of the suit. But the court said: "This objection is not well taken, because the verdict is substantially a general verdict for the plaintiff below. And a general verdict, in effect, finds every essential fact necessary to authorize it, and withholding the possession at the date of the institution of the suit, is one of those facts. Olinger v. Shepherd, 12 Gratt. 462; *Kincheloe v. Tracewells, 11 Gratt. 587.*"

See generally, monographic *note* on "Unlawful Detainer" appended to Dobson v. Culpepper, 23 Gratt. 353.

****Instructions—Misleading.**—See principal case cited and approved in Campbell v. Hughes, 12 W. Va. 209. See also, *foot-note* to Boswell's Case, 20 Gratt. 860; monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192.

††**Appellate Practice—Harmless Errors in the Lower Court.**—The great majority of Virginia and West Virginia decisions seem to uphold the proposition of the principal case, that where it clearly appears affirmatively that an error of the lower court could not affect the merits of the case, nor in any way be prejudicial to the party appealing, the appellate court will not reverse the judgment on the ground of such error. See cases collected in *foot-note* to Binns v. Waddill, 32 Gratt. 588.

But it seems also in accord with the weight of authority that if a misdirection or other mistake of the court appear in the record, it must be presumed that it affected the verdict of the jury, and is therefore a ground for which the judgment must be reversed, unless it plainly appear from the whole record that the error did not and could not, have affected the verdict. Kimball v. Borden, 95 Va. 207, 28 S. E. Rep. 207, citing the principal case; Danville Bank v. Waddill, 27 Gratt. 448; Edmunds v. Harper, 31 Gratt. 637, 644; Richmond Ry., etc., Co. v. Garthright, 92 Va. 627, 631, 24 S. E. Rep. 267; 4 Min. Inst. (4th Ed.) 937.

For the more specific proposition, that, where there is error in giving, or refusing to give, certain instructions; or in admitting, or refusing to admit, certain evidence, if it is manifestly evident from the record that the appellant could not have been prejudiced thereby, such error can afford no ground for a reversal of the judgment, see principal case cited in Bank v. Waddill, 27 Gratt. 450; Binns v. Waddill, 32 Gratt. 592; Snouffer v. Hansbrough, 79 Va. 180; Payne v. Grant, 81 Va. 173; Bernard v. R. F. & P. R. R. Co., 85 Va. 794, 8 S. E. Rep. 785; Reusens v. Lawson, 91 Va. 258, 21 S. E. Rep. 347; Richmond Ry., etc., Co. v. Garthright, 92 Va. 631, 24 S. E. Rep. 267; Nicholas v. Kershner, 20 W. Va. 263. But there is not perfect harmony of decision on this subject in either Virginia or West Virginia.

As to the rule of action of a court in reversing a judgment on account of erroneous instruction, see *foot-note* to Colvin v. Menefee, 11 Gratt. 87, where there is an extended review of the Virginia and West Virginia decisions in point. Further remarks here, on this subject, would be superfluous.

As to when there will be a reversal of judgment because of error in admitting, or excluding, evidence, see *foot-note* to Early v. Wilkinson, 9 Gratt. 68.

In Western M. & M. Co. v. Virginia, etc., Co., 10 W. Va. 295, the court, citing the principal case as authority, lays down the proposition, that, though the lower court errs in refusing to allow an amended bill to be filed, yet, if such error does not affect the merits of the case, nor in any way injure the party tendering such bill, it is no ground for reversing the decree of the lower court.

See principal case also cited in Burtners v. Keran, 24 Gratt. 73.

county of Wood, which recited that Kincheloe had made complaint that the Tracewells unlawfully and against his consent withheld from him the possession of a certain tenement, &c., and directed the sheriff of the county to summon the parties to appear at the court-house of this county on the 7th day of June 1849, to answer the complaint; and also directed the sheriff to summon two justices and a jury to appear there at the same time to try the complaint.

589 *The court was organized on the day appointed, and an order was made directing the surveyor of the county to make a survey of the land in controversy; and it then adjourned until the 23rd of the same month. The court seems afterwards to have adjourned until the 17th of August, when the defendants moved the court to quash the warrant and complaint; which motion was overruled. A jury was then impanelled for the trial of the cause, which failed to agree in a verdict and was discharged; and the cause was continued for a trial to be had at the next term of the court. At the July term 1850 of the County court of Wood, on the motion of the plaintiff, and because the cause had remained in that court for more than one year without being determined, an order was made removing it to the Circuit court of the county.

At the October term 1851 of the Circuit court, the defendants again made a motion to quash the complaint and warrant, which was overruled: And at the November term 1852 a jury was impaneled to try whether the defendants, at any time within three years next before the exhibition of the complaint filed by the plaintiff in the cause, did unlawfully enter upon the tenement in the said complaint mentioned, and turn the said plaintiff out of possession thereof; and whether the defendants continued to hold the possession thereof at the time of the exhibition of said complaint.

On the trial the plaintiff claimed under a patent bearing date the 20th day of October 1785, by which there was granted to Mark Hardin nine hundred and nine acres of land lying on the lower side of the Little Kanawha river, about six miles above its mouth, beginning at a sugar tree at the mouth of Grape creek, and running down the river. Hardin sold and conveyed this land in 1805 to Hugh Phelps, who

590 entered *upon it, but outside of the land in controversy, and cultivated and improved it. In 1821 Phelps conveyed one hundred and fifty acres of his tract of land to Vandiver and Marsh, who took possession of it, and cultivated and improved it. This tract, it was insisted, embraced the land in controversy, but their improvements were not upon that part of it. The land conveyed to Vandiver and Marsh passed by several intermediate conveyances to John Ralston in September 1832; and he conveyed it to the plaintiff Nelson Kincheloe in October 1842. There was no doubt that the successive owners of this land from the time of Hugh Phelps had been in the constant occupation and cultivation of it; but no part of their improvements was upon the land in controversy. And there is little reason to doubt that the boundaries of Hardin's patent, and consequently of the plaintiff's conveyance, included this disputed land.

The defendants claimed under a patent to John Gibson for one thousand acres of land, bearing date the 20th of October 1785, the same date as that of Hardin. This land was also on the Little Kanawha river, and called to include the mouth of Tygart's or Grape creek, and run up the river.

John Gibson died, leaving three children his heirs; and his son John is alleged to have transferred his interest in this land to William Laing: but the proof on this point is defective. There was an allotment of a part of the tract to the children of one of John Gibson's heirs, under a decree of the County court of Wood; and there were deeds of partition executed by attorneys in fact between James Gibson and Laing in December 1830, by which the land next to that held by the plaintiff was allotted to Laing. In August 1831 Laing by his attorney and agent sold to Arnold Tracewell one hundred acres of his land, and executed to him a bond by which he bound him-

591 self to convey *the same to him. This one hundred acres was described as lying on the Little Kanawha, immediately above the mouth of Tygart's creek, beginning at a sugar tree on the bank of the river; and one of its lines called to run to a corner of Kincheloe, and thence with the line of the tract owned by the plaintiff at the time of the trial, to the beginning. Laing in May 1833 conveyed his whole tract to James M. Stephenson; and in August 1834 Stephenson conveyed to Tracewell the one hundred acres purchased by him from Laing.

Arnold Tracewell entered upon the land purchased by him of Laing in 1831, all of it then being in forest and uncultivated, and in August of that year had a corner marked, and a line run and marked from thence to the beginning corner of Hardin's survey on the river at the mouth of Tygart's creek. This corner and line is that claimed by the defendants in this cause, and includes all the land in controversy in their tract. After running the exterior boundaries of said tract, Tracewell, in August 1832, moved upon the land, taking with him his wife and two children, and continued in possession claiming up to the marked boundaries, until the year 1834, when he received his deed for the land; and continued the possession in the same manner, claiming the same marked boundaries, up to the 22nd of November 1839; at which time he died.

In 1832 or 1833 Tracewell made some thousand rails upon the land in controversy, and sold them. He also sold timber from it to make some eighty thousand staves; and in 1837 he took cord-wood from it and also tan-bark. Whilst he was thus living on the land he bought of Laing, he made sugar on this land in controversy; and

since his death the defendants rented out the sugar camp: And during Arnold Tracewell's life time the family obtained their fire-wood off this disputed land; and during all that time John Rolston,
592 *under whom the plaintiff immediately claims, and who lived on the land now owned by the plaintiff, was cognizant of the aforesaid acts of ownership, and made no objection thereto: He set up no claim to the disputed territory; and recognized the corner and line marked and run by Tracewell as the dividing line between them.

The family of Arnold Tracewell, who were the defendants, continued to reside upon the said land, claiming the boundaries their ancestor had claimed, exercising acts of ownership over the land in controversy, and took timber therefrom for a barn, until about the year 1845 or 1846, at which time some person (supposed to be the plaintiff in this suit) cut and made some rails upon it, which the defendants hauled off: And some of the family attended at the August quarterly term of the court for that year, for the purpose of indicting the plaintiff for his alleged trespass, when they were met by the plaintiff, who agreed that if they would not try to indict him, he would not trouble them any more for that land: And no indictment was made, nor was there any further difficulty until the institution of this suit.

All the evidence having been submitted to the jury, the plaintiff, after the opening argument had been concluded, and one of the counsel for the defendants was about concluding his argument, moved the court to exclude from the jury all the documentary evidence offered by the defendants, and purporting to deduce title from the patent of Gibson to the defendants, upon the ground that the same did not connect the defendants with the legal title from Gibson. But the court overruled the motion; and the plaintiff excepted.

The defendants then moved the court to give three instructions, which are not stated. The court refused to give them, because they were not considered in
593 all *respects applicable to the case; but in lieu thereof gave the following:

First. If the jury shall believe, from the evidence, that the deed to the plaintiff, and the several deeds of the persons under whom he claims (commencing with the deed of the attorney of Mark Hardin the patentee, and the patent to the said Hardin), embrace the land in controversy, and that from the time the tract claimed by the plaintiff was severed from the residue of the land contained in the said patent; that the several persons under whom he claims according to the terms of their deeds resided on and improved and cultivated the same, but if none of them resided on, improved or cultivated any part of the land in controversy, but that the same continued to be a forest, and in a state of nature until Arnold Tracewell, the ancestor of the defendants, entered upon the said land under his deed from James M. Stephenson; and if they shall believe that the said one hundred acres conveyed by said deed was plainly marked and bounded; that it embraced the land in controversy, and that the said Arnold Tracewell by virtue of his said deed entered upon the said land in controversy, claiming the same as his own, embraced by the deeds under which the plaintiff claims, and also embraced in the deed under which the said Tracewell entered with intention to take possession of all within his metes and bounds (if the said land in controversy should appear from the evidence to be unimproved forest lands), and took and held actual adverse possession thereof by residence, improvement, cultivation or other open, notorious and habitual acts of ownership, such possession operated as a disseizin of the person owning and in possession of the land claimed by the plaintiff to the interference, nowithstanding the said Tracewell may not have inclosed and cultivated the whole of the land in controversy. And if he so continued in the possession of
594 the land in *controversy under his said claim until the time of his death; if such continuous possession was five years or upwards, and so died in such possession; that on his death there was a descent cast upon his heirs, which would toll the entry of the plaintiff or those under whom he claims, then being the owner of the land now claimed by the plaintiff; and if the said defendants continued the possession as held by their said ancestor and had not abandoned the same at any time before the commencement of the present suit, the plaintiff could not, under such circumstances, maintain a warrant for unlawful entry.

Second. If the jury shall believe from the evidence, that the said Arnold Tracewell, the father of the defendants, entered upon the land in controversy and took possession of it at the time and in the manner supposed in the first instruction, and that he remained in such possession for more than three years after he so took the possession; if they shall also believe that the defendants, at the time that their father so took possession, were infants of tender years, they cannot be considered so responsible for any act that he did upon said land as to enable the plaintiff to maintain an unlawful entry against such infants for such acts.

Third. If the jury shall believe that the said Arnold Tracewell took and held adverse possession of the land in controversy at the time and in the manner supposed in the first instruction, and died so possessed, and that the defendants took possession after his death in the manner in which he had so taken and held the same, and had at no time abandoned said possession, and were in the actual adverse possession of said land in controversy at the time of the conveyance to the plaintiff, then his deed was inoperative for the land in controversy so held in adverse possession.

Which instructions were objected to by plaintiff, but were given by the court.

595 To which opinion of *the court giving said instructions the plaintiff excepted. Thereupon the plaintiff moved the court to give the following instructions:

No. 1. If the jury are satisfied that Hugh Phelps entered under the deed from Hardin, dated 12th day of July 1805, upon the land described in said deed, built a mill, caused a portion of it to be fenced and cultivated by his tenants, intending in so doing to assert his right to the possession of the entire tract, then such acts on the part of Phelps, the same land being wholly unoccupied by any other person, gave him the possession of said tract of land, coextensive with the boundaries of his deed, which possession would continue in Phelps and his assigns (until there was an actual entry upon some part of said tract, under color of title, with an intention to oust said Phelps and those claiming under him, which intention must be evidenced by building, residence, inclosure or other open and notorious acts of possession, equivalent to residence or cultivation or inclosure), and such possession so taken by Phelps, and continued for the period of seven years, would be a bar to any right of entry on the part of the defendants or their ancestor, or any other person claiming under the Gibson patent, in the year 1831 or subsequently, the patent of said Gibson being of the same date of the Hardin patent under which the plaintiff claims.

Nos. 2 & 3. Ask the court to instruct the jury that Arnold Tracewell, up to the making of the deed from Stephenson in August 1834, was bounded and abutted by his title bond on and by the line of Daniel Kincheloe, and that the said Kincheloe, and those claiming under him living on his tract of land called for by said title bond, the law adjudged him or them in possession to his boundary called for by the bond of Tracewell, and that occasional acts of cutting timber, getting tan-bark, making
596 rails or making sugar, outside *of the calls of said title bond by said Tracewell, unaccompanied with a paper title, either legal or colorable, would not confer on the said Tracewell any actual possession within the bounds of said Kincheloe and outside of the boundaries of said title bond, and that such acts up to the time of making of the deed in August 1834, would be adjudged in law to be trespass. That until the making of the deed in August 1834, the said A. Tracewell was bounded and abutted by the line of said Daniel Kincheloe, and that after the making of said deed, it calling for a course common to the deed of Kincheloe and the line of Kincheloe, and the line of Kincheloe called for being marked, are, together with the title bond and the parol evidence before them, to be weighed, and if on the whole evidence they are satisfied the call for, and the marking of the beech, were intended to be in Hardin's or Daniel Kincheloe's line, and that the surveyor and said Tracewell marked said beech, supposing it to be in Hardin's or Kincheloe's line, then, it being marked by mistake, the jury would reject such mistaken mark, and run the line by the other calls, the course and marked line of Tracewell's deed.

No. 4. If the jury believe that A. Tracewell had taken possession at the time and manner indicated in the first instruction given, as early as August 1834, or in the early part of that year, and had cleared and improved upon the land in controversy with an intention to take possession, according to the metes and bounds of his deed, and did such other open and notorious and habitual acts of ownership upon the said land in controversy, as would give him an actual adverse possession, according to the facts supposed in the first instruction given, and so continued in possession, and died in said possession in November 1839, and the defendants, his children and heirs, held and retained the possession so taken by
597 him, then the entry *of the plaintiff, and building of the fence inclosing a part of the land in controversy within the bounds of his deed, would not so operate as to divest the defendants of their possession of the land in controversy according to the metes and bounds of their deed, and confine it to their actual inclosure. But if the said A. Tracewell had not been in possession of the land in controversy for five years before his death, so as to cast a descent upon the defendants, and the said Kincheloe entered upon and inclosed a part of the land in controversy under his title, he would thereby divest the defendants of the possession of all the uninclosed lands within the interlock, provided that the said A. Tracewell, in his life time, and the defendants after his death, had not been, as is supposed in the first instruction, in the actual and continued adverse possession of the land more than seven years; but if the jury shall believe that, at the time the said Kincheloe entered and inclosed part of the interlock, that the said defendants or their ancestor had not the actual possession of the said land long enough to toll the entry of the said Kincheloe, that the defendants again entering upon the possession of said Kincheloe thus regained, would be a trespass; and if they continued to hold the possession, this action may be maintained against them, provided it is brought within three years after they regained possession.

No. 5. The patents being read and there being no parol evidence offered to fix any point whereby the survey of Gibson can be located, nor any evidence other than appears on the face of the papers, the plaintiff's counsel moved the court to instruct the jury what point is by them to be adopted in laying down said survey on the plat, or in other words, how far below the mouth of Tygart's creek they are to fix the beginning corner required.

No. 6. Move the court to instruct
598 the jury that *when there are two patents of the same date, and those claiming under one enter and hold under the same for twenty years, from 1805 to 1833, then such title should prevail against

the other patent of same date under which no possession was had until 1833.

All of which instructions the court refused to give, and the plaintiff again excepted.

There was a verdict in favor of the defendants: Whereupon the plaintiff moved for a new trial upon the ground that the verdict was not sustained by the evidence; and on the further ground of a misdirection of the jury by the court. But the court overruled the motion and gave judgment for the defendants; and the plaintiff again excepted: And upon his application this court granted a supersedeas to the judgment.

Price and Fry, for the appellant.
Fisher, for the appellees.

LEE, J. That a warrant for a forcible or unlawful entry upon lands and tenements and turning another out of possession, or for unlawfully and against his consent withholding possession from the party entitled, under our statute, is a civil action, which, by virtue of the act of the 28th of March 1843, may be removed to the Circuit court, on motion without notice, after it shall have remained undecided in the County court for the period of one year or upwards, has been decided by this court, after full argument during the present term, in the case of Harrison v. Middleton, supra 527. I refer to the opinion delivered by Judge Moncure in that case, for a very full and (to me) satisfactory exposition of the reasons which conduced to that conclusion.

By the provisions of the act referred to, any two justices of the peace of the county may meet at the court-house, and form
599 a court for the trial of such a *warrant; when so met and a court is so constituted, it is declared to be a court of record, with power to issue all proper process to bring before them witnesses or other persons whose attendance may be lawfully required by them; and to adjourn from day to day and from time to time till the trial is ended. The sheriff of the county is required to attend upon the justices constituting it, and to execute their orders. The clerk of the County or Corporation court is also to attend them, to record their proceedings and file away the papers exhibited. A jury is to be impaneled and charged in the manner prescribed by the act; the justices are to suffer the parties to be heard by counsel; to admit all legal evidence offered on either side; to decide all questions of law properly submitted to them; to admit bills of exceptions to their opinions; and in all respects conduct the trial according to the usages of courts of law within this commonwealth. When a verdict has been rendered, the court is to render judgment upon it in favor of the plaintiff or the defendant, according to the nature of the finding; or it may for proper cause set it aside, and grant a new trial, as in other civil causes (Sess. Acts, 1825-6, p. 26, § 3); in which latter case, the cause is to be continued to the regular term of the County or Corporation court, and the new trial is to be had therein. The judgment of the justices so rendered is to be regarded as a judgment of the court of the county, and is to be in all respects executed in the same manner as if it had been the judgment of such court at an ordinary term; and either party thinking himself aggrieved, may have the same remedy, by writ of error or supersedeas, as if it had been the judgment of such court; and if it be reversed, the cause is to be remanded to such court, where necessary. I think it clear, therefore, that a court so constituted is to be regarded as
a special County court for the trial of
600 the *particular cause; and that when two or more justices meet and form such a court, the case is to be regarded for the purpose of the act above referred to, and all other legal purposes, as pending in the County court; and that after the expiration of one year from that time, if it remain undecided, it may be removed to the Circuit court, according to the provisions of that act.

I think the objection which has been urged on the part of the defendants to the warrant is without any valid foundation. The complaint made and verified by the party under oath, may be looked to in aid of the warrant; and taking them in connection, they may be fairly construed as being for an unlawful entry and turning the plaintiff out of possession of the tenement in controversy, and unlawfully holding the plaintiff out of possession at the institution of the suit. The withholding of the possession by the defendant at the emanation of the warrant, was a fact as important to be found by the jury as that of the original turning out, to entitle the plaintiff to a recovery. I think the motion to quash was properly overruled.

The plaintiff's motion to exclude all the documentary testimony offered by the defendant, came at a late period, not having been made until all the evidence had been given, and after the opening argument for the plaintiff had been concluded and that of one of the defendant's counsel about closed; but if the motion is to be treated as a motion to instruct the jury to disregard the evidence, and in that view deemed admissible when made, and waiving the question whether the grant to Gibson and the conveyance from Laing to Stephenson being referred to in the deed from Stephenson to the ancestor of the defendants, as instruments of title under which, together with the title bond from Laing and the deed from Stephenson, the defendants claimed, might not properly have been given in evidence along with the title bond and
601 deed, *for the purpose of proving such a possession under an honest and bona fide claim of title as might ripen their claim, however defective originally, into a perfect title, still, for the purpose of proving such a possession and thus making out a bar under the statute, the title bond and deed from Stephenson were legitimate and proper testimony, though the defendants

did fail to connect themselves with the grant to Gibson; and as the motion was to exclude all the documentary evidence of the defendant, it was too broad. Nor was the court bound to discriminate between the different documents offered; but might properly, as it did, overrule the motion for want of a proper designation by the plaintiff of the particular instruments of evidence which ought to have been excluded.

Of the first instruction given to the jury, complaint is made that its meaning is obscure; and that however understood, it states the law incorrectly. The instruction is perhaps somewhat deficient in perspicuity; but if it be examined with some little care and attention, I think its meaning will be sufficiently apparent. Nor is there any such obscurity about it as would render it unintelligible to a jury of ordinary intelligence. It in effect asserts the following propositions: That if the instruments of title under which the plaintiff and the defendants claimed, respectively, embraced the land in controversy; and if the plaintiff and those under whom he claimed had entered upon and taken actual possession of that part of the land embraced within their boundary outside of the interlock with the defendants' boundary; and if the ancestor of the defendants, under his deed, entered upon the land in controversy (that is, upon the part within the interlock), claiming it as his own, the same being embraced by his deed, and took and held actual adversary possession thereof by residence, improvement, cultivation or other open, notorious
602 and habitual *acts of ownership, coextensive with the limits of the interlock, the land within the same having continued to be forest and in a state of nature, until so entered upon and taken possession of by the defendants' ancestor, such entry and possession of the latter operated a disseizin of those under whom the plaintiff claimed, to the extent of the interlock, although the ancestor of the defendants may not have actually inclosed and cultivated the whole of the land in controversy. And that if he continued in possession uninterruptedly, for five years or upwards, and died so in possession, upon his death a descent was cast upon the defendants, his heirs, which would toll the entry of those so disseized; and that if the defendants continued to hold such possession uninterruptedly from the death of their ancestor until the institution of this suit, the plaintiff could not maintain his action. So understood, I cannot perceive any well founded objection to the instruction. It presupposes an ouster by the defendants' ancestor of the plaintiff to the whole extent of the premises in controversy, the land embraced by the interlock; and affirms that the adversary possession which constitutes it must not of necessity be evidenced by actual inclosure and cultivation, but may be by other open, notorious and habitual acts of ownership, sufficient to amount to actual possession. That such possession may be in this mode is sufficiently established by the cases of Taylor v. Burnsides, 1 Gratt. 165, and Overton v. Davisson, Ibid. 211; and is also supported by the authority of the cases of Ellicott v. Pearl, 10 Peters' R. 412; and Ewing's lessee v. Burnett, 11 Peters' R. 41. That the premises in controversy were embraced by both of the conflicting claims, and that possession had been taken by those under whom the plaintiff claimed, of that part of the land claimed by them without the limits of the interlock, would not render actual inclosure or
603 fencing in, *and actual cultivation, indispensable to enable the defendants or their ancestor to acquire possession of the land within the interlock. For this purpose the exercise of acts of ownership, if they were of the character contemplated by the law as sufficiently importing use, occupation and enjoyment, would suffice: and the possession which they would confer would be of a part or the whole, according as they were restricted to a part, or coextensive with the entire limits of the interlock.

It is supposed, however, that the instruction was intended to present the question raised in the case of Overton v. Davisson, ubi supra, and upon which the opinions of the judges then constituting the court, were so much divided, as to the effect of an actual occupation by a junior patentee of part of an interlock upon the claim of another under an elder and conflicting grant, the latter having previously taken possession of that portion of the land within his boundary outside the interlock. But however that may be, the bill of exceptions as taken, does not present the question. It must be construed as supposing a possession of the whole land within the interlock. Whether it might have been raised upon the evidence in the cause, is immaterial. The instructions asked for by the defendants, and which the court declined to give, are not made part of the record; and in the instructions which the court gave in lieu of them, no opinion is expressed on the point.

The second and third instructions given by the court, have only been questioned, because they refer to the time and manner of taking and holding possession supposed in the first instruction, the expression of which therein is supposed to be elliptical and obscure or repugnant and contradictory in the terms employed. I have already said there is no well founded objection to the first instruction, nor any serious diffi-
604 culty in *understanding its proper meaning. That if the defendants were infants at the time of the acts done by their father, they could not be responsible for those acts in this form, as stated in the second instruction; and if at the time of the conveyance to the plaintiff, the ancestor of the defendants held the land in controversy in actual adverse possession under his claim, and continued to hold the same until his death, and such possession was after his death, continued by the defend-

ants, and never abandoned by them, that such conveyance to the plaintiff was inoperative and ineffectual to pass title to the premises so held in such adversary possession, are propositions too plain to admit of doubt or discussion.

We come next to the instructions asked for by the plaintiff, and which the court refused to give.

With regard to the first of the series, it is only necessary to say that it must be understood as declaring to the jury that possession taken by those under whom the plaintiff claimed, of the premises in controversy, and continued for seven years, would be in the year 1831, or subsequently, a bar to any right of entry on the part of the defendants or their ancestor, or any other person claiming under the Gibson grant; whereas in the year 1831 and until the passage of the act of March 30th, 1837, no possession short of fifteen years, unaided by a descent cast, would bar the entry of one having right or title to the same: and the court, for this reason, might properly refuse to give the instruction.

The second in the series is also objectionable, first, because if taken in connection with the evidence, as it must be to escape the objection of being a mere abstraction, it assumes that the acts relied upon by the defendants as showing their possession, were occasional or interrupted, and not continued and habitual, a matter of which it was for the jury to judge; and
605 *secondly, because it assumes that such acts on the part of the ancestor of the defendants were unaccompanied by any "paper title," legal or colorable; and declares that possession of the premises could not be gained without such a paper title embracing the same within its boundary. An entry by one upon land in possession, actual or constructive, of another, in order to operate as an ouster and gain a possession to the party entering, must be accompanied by a claim of title; but it is not indispensable that the claim should be ostensible in the form of a deed or any other writing. The claim, from its nature and character, may be wholly independent of any written evidence. Nor, if the party have a deed or other writing with a specified boundary, is the possession which he may take and hold necessarily restricted to what shall prove to be within the precise boundary. He may take and may hold actual possession of land lying outside his true boundary. Whether he has done so in any particular case, is a question of fact and of intention; and whether the acts referred to in this case amounted to such a possession, or were those of a mere trespasser, was a matter for the determination of the jury.

With regard to the third instruction asked for, I have only to remark that I think it was upon a matter wholly irrelevant to the issue before the jury. Whether the entry had been made and possession held, mistakenly, in consequence of the supposed error in running the line and marking the beech referred to, was a question which perhaps might have been material on the general issue in an action of ejectment, or on the mise joined on the mere right in a writ of right. But it could not have been material in this case. Here the question was whether in point of fact such entry had been made and such possession held, and how long before the institution of the suit; and I cannot perceive how the origin
606 of the defendant's *possession could tend to illustrate the plaintiff's right, or in any manner aid the jury in determining the line by which the defendant's actual possession was to be bounded.

The fourth instruction asked for by the plaintiff is justly obnoxious to the objection made by him to the first instruction given by the court. The terms in which it is expressed are very vague and indefinite, and the meaning intended is extremely doubtful and obscure. If given, it would have been as likely to confuse the jury as to aid them in their deliberations. But it is otherwise objectionable. It is framed upon the hypothesis that the plaintiff had entered upon and regained possession of the premises in controversy after the entry by the ancestor of the defendants; and there is no proof of such re-entry and regaining of possession. It also assumes as a fact in the cause, that after the plaintiff had thus regained possession the defendants (after the death of their ancestor) had re-entered upon him; and declares such re-entry to be a trespass which might be redressed in this action, if the defendants continued to hold possession, provided it had been brought within three years after they had so regained possession. Now, whether the defendants had entered upon the plaintiff and dispossessed him, was the very gist of the action; and if it had even been stated hypothetically, it would have been no less objectionable, because there was no proof of any such re-entry by the defendants after the death of their ancestor, upon a regained possession of the plaintiff. The only entry that could be imputed to them was the entry made by their ancestor in his life time; and their possession was precisely the continuation of the possession, whatever it was, that he had at the time of his death in 1839. There was no fresh entry made by them, nor any renewal of an interrupted possession. The instruction also imputes to
607 *an entry upon and inclosure of part of the land in controversy by the plaintiff under his title, the effect of divesting the defendants of the possession of all the uninclosed lands within the interlock, without regard to the intent with which such entry and inclosure were made; whether that were to take possession and oust the defendants of the whole, or only the part entered upon and inclosed; and is on this account also obnoxious to just criticism.

The fifth instruction was a direct appeal to the court to settle a fact deemed material in the cause, the locality of the beginning corner of the Gibson survey. It is true the

court might be called on to instruct the jury as to the principles of law which might serve to enable them to determine this point; but it was not for the court to apply those principles to the facts of the case, and point out to the jury the place at which they are to place the corner in question. But if this were even otherwise, it was for the party moving the instruction to designate the point which he contended should be adopted, or those which he thought should be rejected; and not to call upon the court in general terms, to examine the whole case and find out and designate to the jury the point at which the corner in question was to be fixed.

The sixth and last instruction asked for by the plaintiff, in the terms in which it is propounded, presents a mere abstract proposition for the opinion of the court. But if those terms could be aided by taking them in connection with the evidence, then the instruction must be understood as assuming that the evidence proved that those claiming under one of the grants referred to, had entered and held possession of the premises from 1805 till 1833, and that no possession had been had under the other grant until 1833, matters in respect of which there should be no interference on the part of the court with the province of
608 *the jury. Besides, although possession had been taken under one of the two grants referred to, bearing the same date, and had been held from 1805 till 1833, yet if in the last named year those claiming under the other grant had disseized those previously in possession, and had continued to hold the premises in uninterrupted adversary possession down to the institution of the suit in June 1849, it by no means followed that the title of those who held the possession prior to 1833, would prevail in this suit. On the contrary, the subsequent adverse possession for sixteen years would be a bar to such title, unless those claiming it could bring themselves within the exception contained in the act of 1837, or were entitled to recover in a writ of right upon the seizin of their ancestor or predecessor. And we must suppose that the comparison of titles made in the instruction referred to the parties in the pending action; for if it were intended to apply as between previous claimants, it would have been totally irrelevant.

For these reasons, I think no error was committed by the court in refusing to give either of the instructions asked for by the plaintiff. The remark too which has been made in relation to the third of the series, is equally applicable to most if not all of the others. The case was not ejectment nor a writ of right, but a statutory proceeding involving merely a question of an unlawful entry and ouster on the part of the defendants within the period of the limitation, and a wrongful detainer of possession at the institution of the suit; though the parties seemed to regard themselves as fully embarked in a trial of titles. It is difficult to perceive how the questions mooted in those instructions could tend to illustrate the matter in issue before the jury. Upon a trial of titles between these parties they might no doubt be proper subjects for discussion; but however decided in this
609 case, they *would seem to be irrelevant and inconclusive. And though decided erroneously, it should seem the judgment should not on that account be reversed, if we can see from the bill of exceptions that they did not and could not affect the merits of the case before the jury. Hunter v. Jones, 6 Rand. 541. See also Le Bret v. Papillon, 4 East's R. 502.

Waiving all objections to the form of the bill of exceptions purporting to set out the facts proved, I think the motion for a new trial was properly overruled upon the merits. The plaintiff wholly failed to prove any such entry and ouster on the part of the defendants, on the foundation of which alone he could be entitled to recover. The only entry and taking possession proved was that of the defendant's ancestor, which was certainly not later than 1834; and the possession of the defendants was but the continuation of the possession of their ancestor, which devolved upon them on his death in the year 1839. Whatever might have been the fate of a proper action for the trial of the disputed title between these parties, the plaintiff clearly mistook his remedy in resorting to this proceeding. He has wholly failed to make out a case upon which he is entitled to recover here; and the attempt to try the title in this form must be wholly ineffectual.

I am of opinion to affirm the judgment.

The other judges concurred in the opinion of Lee, J.

Judgment affirmed.

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610 *O'Brien & als. v. Stephens & als.

July Term, 1854, Lewisburg.

1 **Foreign Attachments in Equity.**—The act of April 3rd. 1852, Sess. Acts, ch. 95, § 1, p. 78, gives a remedy in a court of equity to a creditor against his absent debtor, where the debtor has estate or debts due to him in the county or corporation where the suit is brought.

2. **Same—Affidavit—When Made.***—The *affidavit* required by the statutes to authorize a creditor to sue out an attachment against the effects of an absent debtor, may be made either before or after the bill is filed.

3. **Same—Relief Given According to Equitable Principles.**†—When the court has properly taken juris-

*Foreign Attachments in Equity—Affidavit—When Made.—See, on this subject, *foot-note* to Fisher v. March, 26 Gratt. 765, where the principal case is cited and all the cases that cite the principal case for this point. See also, monographic *note* on "Attachments" appended to Lancaster v. Wilson, 27 Gratt. 624.

†Chancery Practice—Relief Given According to Equitable Principles.—When the court has properly taken jurisdiction of a cause against an absent de-

diction of a cause against an absent defendant, it must proceed to give relief according to the principles of equity.

4. **Same—When Personal Decree May Be Rendered.**‡—If an absent defendant does not appear in the cause, there cannot be a personal decree against him; but the attached effects can alone be subjected. But if he does appear, there may be a personal decree only against him, or there may be both a personal decree and a decree subjecting the attached effects.

5. **Same—Same.**—If the absent debtor appears, and the attachment has not been sued out or levied, there may still be a personal decree against him. Or the plaintiff may, after the debtor's appearance, make the *affidavit*, sue out an attachment, and have it levied on the effects of the debtor, and have them subjected.

6. **Same—Failure of Bill to Aver Attachment Issued—Effect.**§—A demurrer to a bill against an absent defendant will not lie for the failure to aver that an attachment had issued; because the statute in terms provides that this process may issue after the institution of the suit.

The case is stated in the opinion of Judge Samuels.

Fisher, for the appellants, and McComas, for the appellees, submitted the case.

SAMUELS, J. The appellants filed a bill in the Circuit court of Mason county, at July rules 1852, against Abraham Williams and William J. Stephens, wherein it was in substance alleged, that Abraham Williams of Mason county, and William J. Ste-
611 phens, *of the city of Cincinnati, were bound to complainants in a forfeited forthcoming bond, on which was due the sum of five hundred and twelve dollars and thirty-two cents, with legal interest thereon from April 6th, 1852, until paid. That it was difficult to notify Stephens on the bond; and that it was useless to notify Williams. The bill further alleged that Stephens had valuable real and personal estate in Mason county; and prayed that Stephens' personal property might be sold to satisfy complainants' demand; and if that should not be sufficient for the purpose, that then the real estate might be sold for the deficiency; and for general relief. To this bill the defendants demurred; and upon the hearing, the court below sustained the demurrer, and dismissed the bill. From this decree the appeal before us was taken.

Immediately after July 1st, 1850, when the Code of 1849 went into operation, a bill such as this could not have been entertained; the statute giving the remedy by foreign attachment in chancery, existing prior to July 1st, 1850, having been repealed by the Code of 1849. A new remedy, however, is given by the statute passed April 3rd, 1852, which was in force from its passage. Sess. Acts 1852, ch. 95, § 1, p. 78.

By the statute last named, a right is given to a creditor to sue his debtor in a court of equity, if his debt, exclusive of interest, exceed twenty dollars, if the debtor be not a resident of the state, and if he have estate, or debts due to him within the county or corporation in which the suit is brought. The statute of 1852, above mentioned, taken in connection with the statute, Code 1849, ch. 151, § 1, gives a creditor the right, upon making an affidavit stating the amount and justice of the claim, that there is present cause of action therefor, that the defendant or one of the defendants, is not a resident of this state, and that the affiant believes he has estate
612 or debts due him within *the county

fendant, it must proceed to give relief according to the principles of equity. For the above proposition, see the principal case cited in Coleman v. Waters, 13 W. Va. 311; Perry v. Ruby, 81 Va. 328; Stewart v. Stewart, 27 W. Va. 175; Hall v. Hall, 12 W. Va. 12.

‡**Foreign Attachments—When Personal Decree May Be Rendered.**—For the proposition that, if an absent defendant does not appear in the cause, there cannot be a personal decree against him, but the attached effects can alone be subjected; but if he does appear there may be a personal decree only against him, or there may be both a personal decree and a decree subjecting the attached effects, the principal case is cited and approved in the following cases: Barrett v. McAllister, 33 W. Va. 760, 11 S. E. Rep. 228; Coleman v. Waters, 13 W. Va. 311; Mahany v. Kephart, 15 W. Va. 619; Taylor v. Cox, 32 W. Va. 159, 9 S. E. Rep. 75; Wetherill v. McCloskey, 28 W. Va. 198; Fowler v. Lewis, 36 W. Va. 126, 14 S. E. Rep. 451. As authority for the proposition (in addition to the cases above) that a personal judgment cannot be rendered against a nonresident defendant who does not appear, and that where there is no service of process the judgment is void, see the following cases: Pennoyer v. Neff, 95 U. S. 565; Houston v. McCluney, 8 W. Va. 135; Gilchrist v. W. Va. O. & O. L. Co., 21 W. Va. 115; Wilson v. Bank, 6 Leigh 574; Gray v. Stuart, 33 Gratt. 351, and *note*; Underwood v. McVeigh, 23 Gratt. 409, and *note*; Lamar v. Hale, 79 Va. 147; Wade v. Hancock, 76 Va. 620.

§**Chancery Practice—Failure of Bill to Aver Attachment Issued—Effect.**—In Price v. Pinnell, 4 W. Va. 298, it is said: "To maintain the jurisdiction the counsel relies exclusively on the case of *O'Brien v. Stephens*, *11 Gratt. 610*. In that case there was an appearance and a demurrer to the bill by the nonresident defendant, thereby putting himself fully under the control of the court, for every legitimate purpose. In the case under consideration Pinnell objected to the jurisdiction, because the process had not been executed against him, which makes a case materially different from that of *O'Brien v. Stephens*.

"The defendant had the right to object, as he did, that the process was not executed against him. Hickam v. Larkey, 6 Gratt. 210; The Bank of The Valley v. The Bank of Berkeley, 3 W. Va. 386. If the defendant, Pinnell, had appeared to the action without objecting to the nonexecution of process against him, he would thereby have placed himself in the same situation he would have occupied if process had been executed upon him, which was the situation the defendant occupied in the case of *O'Brien v. Stephens*, The Bank of The Valley v. The Bank of Berkeley, 3 W. Va. Rep. 386, and authorities there cited. The fact that the answer filed contains a full answer to the bill, cannot be held to waive that part of the answer which insists that the court cannot proceed until process is served."

or corporation in which the suit is, or that he is sued with a defendant residing therein, to sue out of the clerk's office an attachment against the estate of the non-resident for the amount so stated. Section 2 of ch. 151, Code 1849; and section 1 of the act of 1852, give the creditor the right to sue out the attachment after bringing his suit.

In the case before us, the complainants made no affidavit; nor had they sued out any attachment up to the hearing of the cause; the case stated in the bill, however, was such that the affidavit might be made, and the attachment sued out, after the bill was filed. See act April 3d, 1852, § 1.

The question is thus presented, whether the affidavit and attachment were essential to the jurisdiction of the court at the time the cause was heard on the demurrer?

The statute last above cited, § 2, directs that in suits of this nature the proceedings shall be the same as in other suits in chancery. Applying then the general principles of chancery practice, as modified by the statute of April 3rd, 1852, we must hold that if the court once had jurisdiction, it might rightfully proceed to do full justice between the parties before it, although the claim of the complainant be purely legal; as in case of a bill for discovery and relief in the matter of a legal demand: The right to a discovery gives the court jurisdiction; but having the case before it on this ground, the court should proceed to give a decree for the debt, although it be merely legal in its nature. In this case, the nature of the claim asserted, the residence of the defendant Stephens, and the location of his property, give to the Circuit court jurisdiction of the subject: the mode and measure of relief must be governed by the general rules of chancery practice, as modified by the statute of 1822.

613 *It would be unreasonable to suppose that the mere existence of Stephens' property within the county of Mason was intended to give complainants the right to a general and personal decree in nowise affecting the specific property. The suit must be brought in the county in which the property is placed. There must be some reason for this requisition; and no other than this can be suggested, that the property may be subjected to the payment of complainants' demand. A mere personal decree might be rendered in the courts of any county; a decree subjecting the property would be more conveniently and effectively rendered in the courts of the county in which that property is placed. I am, therefore, clearly of opinion, that the only decree complainants could have had against Stephens, if he had not appeared and made defence, would have been for satisfaction out of his property attached under the process provided by the statute of 1852.

The defendants, however, appeared and made defence, thereby putting themselves fully under the control of the court, for every legitimate purpose in the cause. The attachment was intended to perform two several and distinct functions; one to give the absent defendant notice of the suit brought against him. This mode of giving notice by levying on property, was formerly in familiar use. In the case before us it became unnecessary to resort to this mode of notice, in as much as the absent defendant appeared and defended himself. The other function of the attachment is to give complainants security for the payment of their demand. This operation of the attachment is wholly for the benefit of complainants; if waived or omitted, it can in nowise injure the defendant, seeing that he has already had notice to defend himself, and has acted accordingly. The complainants, if they elect to do so, may waive

614 a part of their remedy, and *rely upon another part. They may, therefore, take a mere personal decree against the defendants before the court, which decree the court in virtue of its jurisdiction over the parties now before it, may lawfully render. Or they may hereafter resort to the remedy by attachment, seeing that the statute authorizes such resort after the suit is brought.

If, however, the law were otherwise, and relief could be had under any circumstances, only by attachment, still the objection was not properly taken in this case. A demurrer reaches only such defects as appear on the face of the pleading demurred to; it will not lie for defect or omission of process; or for omission to aver facts not essential to the jurisdiction, but collateral to the pleading demurred to, although they are necessary to justify the relief prayed for. It is the office of a plea or of an answer to bring before the court reasons for refusing relief not appearing on the face of the bill. In our case it was not necessary to aver in the bill that an attachment had issued, because the statute, in terms, provides that this process may issue after the institution of the suit.

I am, therefore, of opinion to reverse the decree dismissing the bill; to overrule the demurrer; and remand the cause to the Circuit court, with directions to require the defendants to answer; and that the complainants, on proving their case as alleged, may have a personal decree against the defendants; or that they may at their election, sue out an attachment in the mode prescribed by law, and subject the property attached to the satisfaction of their demand.

The other judges concurred in the opinion of Samuels, J.

Decree reversed.

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615 ***Evans & als. v. Spurgin & als.***

Two Cases.

July Term, 1854, Lewisburg.

(Absent DANIEL, J.)

1. **Decrees—Fraud—Effect.**†—A decree of a court of equity set aside on the ground of fraud, upon a

***For monographic note on Decrees, see end of case.**

†See the principal case cited in Hodgson v. Perkins, 84 Va. 712, 5 S. E. Rep. 710.

bill against the heirs at law of the party procuring the decree.

2. **Equity Practice—Lapse of Time—In Whose Favor Rule Invoked.**—Lapse of time is justly allowed great weight in controversies about transactions long since past. But this weight is thrown in favor of the party who insists that the state of things existing during that lapse of time shall not be disturbed: It cannot be relied on by those seeking to change that state of things.

3. **Statute—Decrees against Absent Defendant—Effect of Fraud.**—The statute, 1 Rev. Code, p. 475-6, § 4, which provides that a decree made against an absent defendant shall, after seven years, stand absolutely confirmed against him, does not protect a decree procured by fraud, after the death of the absent defendant, without suggesting his death or reviving it against his representative or heirs.

These cases arose out of the case of Evans & wife v. Spurgin, reported 6 Gratt. 107. That case came up to this court from the Circuit court of Preston county: And after the cause went back, Jesse Spurgin and the heirs of Daniel Lantz filed a bill in that court to enjoin the enforcement of that judgment until the hearing of another suit which the plaintiffs had instituted in the Circuit court of Monongalia county in December 1849, against the heirs of Gilly C. Evans, wife of John Evans, and the administrator of Staley, for the purpose of setting aside the decree of the 21st of April 1836, made in the case of Staley v. Lantz, the proceedings in which case are stated in the report of the case in 6 Grattan.

In their bill filed in the case in Monongalia, after setting out the purchase of the land by Daniel Lantz from Staley, and the porceedings in the chancery cause of Staley v. Lantz, they alleged that Daniel Lantz lived in the county of Alleghany in
616 the state of Maryland *until his death, which occurred in 1816. That the place of his residence and his death were facts well known to Nimrod Evans, John Evans and his wife, long before the death of Nimrod Evans, which occurred in 1828: And they charged that John Evans and his wife, with a view to prevent the correction of the errors and irregularities in the case of Staley v. Lantz, and with a view to defraud the heirs of Lantz, under whom Spurgin claimed, had procured the removal of the cause in 1833 from Staunton to Monongalia county, after the death of Lantz and without notice to his heirs, some of whom were infants and others femes covert; and that all the subsequent proceedings and decrees were fraudulent.

They further alleged that on the 26th of November 1807 Lantz and Staley entered into a contract with the privity and knowledge of Nimrod Evans, by which the sale by the commissioners to Evans was canceled, and his money probably returned to him, or he had purchased for Staley, and everything pertaining to the chancery suit aforesaid was adjusted and satisfied as it related to both Staley and Evans; and Staley bound himself to convey to Lantz three tracts of land supposed to contain twelve hundred and fifty-nine acres, of which the land in controversy was one, when Lantz should pay to Henry Schroeder of Baltimore one thousand eight hundred and fifty dollars for Staley, and when Schroeder's receipts were produced to him Staley bound himself to convey the land. That Lantz did pay the money to Schroeder, and Staley, by deed dated the 16th of August 1809, conveyed the land to Lantz.

The plaintiffs further alleged that Lantz was in possession of the land purchased of Staley in 1805, from that time until his death in 1816. That his widow and children continued in possession until 1834, when a decree was made in the Circuit court
617 of Hampshire, *in a cause instituted by William F. Taylor, a creditor of Daniel Lantz, against his widow and heirs, to subject the lands of Lantz to satisfy the plaintiff's debt, by which decree a sale of the land by a commissioner of the court to George W. Devicman was confirmed: And that in 1839 Devicman sold the land in controversy to the plaintiff Spurgin; and that the possession had been continued by Devicman and Spurgin down to the time of filing the bill. The prayer of the bill was that the decree of 1836 in the suit of Staley v. Lantz might be set aside; that the defendants might be enjoined from enforcing their judgment at law for the recovery of the land; and for general relief.

The heirs of Gilley C. Evans answered the bill. They said they knew nothing of the facts of the case except what appears from the records of the causes in relation to the land in controversy, and they called for proof. They relied on the fact that Devicman was a purchaser whilst the suit of Staley v. Lantz was pending; and therefore, that he had legal notice of Staley's suit; and in fact that Spurgin purchased in 1839 with full knowledge of the decree in that suit of the 21st of April 1836. They say that they had no knowledge of the death of Daniel Lantz at any time previous to the suing out of the writ of right; nor had they any knowledge that John or Gilley C. Evans was informed of that fact at any time before the decree of 1836; and they deny all fraud on the part of said John and Gilley C. Evans, or that they or either of them purposely concealed the death of Lantz; or that they delayed bringing their suit for the purpose of suffering the time to elapse in which the supposed errors in the decree of 1836 might be corrected. They deny that there had been any new discovery of facts or evidence affecting this controversy by the plaintiffs since 1836. And they relied upon the decree of 1836 as a bar to
618 *the relief sought by the bill; and also upon the statute of limitations, and the delay of the plaintiffs for fourteen years to institute proceedings to impeach the decree of April 1836.

It appears from the evidence that Nimrod Evans, the purchaser of the land in controversy from the commissioners in the case of Staley v. Lantz, was in 1807, and continued to be until his death in 1828,

clerk of the County court of Preston. And a paper purporting to be a copy of an agreement between Staley and Lantz, though not signed, was produced in evidence, which was proved to be in the handwriting of Evans. By this paper which bore date the 26th day of November 1807, Staley agreed to sell to Lantz certain lands supposed to contain twelve hundred and fifty-nine acres; a part of which was the land previously sold to Nimrod Evans: For which lands Lantz bound himself to pay to Henry Schroeder of Baltimore one thousand eight hundred and fifty dollars, and to procure from Schroeder a receipt in favor of Staley for that sum; when Staley was to convey the lands to Lantz. On the back of this paper was an endorsement also in the handwriting of Nimrod Evans: "J. Staley and D. Lantz. Agreement. Copy. N. E."

It was also proved by a son of John Schroeder, that there was on his father's books, in the handwriting of a partner in the concern who had since died, an entry under the date of February 19th, 1808, by which John Staley was credited by three notes of Daniel Lantz, amounting to one thousand eight hundred and fifty dollars, with a memorandum at the foot of the entry "To be considered a cash payment from the 26th November 1807." And it was proved that Lantz was a man in good circumstances from 1807 up to the time of his death, which occurred in July 1818, fully able to meet all his engagements. It appeared further that Nimrod Evans never had the land en-
619 tered on the *commissioner's books as his, or paid the taxes; but that it stood on these books as the land of Lantz, and the taxes were paid by him and those claiming under him. Devicman was informed of the decree of April 1836 in the same year; and Spurgin knew it in 1839.

When the causes came on to be heard, the court below set aside the decree of April 1836, and perpetually enjoined the defendants from proceeding to enforce their judgment recovered in the writ of right case. And from these decrees the defendants obtained an appeal to this court.

N. Harrison and Stanard, for the appellants.

Fry, for the appellee.

SAMUELS, J. These two cases being, substantially, between the same parties, in regard to the same property, and depending upon the same facts, were heard together in this court. Many of the facts are set forth in the case of Evans & wife v. Spurgin, 6 Gratt. 107. The judgment in that case determined that the better right at law was in the demandants. After the judgment the tenant Spurgin and others, the heirs at law of Lantz, filed a bill in equity in the Circuit court of Preston county, in which county the land lies, against the heirs at law of Gilley C. Evans (she and her husband John Evans being then dead), to whom the legal title had descended. The sole purpose of this bill was to enjoin the judgment at law until the equity alleged in the other bill could be decided on. Spurgin also filed a bill in the Circuit court of Monongalia county, impeaching the decree of April 1836, as being obtained by fraud on the part of Evans and wife. This fraud is alleged to have been perpetrated by removing the cause from the District court of chancery at Staunton to the Circuit court of Monon-
galia, and proceeding therein, as re-
620 ported in 6 Grattan above *referred to, without revivor against Lantz's heirs. The bill alleges that if the heirs had thus been made parties, it would have been shown that Staley's decree of 1807 had been fully satisfied; that Nimrod Evans, in making the purchase, was either acting as the agent of Staley, or that any interest he might have had under his purchase was passed to Staley. That the claim asserted by Staley in the chancery cause, and the claim of Nimrod Evans, whatever it was, were fully adjusted by Staley and Lantz with the privity of Evans. That an agreement in writing was entered into between Lantz and Staley on the 26th of November 1807, with the privity of Evans, by which Staley again sold to Lantz the land in controversy with other land, for one thousand eight hundred and fifty dollars, to be paid by Lantz to the credit of Staley with Henry Schroeder of Baltimore; that the price was paid accordingly, and that Staley on the 16th of August 1809, conveyed the land to Lantz as the contract required.

The facts alleged are established by satisfactory proof. The original agreement in writing is not produced; but a paper in the handwriting of Evans is exhibited purporting to be a copy of that agreement. The signatures of Staley and Lantz are not affixed to this copy: but that it truly sets forth the terms of the agreement is manifest from the facts that Lantz procured credit for Staley with Schroeder for the price of the land named in the copy, that is one thousand eight hundred and fifty dollars; and that this credit was as of the date of November 26th, 1807, the date of the alleged contract; and that Staley afterwards, on the 15th of August 1809, executed a deed to Lantz for the land described in the copy filed, which includes the land in controversy. The acts performed by Staley and Lantz, respectively, distinctly show what the contract was; and their long ac-
621 quiescence *in the state of things resulting from those acts stamps the contract with absolute verity. So far as the claim of Evans' heirs depends upon the decree in favor of Staley, it is wholly without foundation in equity.

That Nimrod Evans was privy and consenting to the arrangement between Lantz and Staley, is as fully shown as any such fact can usually be shown after such a lapse of time. A paper is produced in the handwriting of Evans, setting forth the terms of the contract precisely as they were afterwards performed by Lantz and Staley respectively; this paper is endorsed in Evans' handwriting, "J. Staley & D. Lantz.

Agreement. Copy. N. E." Evans never in anywise whatsoever exercised any act of ownership over the property, but left it in possession of Lantz and those claiming under him. He was clerk of the County court of Monongalia county, and although the deed to himself from the commissioners in the chancery suit, had been admitted to record in his court, yet he never caused the alienation to be noticed on the land books of the commissioner of the revenue by withdrawing the taxes from Lantz and placing them to his own account. If the land was really his, his official duty required him to make the change; and his duty as a private citizen required him to cause the change to be made. The deed from Staley to Lantz was recorded in the office of which Evans was clerk; and under that deed the vendor and those claiming under him have held quiet possession until disturbed by Evans' residuary devisee asserting a title which Evans himself never set up.

Upon all this I hold that Nimrod Evans had no title, good in equity, against Lantz and those claiming under them. It only remains to consider whether the appellees can set up their equitable title against the legal title held by the appellants.

622 Several reasons *are alleged by the appellants why the equitable title shall not be now set up:

1. Laches.
2. The statute of limitations.
3. That the appellee Spurgin purchased the land with knowledge of the legal title held by Evans and wife.

In regard to the first: Lapse of time is justly allowed great weight in controversies about transactions long since passed. This weight, however, is thrown in favor of the party who insists that the state of things existing during that lapse shall not be disturbed. This is especially the case where the immediate parties to any given transaction are dead. It is presumed that any person having the right of property will ever use that right, such being the ordinary course of things. If no such right be exercised, the presumption is obvious that the right does not exist. In the cases before us, however, the appellees seek only to preserve the existing state of things; they and those under whom they claim have been in possession of the subject in controversy, and have held it since August 1809 at least. They are demanding nothing at the hands of the appellants; they seek only to defend their long continued actual possession, by means of their superior equitable title; a title fully proved by the direct testimony, and confirmed by the lapse of time. There is nothing in the record on which to found the allegation that the appellees or those under whom they claim have abandoned or waived their rights; on the contrary, from 1805 or from 1809, they have in the most emphatic manner asserted those rights by holding and enjoying their property.

Second. As to the statute of limitations: To sustain this branch of the defense, the appellants rely upon 1 Rev. Code, p. 623 475-6, § 4. In considering this *objection it must be recollected that the bills before us are filed for the purpose of avoiding transactions occurring after the decree of 1807; and to prevent the fraudulent use of that decree. The nature of those transactions I have already considered. If we could even hold that the party was guilty of no actual fraud in removing the case from the court at Staunton to Monongalia, and proceeding therein without reviving against Lantz's heirs and administrator, yet the gross disregard of the rights of others manifested in that proceeding is equivalent to fraud; it does all the mischief of fraud. The attempt of the appellants to enforce a mere legal title against a clear equitable title accompanied by long possession, is in itself a fraud; if innocent in acquiring the legal title, they are guilty of fraud in the attempt to use it. If we put ourselves in the place of the legislature, with the purpose of ascertaining the intention of the statute, we cannot suppose for a moment that it was intended to apply to such a case as this. The language of all public statutes is necessarily general; it is the duty of courts to determine their applicability to the circumstances of each particular case coming before them. The statute in question intends to quiet the possession of property acquired under decrees fairly obtained against absent parties, to bar any further litigation in the matter of the suit so decided, after seven years from the date of the decree. It does not intend to quiet parties in the enjoyment of property acquired under a decree fraudulently obtained; and this to the prejudice of parties fraudulently omitted.

Third. The third objection is without force: The vendors of the appellee Spurgin were in actual possession claiming title, and supposing that title to be good at law. In this they were mistaken; for the title, although clearly good in equity, was

624 not good *at law. No reason can be assigned why a vendor in actual possession holding a good equitable title may not sell his title and deliver possession to another; the circumstance that another holds a legal title which may be called in at any time and conveyed to the real owner, cannot prevent the real owner from selling.

I am of opinion to affirm the decrees.

The other judges concurred.

Decrees affirmed.

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Cross References to Monographic Notes.

Appeals.
Bills of Review, appended to Campbell v. Campbell, 22 Gratt. 649.
Commissioners in Chancery, appended to Whitehead v. Whitehead, 23 Gratt. 376.
Costs, appended to Jones v. Tatum, 19 Gratt. 720.
Creditors' Bills.
Divorce, appended to Bailey v. Bailey, 21 Gratt. 43.
Executions, appended to Paine v. Tutwiler, 27 Gratt. 440.
Executors and Administrators.
Fraudulent and Voluntary Conveyances, appended to Cochran v. Paris, 11 Gratt. 348.
Husband and Wife.
Infants, appended to Caperton v. Gregory, 11 Gratt. 505.
Interest, appended to Fred v. Dixon, 27 Gratt. 541.
Judgments.
Judicial Sales, appended to Walker v. Page, 21 Gratt. 636.
Liens.

I. IN GENERAL.

Scope.—The scope of this note includes the general subject of decrees. The treatment of decrees in particular cases in most instances has been limited, and in some cases it has been altogether omitted, reference being made to the monographic *notes* on the particular subjects for a more complete treatise.

Definition.—A decree is the judicial decision of a litigated cause by courts of equity, admiralty and probate. In its accurate use the term is employed to distinguish decrees of equity courts from judgments of law courts, though the term judgment is often used to include both. Bouvier's Law Dictionary.

Should Conform to Law of State Where Liability Is Fixed.—The decrees of courts of chancery in a state should conform to the law of the state where the liability of the parties is determined, and if it is by that law several, to render a joint decree will constitute error. De Ende v. Wilkinson, 2 P. & H. 663.

Judge Must Be Disinterested.—It is a general and fundamental rule that no man can be a judge in his own cause, and a decree pronounced by a judge who is even remotely interested in the subject-matter in controversy is voidable, and will be set aside if the proper steps therefor are taken. Findley v. Smith, 42 W. Va. 299, 26 S. E. Rep. 370.

II. NATURE AND EXTENT OF RELIEF.

1. COMPLETE RELIEF.

Against Party Ultimately Liable.—It is the practice of a court of equity to decree, in the first instance, against the party who is ultimately liable; but this is done only where the parties are before the court at the time of the decree, and their several liabilities are clearly ascertained. Garnett v. Macon, 6 Call 308.

Joint Decree against Guardian and Sureties.—A joint decree may be entered against a guardian and his sureties in an action against them by the ward on their official bond. Equity never takes two bites at a cherry, and it will not require that the guardian shall be proceeded against first, before the sureties may be held liable. Barnes v. Trafton, 80 Va. 524.

When Proper to Decree against Surety in First Instance.—In an action against a principal debtor and his surety, the bill alleges that there is no estate of the principal against which the plaintiff might resort, and that he is insolvent; this allegation is not denied in the answers and is sustained by the record. In such case it is not error to decree at once against the estate of the surety. Jones v. Degge, 84 Va. 685, 5 S. E. Rep. 799.

Against Land Partitioned among Heirs.—When land, which has been partitioned among heirs, is sold to enforce the vendor's lien, it is not error to decree the sale of their respective shares to pay their proportion of the lien, when it does not appear that the debt will be prejudiced or delayed. Max Meadows L. & I. Co. v. McGavock, 96 Va. 131, 30 S. E. Rep. 460.

Liability of Grantee under Invalid Title to Creditors.—In a suit in chancery against two defendants, one of whom is a nonresident, and the other is in this country, if the defendant present appear not to be a debtor of the absentee, but to hold effects belonging to him by a title invalid as to creditors, he should be considered personally responsible for so much as he may have used, or for the profits he may have received from them, and for that amount a decree may be made against him personally in the first place, holding the property in his hands ultimately liable if he be insolvent; for the balance of the plaintiff's claim, the court may proceed in the first place against the property itself. Gibson v. White, 3 Munf. 94.

Dissolving Injunction against Assignee of Bond.—The decree of a court of equity, dissolving an injunction against the assignee of a bond, because the payments, for which credits are claimed by the complainant, were made to the obligee after notice of the assignment, ought to also provide that the obligee (being defendant to the bill) do repay the sum so received by him, so soon as the complainant shall have paid the amount of the judgment to the assignee. Roberts v. Jordans, 3 Munf. 488.

Equalization in Final Distribution.—If a court of equity takes charge of a large fund, and enters a general decree providing for the distribution of such fund among the distributees entitled thereto in proportionate shares, and in subsequent decrees relating to the fund it departs from such apportionment, in its final distribution of the residue it should so equalize the same as to make the final decree conform to the general decree. Kearfott v. Dandridge, 45 W. Va. 673, 31 S. E. Rep. 947.

Where Maker of Note Enjoins Payee and Assignee.—If the maker of a negotiable note file a bill of injunction against the payee and assignee on the ground of an equity affecting the payee only, the court of chancery having before it all the parties concerned, ought not to discharge the maker altogether, nor to turn over the assignee to a suit at law against the payee, but should decree against the latter in the first instance that he pay the amount of the note to the assignee, and liberty should be reserved to the assignee to apply to the court to dissolve the injunction as to the maker for so much of the debt as he may not be able to recover from the payee; in which case a decree ought also to be rendered in favor of the maker against the payee, for so much thereof as he may be compelled to pay. And the decree should further direct that the action at law in favor of the assignee against the payee, be perpetually enjoined. McNiel v. Baird, 6 Munf. 316.

Additional Trustee Appointed and Accounts Settled.—Where a creditor filed a bill, and asked that a deed of trust to secure him be enforced, it was held competent and proper for the court to decree the appointment of another trustee to aid the execution of the trust, and also to settle the accounts of the administrator, and to adjust and protect the rights of the complainant and all the parties in interest. Woods v. Fisher, 3 W. Va. 536.

2. FLEXIBILITY.

In General.—It is a distinctive characteristic of chancery courts that they have the power to mould their decrees to suit the postures of the case, and to embrace and finally dispose of the rights of the parties to the cause in one decree. 5 Enc. Pl. & Pr. 958, and cases cited. See also, Roberts v. Jordans, 3 Munf. 488; Kearfott v. Dandridge, 45 W. Va. 673, 31 S. E. Rep. 947.

Against Voluntary Devisees—Contribution.—Where a decree is rendered on behalf of a creditor against several voluntary devisees of the debtor, a court of equity should decree contribution among them, so that each man should only pay his just proportion of the debt. But all the devisees should be liable for the failure of any one to pay his part, until the debt is completely discharged, as far as he has received the funds of the donor. Chamberlayne v. Temple, 2 Rand. 384.

Legatees Joint Plaintiffs.—Though specific legatees jointly sue, the decree ought to be several, in conformity with their respective rights. Quarles v. Quarles, 2 Munf. 321.

Against Devisees—Pro Rata Decree.—Where a suit is brought to subject land in the hands of two devisees, one of whom owns one-fourth and the other three-fourths, for the payment of a debt due from their ancestor, the decree should be separate against each for the payment of his *pro rata* share of the debt, with a reservation to the plaintiff to proceed against him for so much of the share of the other as can be made out of that one's part of the land. Pugh v. Russell, 27 Gratt. 789.

A decree against devisees, who hold by several and distinct devisees, ought not to be against them jointly, but should have directed a valuation of their lands, and charged them *pro rata*. Mason v. Peter, 1 Munf. 437.

Fraudulent Transaction—Apportionment of Relief.—Where a transaction between a debtor and his creditor was intended by both of them to defraud the other creditors of the debtor, but the creditor was not as guilty as the debtor, a court of equity ought not to refuse relief to the debtor altogether, but ought to apportion the relief granted to the degree of guilt of both parties, in order to avoid the encouragement of fraud, and to prevent extortion and oppression. Austin v. Winston, 1 H. & M. 33, 3 Am. Dec. 583.

Annuity—Future Payments.—In a suit in equity for arrears of an annuity, the decree should be for the sum due, reserving liberty to apply to the court from time to time to extend its decree so as to embrace the payments thereafter falling due. Marshall v. Thompson, 2 Munf. 412.

Same—Security by Mortgage.—A decree against the purchasers of a tract of land, which is encumbered by a mortgage to secure the payment of an annuity ought to provide that so much of the land respectively be sold as will be their proportions of the sum due and unsatisfied by a sale of that part of the tract of land which was retained by the vendor, except so far as they shall pay their respective proportions of debt, and agree to hold their lands subject to the future decree of the court for their share of any sums becoming due to the plaintiff thereafter. Mayo v. Tomkies, 6 Munf. 520.

Estate Committed to Sheriff—Managed by Deputy.—Where the representative of a sheriff was sued on account of an estate committed to his hands, and it appeared that his deputy, who was also sued, had the entire management of the estate, the court may decree against the deputy in the first instance, if assented to by the plaintiff, reserving liberty to him to resort to the court for decrees against the other parties. But if such consent was not given, it was the duty of the court to decree between the defend ants, in order to throw the burden on the person ultimately liable. Cocke v. Harrison, 3 Rand. 494.

3. UNDER THE GENERAL PRAYER.

Decree Different from Special Prayer.—Though the decree entered in a suit be different from the special relief prayed for, still if the bill contains a prayer for general relief, and a proper case is made for such relief, it may be given under the prayer for general relief, if consistent with that which is actually prayed. Raper v. Sanders, 21 Gratt. 60; Brown v. Wylie, 2 W. Va. 502. But there can be no decree distinct from that demanded by the bill. Pickens v. Knisely, 29 W. Va. 1, 11 S. E. Rep. 932; Sheppard v. Starke, 3 Munf. 29.

Entitled to Decree on Other Grounds Than Alleged.—Whenever the object of a bill is to recover money for any debt, or for the breach of any contract, or on account of any other matter, and it is shown that the complainant is entitled to any sum on account of the particular matters and transactions alleged in the bill, though it may be on other grounds, and for different reasons, and for a less amount than is alleged and claimed in the bill, the amount to which the claimant may be so entitled may be decreed to him under the general prayer for relief. Hall v. Pierce, 4 W. Va. 107.

Personal Decree against Grantor for Fraudulently Marking Deed Satisfied.—Under the prayer of general relief in a suit to enforce a deed of trust, a personal decree may be entered against the grantor for any loss suffered by the plaintiff, because of the fraudulent marking satisfied of said deed by the grantor after assignment to the plaintiff. Evans v. Bank, 95 Va. 294, 28 S. E. Rep. 323.

Interest in Suit to Set Aside Fraudulent Conveyance.—A creditor having obtained a judgment against his debtor, without running interest, his execution is obstructed by a fraudulent conveyance made by the debtor of his property. A suit in chancery is then brought to remove the obstruction of the conveyance, and for general relief. The chancellor ought to decree the interest, as well as set aside the conveyance; the prayer for general relief being sufficient to cover the demand of interest. Beall v. Silver, 2 Rand. 401.

4. BETWEEN CODEFENDANTS.

General Doctrine.—The general doctrine in regard to decrees between codefendants in equity has been well stated by LORD ELDON as follows: "Wherever a case is made out between defendants by the evidence arising from pleadings and proof between plaintiffs and defendants, a court of equity is entitled to make a decree between the defendants, and is bound to do so. The defendant chargeable has a right to insist that he shall not be liable to be made a defendant in another suit for the same matter which may be then decided between him and his codefendant. And the codefendant may insist that he shall not be obliged to institute another suit, for a matter which may be then adjusted between the defendants." Blair v. Thompson, 11 Gratt. 441. See Braxton v. Harrison, 11 Gratt. 30; and Taliaferro v. Minor, 2 Call 190; Titchenell v. Jackson, 26 W. Va. 460.

It is well settled that where a case is made out between codefendants by evidence arising from pleadings between the complainants and defendants, a court of equity should render a decree between the codefendants; but when there are no such pleadings, a court of equity cannot render a decree between the codefendants. Worthington v. Staunton, 16 W. Va. 208; Roots v. Mason City, S. & M. Co., 27 W. Va. 483; Burlew v. Quarrier, 16 W. Va. 108; Yates v. Stuart, 39 W. Va. 124, 19 S. E. Rep. 423; Hoffman v. Ryan, 21 W. Va. 415; Templeman v. Fauntleroy, 3 Rand. 434; Morris v. Terrell, 2 Rand. 6; Ruffner v. Hewitt, 14 W. Va. 737; Vance v. Evans, 11 W. Va. 342.

Must Be Proper Case for Decree for Plaintiff.—There can be no decree in any case between codefendants, when no decree can properly be rendered in favor of the plaintiff, whether this arises from the fact that the bill does not make out a case, which entitles him to relief, or from the fact that the proof does not sustain the case as set out in the bill. Watson v. Wigginton, 28 W. Va. 533, citing Hansford v. Chesapeake Coal Co., 22 W. Va. 70; Ould v. Meyers, 23 Gratt. 384; Hubbard v. Goodwin, 3 Leigh 522, and numerous other cases to the same effect. See Western Lunatic Asylum v. Miller, 29 W. Va. 326, 1 S. E. Rep. 740; Radcliff v. Corrothers, 33 W. Va. 694, 11 S. E. Rep. 232; Kinports v. Rawson, 36 W. Va. 237, 15 S. E. Rep. 68; Glenn v. Clark, 21 Gratt. 35.

But in a bill asking that the liens in a debtor's lands be audited, the order of their priorities ascertained, and that the land be sold to pay them, though a particular debt is conceded to be a lien, it is proper for the debtor and other lienor to dispute such lien without violating the above rule. Tavenner v. Barrett, 21 W. Va. 656.

Issue Must Be Made.—The contest between codefendants can never come fairly before the court, where no issue is made up, nor any provision for taking their testimony as to the matters in difference between them. Hubbard v. Goodwin, 3 Leigh 492.

Same—Satisfactory Evidence.—Unless the matter has been put in issue by the pleadings, and there is satisfactory evidence of the facts, it is not deemed proper to decree in favor of one defendant against another. Yerby v. Grigsby, 9 Leigh 387.

First Subjecting One Ultimately Liable.—A court of equity may enter a decree between codefendants, in a case where the same decree operates in favor of the complainant, by subjecting in the first

instance that defendant who ought ultimately to pay the debt. McNiel v. Baird, 6 Munf. 316.

When Decree Not Proper.—In a bill brought by vendee of land to enjoin the payment of purchase money, alleging as a ground a defect of title to a part of the land, and also alleging that there is an adverse claimant to part of the land, there is no privity between the plaintiff and the adverse claimant, and the equity between the latter and the vendor does not arise from the pleading and proof between plaintiff and defendant, and is not therefore the proper subject of a decree between codefendants. Steed v. Baker, 13 Gratt. 380.

Same—Suit against Administrator and Sureties for Devastavit.—A bill was filed by a creditor against an administrator and his sureties, charging a devastavit by the former, and the liability of his sureties for it. Some of the sureties insist in their answer that under the circumstances one of the sureties is liable to the other, if they are liable to the plaintiff. There was a decree for the plaintiff, and though it appeared that the devastavit was occasioned by a payment of a debt of inferior dignity to the surety sought to be charged, yet it was not a proper case for a decree between codefendants. Allen v. Morgan, 8 Gratt. 60.

Proper Case.—Where a decree for a sale of land which was bound for the payment of certain notes was interlocutory, although it was affirmed on appeal, there may be a decree between the codefendants when the cause goes back, if it is a proper case for such a decree. Alley v. Rogers, 19 Gratt. 366.

Same—Setting Aside Fraudulent Deed.—Where judgment creditors seek to subject land of their debtor, which has been conveyed in trust to secure a debt, and in their bill they charge that the deed was intended by the grantor to defraud his creditors, and the trustee and creditor were cognizant of the fraudulent intent at the time, there is enough in the pleadings to justify a decree between the codefendants. Barger v. Buckland, 28 Gratt. 850.

III. ESSENTIALS OF VALID DECREE.

1. JURISDICTION.

a. OF PARTIES GENERALLY.

General Rule—Notice Essential—Effect of Recital.—Jurisdiction of the cause and parties is essential to the conclusiveness of a decree. To acquire jurisdiction of the defendant it is necessary that in some appropriate way he be notified of the pendency of the suit. If upon inspection of the record, it appears that no such notice has been given, the decree is void. But if the court rendering the decree is a domestic court of general jurisdiction, and the record recites that notice has been given, such recital cannot be contradicted by extrinsic proof. In such case the decree is sustained, not because a decree rendered without notice is good, but because the law does not permit the introduction of evidence to overthrow that which, for reasons of public policy, it treats as absolute verity. Wilcher v. Robertson, 78 Va. 602.

Decree a Nullity if No Notice Is Given.—No doctrine is better settled than that every man is entitled to a day in court to defend his rights, and that a decree rendered against him, when he has had no opportunity for defence, is a nullity, and may be so pronounced by any court wherein it may be drawn into controversy. Ogden v. Davidson, 81 Va. 757; Myrick v. Adams, 4 Munf. 366; Robinson v. Dix, 18 W. Va. 528; Myers v. Nelson, 26 Gratt. 729; Beery v. Irick, 22 Gratt. 614; Purdie v. Jones, 32 Gratt. 827; Fultz v. Brightwell, 77 Va. 742; Hobson v. Yancey, 2 Gratt. 73; Shaffer v. Fetty, 30 W. Va. 248, 4 S. E. Rep. 278. The same doctrine is applicable where the decree is in favor of a person not a party. See Bailey v. Robinsons, 1 Gratt. 4, 42 Am. Dec. 540; Sheppard v. Starke, 3 Munf. 29. The fact that the necessary parties are infants makes no difference. Clendenning v. Conrad, 91 Va. 410, 21 S. E. Rep. 818.

Against Trustee Not Binding on Cestui Que Trust Not a Party.—In a suit where there is a claim under an adverse title to property, which has been conveyed to trustees for the payment of debts, to which only the grantor and the trustees were made parties defendant, a decree in the cause in favor of the plaintiff does not bind the *cestuis que trust* because they were not parties to the suit. Com. v. Ricks, 1 Gratt. 416. The general rule that a decree against trustees is not binding on their *cestuis que trust* seems to be universally accepted as the just and correct doctrine. See Collins v. Lofftus, 10 Leigh 5, 34 Am. Dec. 719, and *note*.

Coexecutors—Process against Both Essential.—A legatee assigns his interest under a will, which appoints two executors to sell the property therein conveyed, and divide the proceeds among the several legatees. The assignee brought suit against one of the executors only, and did not make the legatees parties. On both of these grounds it was an error for the court to render a decree in favor of the plaintiff. It should also have taken an account of the sale before it rendered a final decree for any particular sum, and this, notwithstanding the defendants have not answered and the bill was taken for confessed. Findlay v. Sheffey, 1 Rand. 73.

Personal Decree against a Corporation.—In West Virginia a personal decree may be rendered for specific performance against a foreign corporation upon which actual service has been had within the state under the provisions of the statute. Shafer v. O'Brien, 31 W. Va. 601, 8 S. E. Rep. 298.

Erroneous Where Proper Parties Not Summoned.—A bill was filed on behalf of certain infants against the heirs of their guardian, his administrator, the surviving security on his bond, and the administrator of the other security, as codefendants. Process was not served on a part of the heirs, nor on the surviving security. The decree against the administrator of the deceased security was held to be erroneous, because the proper parties were not before the court. Bland v. Wyatt, 1 H. & M. 543.

To Sell Land of Testator Devisees Are Necessary Parties.—In a suit for the sale of the land of a testator, his devisees were not made parties. A decree was rendered appointing commissioners to sell, who complied with the decree, and their report was confirmed. But it was held that the devisees were not bound by the decree, and that the sale and deed of the commissioners, and the subsequent confirmation of their report, did not operate to pass the legal title. Hudgin v. Hudgin, 6 Gratt. 320, 52 Am. Dec. 124.

Decree Nisi Necessary before Final Decree—Appearing before Commissioner of Accounts.—Where a defendant in chancery has not answered the bill, it is error to enter a final decree against him without the previous service of a decree *nisi*. And his appearing before commissioners appointed to take an account, or having notice of their proceeding to take it, does not preclude him from making this objection. Legrand v. Francisco, 3 Munf. 83.

Creditors' Suit—Service of Notice of Account.—A court has no jurisdiction over a person who has not

been made a party to a suit, and could render no decree against him, and if one was rendered it was a mere nullity. Hence, where in a creditors' suit to subject real estate, the debtor only is made defendant, although there is a prior deed of trust on the land, a decree in such suit is not binding on the trustee or the *cestui que trust*, nor does the service of a notice of the taking of accounts by the commissioner make them parties, or render such decree valid. McCoy v. Allen, 16 W. Va. 724.

When Defendant Is in Lines of Enemy.—A decree in a suit instituted by a plaintiff within the union lines against defendants in the confederacy, who do not appear and are unnotified other than by order of publication, is void and may be so considered in that or any subsequent suit. Sturm v. Fleming, 22 W. Va. 404; Grinnan v. Edwards, 21 W. Va. 347; Haymond v. Camden, 22 W. Va. 180.

Of Court of Appeals of Virginia in 1861.—A decree rendered by a pretended court of appeals of Virginia at Richmond during the pendency of the civil war, who acted under the authority of citizens of a state then in insurrection against the United States, is not binding on the parties to such cause. Snider v. Snider, 3 W. Va. 200.

Effect of Giving Depositions.—Where defendants are not served with process, and do not in any way enter an appearance in a cause, a personal decree cannot be entered against them, and the fact that they gave their depositions in a case does not authorize the court to give such a decree against them. Edichal, etc., Co. v. Columbia, etc., Co., 87 Va. 641, 13 S. E. Rep. 100.

Action by Joint Vendees—Both Must Be Represented.—After a judgment has been recovered by a vendor against two joint vendees of land for the balance of the purchase money, one of the vendees dies and the other brings a suit in equity against the vendor, asking that the judgment be enjoined and money refunded because of a deficiency in the quantity of the land. In such a case it is improper to enter a decree without having the representatives of the deceased vendee before the court. Crawford v. McDaniel, 1 Rob. 448.

Patents—Patentee Must Be Represented.—A court of equity has jurisdiction to set aside a patent obtained with knowledge of a prior entry, but the court cannot enter a decree in such case on the merits, until the patentee or his representative has been made party to the suit. Hagan v. Wardens, 3 Gratt. 315.

b. OF NONRESIDENTS.

Nonresidents Must Have Notice.—As to defendants, who are nonresidents, who have had no service of process upon them, have not appeared or authorized anyone to appear for them, no personal decree can be entered against them. McGavock v. Clark, 93 Va. 810, 22 S. E. Rep. 864; Coleman v. Waters, 13 W. Va. 278; Barrett v. McAllister, 33 W. Va. 738, 11 S. E. Rep. 220.

Regularity of Proceedings Should Appear.—The record of a suit in which there were nonresident defendants shows that after a decree *nisi*, the "bill was taken for confessed" at the next rules. This was followed by decrees affecting absent defendants, who were not before the court. It was recited that there was an order of publication as to the absent defendants, but there was nothing to show that it was posted as required by statute. No decree should be rendered affecting the interest of an absent defendant, unless it appear (if it be not otherwise brought before the court) that he had been regularly proceeded against by order of publication duly published in a newspaper and posted at the front door of the courthouse. McCoy v. McCoy, 9 W. Va. 443, citing Craig v. Sebrell, 9 Gratt. 131; Hadfield v. Jameson, 2 Munf. 53. In a suit in chancery against a defendant, who is out of this country, and another within the same, having in his hands effects of, or otherwise indebted to, such absentee, a decree cannot be entered against the defendant in this country until, by legal and regular proceedings, the plaintiff has established his claim against the absentee. Gibson v. White, 3 Munf. 94.

c. OF SUBJECT-MATTER.

Jurisdiction Essential to Valid Decree.—It is an elementary principle in our jurisprudence, that jurisdiction of the subject-matter and the parties is essential to the conclusiveness of a decree and though a court may obtain jurisdiction rightfully, yet its decree may be void, because in the progress of the case, it has exceeded its jurisdiction. In a suit for the sale of land a court exceeded its jurisdiction, hence it was held that the proceedings under the decree of sale were void and might be attacked collaterally. Seamster v. Blackstock, 83 Va. 232, 2 S. E. Rep. 36.

Same—Bankruptcy.—In a suit in bankruptcy it appeared that the court had no jurisdiction over the lands of a person, which had not been surrendered in that court, and against which the bankrupt had no claim. The court was therefore lacking in jurisdiction of the subject-matter, and its decree fixing liens upon the same was void, and may be set aside and disregarded as a nullity, wherever and whenever it may be called in question. Richardson v. Seevers, 84 Va. 259, 4 S. E. Rep. 712.

Same—Contempts.—It is no contempt of court to violate or disobey an order or decree which the court had no authority to make. If the court had no jurisdiction to make said order it is without authority and void. Ruhl v. Ruhl, 24 W. Va. 279, citing Swinburn v. Smith, 15 W. Va. 483, 500.

Improper Exercise of Jurisdiction.—Where jurisdiction has been obtained over the person and subject-matter no error in its exercise can make the judgment void. The authority to decide being shown, it cannot be divested by being improperly or incorrectly employed. Lawson v. Moorman, 85 Va. 880, 9 S. E. Rep. 150.

2. CONFORMITY TO PLEADINGS AND PROOFS.

General Rule.—It is a well-settled rule of the courts of equity that a decree can only be entered in accordance with the case as made by the pleadings, and no account will be taken of evidence of matters not alleged. Welfley v. Shen., etc., Co., 83 Va. 768, 3 S. E. Rep. 376; Mundy v. Vawter, 3 Gratt. 518; Kent v. Kent, 82 Va. 205; Potomac Mfg. Co. v. Evans, 84 Va. 717, 6 S. E. Rep. 2; Staples v. Staples, 85 Va. 76, 7 S. E. Rep. 199; Smith v. Lowther, 35 W. Va. 300, 13 S. E. Rep. 999; Roberts v. Coleman, 37 W. Va. 143, 16 S. E. Rep. 482; Vance Shoe Co. v. Haught, 41 W. Va. 275, 23 S. E. Rep. 553.

Evidence.—Although a plaintiff may present a good case by his proofs he is not entitled to a decree which is not justified by the allegations of his bill. Evans v. Kelley (W. Va.), 38 S. E. Rep. 497. A decree must be justified by both the pleadings and the proof. Fadely v. Tomlinson, 41 W. Va. 606, 24 S. E. Rep. 645. When the evidence is defective as to a particular item, no decree should be made as to that. McConnico v. Curzen, 2 Call 358, 1 Am. Dec. 540.

Answer.—If matter appear in the answer of a defendant in equity, which is nowise alleged in the

bill, it cannot justify a decree against the defendant, though it might have been ground for such decree if it had been alleged in the bill. Eib v. Martin, 5 Leigh 132.

When the answer of the defendant contains a claim which has no connection with the relief sought in the bill, and is not necessary to be considered in deciding the case as made by the bill, and the court in its decree expresses an opinion in favor of the defendant, this decree does not conclude the question when it is afterwards set up by the defendant in a cross bill in the cause. Niday v. Harvey, 9 Gratt. 454.

No Relief Unless Prayer Therefor.—When the pleadings contain no proper prayer therefor, it is error to decree affirmative relief. Harrison v. Brewster, 38 W. Va. 294, 18 S. E. Rep. 568; Middleton v. Selby, 19 W. Va. 168.

On Matters in Cross Bill Not in Original Bill.—No decree can be found upon matters in a cross bill, which are not stated in the original bill, for as to them it is an original bill. Hansford v. Chesapeake Coal Co., 22 W. Va. 70.

Trustee of Married Women.—Where there was no misconduct in the trustee of a married woman, it was error to enter a personal decree against him in a suit brought to enforce collection of a debt of his *cestui que trust*. Woodson v. Perkins, 5 Gratt. 345.

Debts of Heirs Not Enforceable in Suit to Charge Ancestor's Estate.—A suit against a decedent's representative to charge his estate with a debt, the pleadings in which contain no allegation of debts against his heirs, and ask no relief as to their debts against land descended to them from such decedent, cannot be made the vehicle of ascertaining and enforcing personal debts of such heirs against such land, and any decree entered therein as to that matter will be a nullity. Fowler v. Lewis, 36 W. Va. 112, 14 S. E. Rep. 447.

Decree Void as to Party Not Named, and No Allegation against.—In a bill in chancery against several defendants, process was issued against one who was not a party defendant, and against whom there was no allegation and no relief prayed. A decree was entered against him by default and against the other defendants, by some of whom an appeal was taken and the decree reversed as to them, but in all things else affirmed. The decree was a mere nullity as to the party not named in the bill, and against whom the bill contained no allegation and prayed no relief. Moseley v. Cocke, 7 Leigh 224; Cronise v. Carper, 80 Va. 678; Ogden v. Davidson, 81 Va. 757; Strother v. Mitchell, 80 Va. 149.

Relief Not Sought.—A decree is erroneous which passes upon questions not properly presented by the plaintiffs, and directs any relief which is not sought or desired, and the proper parties are not all before the court. Donahoe v. Fackler, 8 W. Va. 249.

Single Creditor's Bill—Account of All Debts Erroneous.—In a single creditor's bill against all lienors on a tract of land designated in the bill, but which was not a general creditors' bill, it is an error to decree an account to be taken of *all* the debts due by the defendant, and which are valid liens on his land, their amounts and priorities. Such account not being asked by the bill, parties in interest may be taken by surprise. Baugher v. Eichelberger, 11 W. Va. 217.

IV. PRESUMPTION AND EFFECT.

1. PRESUMPTION.

a. AS TO RECITALS.

Verity of When Attacked for Fraud.—The recitals of a decree which are directly attacked for fraud and surprise in the procurement are not presumed to be absolute verities, but are subject to impeachment. Springston v. Morris (W. Va.), 34 S. E. Rep. 766.

No Exceptions Taken to Commissioner's Report.—A decree confirming the report of a master commissioner recited that there were no exceptions taken to it, and it was confirmed. This decree must be presumed to be correct as to its recitals, unless the record shows otherwise. In this case the record contains nothing which conflicts with the decree. There were exceptions found in the record taken by some of the defendants, but they were without date and nothing appears from which it can be inferred that they were filed before the decree was rendered, and it may be that they were taken and filed afterwards. Alderson v. Henderson, 5 W. Va. 182.

Order of Publication.—A decree states that the cause was heard on the bill and order of publication returned duly executed. This decree must be regarded as solemnly affirming that there was an order of publication duly taken against the defendant, and that it was duly published and posted as the law directs, and the verity of the record upon this point is not to be called into question by any averment or proof to the contrary. Craig v. Sebrell, 9 Gratt. 131.

Notice of Papers Recited in Cause.—If the caption of a decree names that the defendants in the cause are certain persons whose answers are filed, and the decree states that the cause was heard upon the bill, answers and exhibits, it will be inferred that the court in giving its decree took notice of the answers. Pickett v. Chilton, 5 Munf. 467.

Service of Process.—Where a decree recites on its face that all the defendants had been duly served with process, in the absence of anything in the record to the contrary, the presumption is conclusive that the recital is true. Moore v. Green, 90 Va. 181, 17 S. E. Rep. 872; Wilcher v. Robertson, 78 Va. 602.

A decree which recites that process was duly served on defendant is sufficient in the appellate court on an appeal, according to the principles in Craig v. Sebrell, 9 Gratt. 131; Moore v. Holt, 10 Gratt. 284, and other cases there cited. Arnold v. Arnold, 11 W. Va. 449.

Preliminary Steps to Trial.—It is not necessary to state in a decree in chancery, that all the preliminary steps towards maturing the cause for hearing were taken; it being intended, where the cause is set for hearing, that it was regularly done, unless the party attempting to impugn the decree show the contrary. Quarrier v. Carter, 4 H. & M. 242.

b. AS TO RECORD.

Of Courts of General Jurisdiction.—Nothing is better settled than that decrees of a court of general jurisdiction, acting within the scope of its authority, are presumed to be right, until the contrary appears, and are not open to collateral attack; and this is so, even though the party against whom, or in whose favor the decree was rendered was dead at the time, and such a decree is unassailable in a collateral action, as the record is conclusively presumed to speak the truth, and can only be tried by inspection. Pugh v. McCue, 86 Va. 475, 10 S. E. Rep. 715; Shelton v. Jones, 26 Gratt. 891; Pulaski Co. v. Stuart, etc., Co., 28 Gratt. 879; Lawson v. Moorman, 85 Va. 880, 9 S. E. Rep. 150; Pennybacker v. Switzer, 75 Va. 671; Brengle v. Richardson, 78 Va. 406; Marshall v. Cheatham, 88 Va. 31, 13 S. E. Rep. 308;

Grigg v. Dalsheimer, 88 Va. 508, 13 S. E. Rep. 993; Hill v. Woodward, 78 Va. 765; Wimbish v. Breeden, 77 Va. 324; Wilcher v. Robertson, 78 Va. 602; Woodhouse v. Fillbates, 77 Va. 317.

A judgment against a person who has not been served with notice is a void judgment, and is *ex vi termini* a nullity. But when a court of general jurisdiction has pronounced judgment, its adjudication should be as conclusive on the question whether a party was duly notified, as on any other point necessary to a proper determination of the case, as judgments of such courts are presumed correct. Ferguson v. Teel, 82 Va. 690.

Effect of Commissioner's Findings.—In the absence from the record of the evidence upon which a commissioner has reached his conclusions, and the report being confirmed by the lower court, the decree will be presumed to be correct until the contrary is shown. Saunders v. Pruntey (Va.), 26 S. E. Rep. 584.

The findings of a commissioner will be sustained, although the record is unsatisfactory, and the evidence not clear, and the conclusions not accurate in all respects. Browning v. Browning (Va.), 36 S. E. Rep. 525.

Without Reservation—Effect.—A decree on full hearing, dismissing a bill generally, without reservation of right to the plaintiff to sue at law, is conclusive upon all matters involved in the case, even though there was no jurisdiction in equity because of an adequate remedy at law. Unless it otherwise appear from the decree, it will be taken that the dismissal was on a hearing on the merits. Carberry v. Railroad Co., 44 W. Va. 260, 28 S. E. Rep. 694.

Of Foreign State.—The record of a decree of a court of another state is regarded as the decree of a court of general jurisdiction, and entitled to every presumption in favor of its validity. Stewart v. Stewart, 27 W. Va. 167.

Where Evidence Is Not Preserved.—An appellate court will not assume that the lower court decreed erroneously, when the evidence upon which it was made has not been preserved, and is not before the appellate court. Paxton v. Rucker, 15 W. Va. 547.

Decree against Absent Debtor—Weight in Collateral Suits.—A decree *in personam* against an absent debtor is entitled to all the respect to which any other decree is entitled, in all collateral controversies. If property is sold under an execution issued thereon, the title to the property cannot be impeached by objections to the form or merits of the decree. Rootes v. Tompkins, 3 Gratt. 98.

Same—Bars Statute of Limitations.—A decree against an absent debtor merges the original cause of action, so far as to enable the plaintiff to rely thereon, in any subsequent proceeding to enforce it, as *prima facie* evidence of the demand it establishes; and to repel the statute of limitations, except so far as the statute may apply to judgments or decrees. Rootes v. Tompkins, 3 Gratt. 98.

2. EFFECT.

a. IN GENERAL.

Of Reference as Exhibit.—Where a decree makes an exhibit of the record of another cause by referring to it as such, this makes it a part of the record, although it was not referred to in the bill or answer, nor was made an exhibit by an entry on the order book. Craig v. Sebrell, 9 Gratt. 131.

Decree Obtained by Fraud.—Property which is claimed by a son-in-law under a marriage contract with a decedent in his lifetime, and recovered by a decree against the administratrix and distributees, is not in any way responsible to the creditors of such decedent, unless it appear that such decree was obtained by fraud and collusion between the parties. Clay v. Williams, 2 Munf. 105.

Lapse of Ten Years—Impeachment.—After a lapse of nearly ten years, a party to a suit will not be heard, as a general rule, to impeach a decree in a suit to enforce a vendor's lien, by original bill, unless some valid excuse is shown for the long delay. Walker v. Ruffner, 32 W. Va. 297, 9 S. E. Rep. 215.

Estoppel—After Twenty-Two Years.—A party may be estopped by his acquiescence in a decree, affecting his rights made in the progress of the cause, under which decree he takes a part of the fund affected by it, and makes no objection to it until after final decree in the cause made twenty-two years after it. Burton v. Brown, 22 Gratt. 1.

b. OF DECREE OF COMPETENT COURT.

Valid until Reversed.—A decree of a court of competent jurisdiction, in a suit between proper parties, is valid and conclusive until reversed on some proper proceedings in the same suit and in the same court, or on appeal, unless there be some sufficient ground of fraud or surprise to entitle the injured party to relief in some other suit. Fox v. Cottage, etc., Ass'n, 81 Va. 677, citing Wilson v. Smith, 22 Gratt. 493; Peirce v. Graham, 85 Va. 227, 7 S. E. Rep. 189.

As to Existence of Facts and Parties.—A decree is conclusive, as to the existence or nonexistence of every fact on which it depends, upon the parties to the suit and those claiming through them. Bodkin v. Arnold, 45 W. Va. 90, 30 S. E. Rep. 154.

Jurisdiction.—The validity of a decree of a court of general civil jurisdiction cannot be questioned when it is offered in evidence collaterally in another suit, unless the errors therein affect the jurisdiction of the court. Hall v. Hall, 12 W. Va. 1.

Confirmation of Commissioner's Report.—A court of equity will not interfere to give relief to a purchaser under a decree of a court having jurisdiction of the subject, or to his sureties, for errors in the decree, or the proceedings under it, where the report of the commissioners has been confirmed. Worsham v. Hardaway, 5 Gratt. 60.

Of Court of Another State.—A decree rendered by a court of competent jurisdiction in another state is valid and binding in West Virginia, and its effect here is the same as in the state where rendered. Stewart v. Stewart, 27 W. Va. 167.

Of Bankrupt Court.—A decree of a bankrupt court having cognizance of the parties and the subject-matter, is an act of a court of competent jurisdiction, and cannot be questioned elsewhere. Adams v. Logan, 27 Gratt. 201; Brengle v. Richardson, 78 Va. 410.

A decree which discharges a bankrupt under the act of congress of August 19, 1841, is conclusive upon all his creditors, in all suits which may be brought against him in any court, except where the discharge is impeached for fraud or willful concealment by the bankrupt of his property or rights of property, contrary to the provisions of that act. Tichenor v. Allen, 13 Gratt. 15.

Decree in Suit against Corporation Binding on Stockholders.—In a suit against a corporation, upon an officer of which process had been duly served, but to which stockholders were not made parties, a decree was entered making a call for unpaid subscriptions. It cannot be doubted in such case that the decree against the stockholders is in every respect valid, and should be so held in the courts of

every jurisdiction, where it may be called into question. Nor can its validity be assailed because the stockholders were not in their individual capacities before the court as parties to the suit, as a corporation must sue and be sued in its corporate name and in its corporate capacity. Lewis v. Glenn, 84 Va. 947, 6 S. E. Rep. 866.

On Demurrer Dismissing Bill.—A decision on a demurrer dismissing a bill will be conclusive of every matter, whether specifically stated in the bill or not, provided it is clear that such matter was necessarily in controversy in the suit and was decided by it. Poole v. Dilworth, 26 W. Va. 583.

Foreign Attachment.—In a suit in the nature of a foreign attachment, the process was served upon the absent defendant, and there was a personal decree against him for the amount of the debt. When the plaintiff seeks to obtain satisfaction of this decree in another suit, the validity of the decree of the prior suit cannot be questioned. Burbridge v. Higgins, 6 Gratt. 119.

Of Former Term Inter Partes.—The court cannot examine the propriety of a decree made at a former term *inter partes*, nor set aside such decree of a former term, on the ground that it decided matters *coram non judice* at the term. Bank v. Craig, 6 Leigh 399.

c. OF DECREE OF PENDING SUIT.

Purchasers Pending Suit Bound by Decree.—*Pendente lite* purchasers of land, during the progress of a suit involving it, are as much bound by decrees entered therein as the parties to the suit. Lynch v. Andrews, 25 W. Va. 751.

"Ordinarily the decree of a court only binds the parties and their privies in representation or estate; but he, who purchases during the pendency of a suit, is held bound by the decree that may be made against the person, from whom he derives title. Such purchaser need not be made a party. This rule however is modified to a considerable extent in some cases by our statute in relation to recording *lis pendens*." Zane v. Fink, 18 W. Va. 693.

d. EXTERRITORIALLY.

For Partition—Sale—Conveyance.—It is a well-settled general rule that the court of one state has no jurisdiction to make a decree which will directly affect either legal or equitable titles to land situated in another state. But if the person to do the act decreed is within the jurisdiction of the court, and the act may be done without exercising any authority operating territorially within the foreign jurisdiction, the court may act *in personam*, and oblige the party to convey or otherwise to comply with its decree. But it is not competent for the court to decree touching a foreign subject, when the act to be done can be accomplished and perfected only by an authority operating territorially. Thus a conveyance may be decreed of lands abroad if the defendant is within the jurisdiction of the court, but neither a partition of lands nor a sale of lands lying in another state can be made by a court in this state. Poindexter v. Burwell, 82 Va. 507; Wimer v. Wimer, 82 Va. 890, 5 S. E. Rep. 536; Pillow v. Southwest, etc., Imp. Co., 92 Va. 144, 23 S. E. Rep. 32.

A decree of a court of a county, which requires a defendant residing within its limits to execute a conveyance for lands lying in another county, can be enforced upon the person only of such defendant, and does not of itself vest any legal title in the plaintiff. If this decree should be offered as evidence of title in such a case in an action of ejectment, it ought not to be received. Aldridge v. Giles, 3 H. & M. 136.

e. DIRECTING CONVEYANCE.

Decree of Partition Does Not Operate as Conveyance.—It is a well-settled doctrine of the courts of equity that a decree of partition does not of itself operate as a conveyance of title. Such a decree does not purport to invest the parties with title to their several allotments. Hence the court in making partition usually requires that mutual conveyances shall be executed, and if necessary to carry its decree into effect will appoint a commissioner to execute proper deeds. Bolling v. Teel, 76 Va. 487.

Directing Title.—A decree which directs that a title be made to a party in a suit does not of itself vest title in that party to whom it is directed to be made. The deed itself must be executed in order to pass the title. Nelson v. Triplett, 81 Va. 236.

Rule against Parties in Possession—Death of Defendant after Decree.—Where a final decree has been entered in a suit transferring title to land, and a rule has been issued against parties in possession of the land in controversy, the latter in response to the rule made an affidavit that one of the defendants in the cause under whom they held, had died since the final decree and before the rule was issued. The decree being made in the lifetime of the defendant, it was not necessary to suggest his death and revive the suit in the name of his heirs in order to proceed with the rule. Trimble v. Patton, 5 W. Va. 432.

f. RES JUDICATA.—See generally, monographic *note* on "Judgments."

General Rule.—In order that a fact tried by a court of competent jurisdiction be *res judicata* it must have been directly and not collaterally in issue, and it makes no difference whether it was decided by a court of law or chancery, if it had jurisdiction. This may be pleaded as an estoppel in either kind of court. It is not necessary that the same parties were plaintiffs or defendants in the two suits, provided the same subject in controversy between two or more of the parties, plaintiffs and defendants to the two suits respectively, has been directly in issue in the former suit and decided. Western, etc., Co. v. Va., etc., Co., 10 W. Va. 250. See McCoy v. McCoy, 29 W. Va. 794, 2 S. E. Rep. 809, and numerous cases there cited; also, monographic *note* on "Judgments."

Bars Subsequent Action on Matters Existing at Time of Decree.—It is a familiar doctrine in our jurisprudence that the decree of a court of competent jurisdiction directly on a point, is as a plea a bar, as long as it remains in force, and conclusive between the same parties upon the same matter directly in question in a subsequent action. This doctrine of *res judicata* applies to all matters which exist at the time of rendering the decree, and which the party had the opportunity of bringing before the court. Blackwell v. Bragg, 78 Va. 529; Corprew v. Corprew, 84 Va. 599, 5 S. E. Rep. 798; Fishburne v. Ferguson, 85 Va. 321, 7 S. E. Rep. 361; Foster v. City of Manchester, 89 Va. 92, 15 S. E. Rep. 497; Harrison v. Wallton, 95 Va. 721, 30 S. E. Rep. 372; Seabright v. Seabright, 33 W. Va. 152, 10 S. E. Rep. 265.

No Review by Cross Bill in Another Suit.—A final decree having been made in a cause, the plaintiffs afterwards bring another suit in another court against the same defendants, to have satisfaction of the decree. It is not competent for the defendants to file a cross bill in the second suit depending in one court, to review the decree of another court. Vanmeter v. Vanmeters, 3 Gratt. 148.

Contract of Partnership.—A decree upon a bill setting up a contract of partnership is a bar to a second suit upon this contract, where it was held in a previous suit that this contract was not a valid one, the matters alleged being sufficient to put the fact of such a contract in issue. McComb v. Lobdell, 32 Gratt. 185.

Payment Prior to Decree Ascertaining Liens.—Where a decree ascertains and fixes the amounts and priorities of liens upon real estate, and provides for the sale thereof unless such liens are paid by a certain day mentioned in the deed, this decree is appealable, and is *res judicata* as to all payments made prior to its date, on account of any claim therein decreed to be paid. Lehman v. Hinton, 44 W. Va. 1, 29 S. E. Rep. 984.

Construction of Fraudulent Deed.—A decree by a court of competent jurisdiction dismissing a bill upon the ground that the deed under which the complainant claimed was fraudulent, is a complete bar to another original bill to try the validity of the same deed; the proper remedy, if such decree be erroneous, being by appeal, writ of error, supersedeas, or a bill of review; not by original bill. Holliday v. Coleman, 2 Munf. 162.

Dismissal of Petition.—A decree which dismisses a petition filed in a chancery suit does not make the matters alleged therein *res judicata*.

Making Division of Estate a Bar.—It seems that a final decree in a suit by legatees, for the division of a testator's estate, is a bar to a bill exhibited by the same person, or their legal representatives, suggesting that the executor had kept back part of the property, but not averring that this was new matter since discovered, or that the decree was obtained by fraud. Legrand v. Francisco, 3 Munf. 83; Seamster v. Blackstock, 83 Va. 232, 2 S. E. Rep. 36.

Reservation of Right of Litigation—No Appeal.—When a decree is entered reserving the right to any party to further litigate any matter in controversy in a suit, such reservation may be reviewed on appeal by any party prejudiced thereby; and if no appeal is taken, such reservation becomes *res judicata*, and cannot be called in question by any party in another suit or proceeding. Bodkin v. Arnold, 45 W. Va. 90, 30 S. E. Rep. 154.

V. KINDS OF DECREES.

1. INTERLOCUTORY.

a. IN GENERAL.

Affirmation by Appellate Court Final.—An interlocutory decree affirmed on appeal by an appellate court cannot be reheard by the court in which it was pronounced. And an order of the appellate court dismissing an appeal for failure to have the record printed, is in effect, so far at least as a subsequent appeal is concerned, equivalent to an affirmation of the decree. Woodson v. Leyburn, 83 Va. 843, 3 S. E. Rep. 873. See Adkins v. Edwards, 83 Va. 301, 2 S. E. Rep. 435; Trevelyan v. Lofft, 83 Va. 146, 1 S. E. Rep. 901; Newberry v. Stuart, 86 Va. 967, 11 S. E. Rep. 880; Fultz v. Brightwell, 77 Va. 750; Staples v. Staples, 85 Va. 79, 7 S. E. Rep. 199; Rawlings v. Rawlings, 75 Va. 91; Wayland v. Crank, 79 Va. 604.

No Bar.—An interlocutory decree in a suit is no bar to a subsequent suit involving the same questions. Quarles v. Kerr, 14 Gratt. 48.

Bill of Review Improper.—Where a decree of sale was not final, but interlocutory, much remaining to be done to give completely the relief contemplated by the court, it was an error to treat an injunction bill as a bill of review for the purposes of modifying the decree of sale; a bill of review being the remedy when a final decree is to be corrected. Dellinger v. Foltz, 93 Va. 729, 25 S. E. Rep. 998.

May Be Excepted to at Any Time before Final Decree.—Where an interlocutory decree was entered and the court retained the cause and directed important inquiries essential to the final decree, disposing of the whole cause, it was competent for the appellees to except to the commissioner's report at any time before a final decree. Miller v. Cook, 77 Va. 806; Templeman v. Steptoe, 1 Munf. 339; Smith v. Blackwell, 31 Gratt. 291.

No Provision for Costs Immaterial.—In an interlocutory decree, it cannot be objected that no provision has been made for the payment of costs, as it will be time enough to do this when the cause is ready for final decree. Yost v. Porter, 80 Va. 855.

Uncertainty in.—A decree ought not to be reversed for uncertainty in matters as to which it is only interlocutory, and may be perfected by application to the court. Birchett v. Bolling, 5 Munf. 442.

Set Aside at Next Term.—When an interlocutory decree is entered at one term of the court of appeals, it may be set aside at a subsequent term. Com. v. Beaumarchais, 3 Call 122.

Alternate and Conflicting Statements in.—When an interlocutory decree merely confirms generally a report containing alternate and conflicting statements, it must be understood that the court has reserved to itself the power of selecting by its future decree between such statements, and of decreeing accordingly. McCandlish v. Edloe, 3 Gratt. 330.

b. WHAT CONSTITUTES.

Does Not Give Complete Relief.—When the further action of the court in a cause is necessary to give completely the relief contemplated by the court, there the decree upon which the question arises is to be regarded not as final, but interlocutory. Cocke v. Gilpin, 1 Rob. 20; Miller v. Cook, 77 Va. 806; Sims v. Sims, 94 Va. 580, 27 S. E. Rep. 436.

Same—Leave Reserved for Further Decree.—In a suit, the object of which was to make a partition of the lands among the cotenants thereof, a decree was entered which approved and confirmed the report making the partition. It provided in express terms that, "leave is given the parties to whom the several parcels of lands are allotted by that report, and their alienees, to have such decree as the parties may agree upon finally settling their respective interests entered in the causes in vacation." It is evident that further action by the court to complete the relief contemplated was provided for, and it does not change the nature of the decree that no application for the further decree was ever made. It was nevertheless a pending cause and open to such orders and decrees as might be necessary. The applications for rehearing are always addressed to the sound discretion of the chancellor, and even if the decree was interlocutory, it can be reheard at any time before final decree, even after the lapse of a great length of time. Wright v. Strother, 76 Va. 857.

Same—Remanding Cause for Commissioner's Report.—Where a decree in a suit brought to subject real estate to the lien of a judgment has not fully ascertained the liens upon such land, and the cause has been remanded to a commissioner for further inquiry and report, this does not constitute a final decree, as it does not decide the whole matter in controversy and leave nothing for the court to do. If the report of liens had been completed, and had

been confirmed, and a decree for sale had been entered, it would not have been a final decree, for it would still be necessary for the court to act upon the report of the sale. Repass v. Moore, 96 Va. 147, 30 S. E. Rep. 458.

Leaves Something to Be Done in the Cause—Option.—Every decree which leaves anything in the cause to be done by the court is interlocutory as between the parties remaining in the court. Hence when in construing a will, the court gave the devisee the option to hold in fee what he received under the will, or else to come into hotchpot and share in the rest of the estate, the boundaries and value of which had not been ascertained, this clearly constituted an interlocutory decree, and the fact that the principles of the cause were settled so far as the devisee was concerned, did not change its character. He was entitled to a petition to rehear, although more than a year had elapsed since the last decree. Noel v. Noel, 86 Va. 109, 9 S. E. Rep. 584.

Same—Account Directed.—In a suit involving the right of access to a well, a decree was entered which directed that the plaintiff should have uninterrupted access to the water of the well, unless and until otherwise ordered by the court; that the injunction before awarded, which was only until the rights of the complainants could be considered and adjudicated, should be continued; that an account should be taken by a commissioner to ascertain the amount of expenses incurred by the father of the defendant, from whom the defendant claimed, and by the latter in keeping the well in repair, and the amount paid by the plaintiffs; and that the account when taken should be reported. The rights of the parties were not finally adjudicated; the injunction was not perpetuated; the decree directed an account to be taken and reported; but it did not determine the question of costs nor direct their payment. The decree was merely interlocutory. Warren v. Syme, 7 W. Va. 474.

Same—Sale Decreed with Power Reserved to Confirm or Set Aside.—In a suit to subject land in the hands of the heirs to the payment of the debts of their ancestor, in the decree for sale the court reserved complete power over the sale, to confirm it or set it aside as the interest of the parties might require. No title could be made to the purchaser, without further action of the court, and what is most material to notice, no disposition is made of the purchase money; no directions given to the commissioner on the subject, so that the creditors could not receive a dollar of the proceeds, nor the heirs the surplus, without a further decree. If this be a final decree, the court has deprived itself of all control over the subject-matter in controversy, and ended the cause, without giving the parties the slightest relief. The very fact that no direction is given as to the proceeds of sale, and that the commissioners are required to report their proceedings to the court, is conclusive that further action of the court was not only contemplated, but actually necessary. According to the uniform decisions of this court, a decree, which disposes of the whole subject, gives all the relief that is contemplated and leaves nothing to be done by the court, is only to be regarded as final. On the other hand every decree which leaves anything in the cause to be done by the court, is interlocutory as between the parties remaining in the court. Ryan v. McLeod, 32 Gratt. 367.

Same—Conveyance Set Aside and Report Ordered.—In an action to set aside certain conveyances and to subject the lands conveyed therein to the satisfaction of a judgment, a decree that sets aside the conveyances and refers the cause to a commissioner for inquiry and report, with a view to further action in the cause, is an interlocutory and not a final decree, as it is a step preliminary to subjecting the land to the judgment. Welsh v. Solenberger, 85 Va. 441, 8 S. E. Rep. 91.

Further Action of Court Necessary.—A decree though deciding the right to the property in controversy, and awarding the costs of the suit, is still only interlocutory, if commissioners be appointed to carry it into effect, and the court has yet to act upon their report. Neither does it cease to be interlocutory in consequence of an order that the defendant be attached for failing to comply with it. Mackey v. Bell, 2 Munf. 523.

Decree for Sale and Report.—A decree empowering an executor to sell the lands of his testator, for payment of debts, and report his proceedings, in execution thereof, to the court, is not final but interlocutory. Goodwin v. Miller, 2 Munf. 42.

A decree which directs a sale of the defendant's land to satisfy the charges upon it is not a final decree. Spoor v. Tilson, 97 Va. 279, 33 S. E. Rep. 609. See also, Repass v. Moore, 96 Va. 147, 30 S. E. Rep. 458, and cases there cited.

A decree, which forecloses the equity of redemption in mortgaged property, and appoints commissioners to make the sale of it, is only interlocutory, and an appeal cannot be allowed by the county court from such decree even in term time. Allen v. Belches, 2 H. & M. 595.

A decree, foreclosing a mortgage and directing a sale of the mortgaged premises, is an interlocutory decree. Fairfax v. Muse, 2 H. & M. 557.

Directing an Account.—A decree, dismissing so much of a bill as claims one of two separate subjects in controversy, and as to the other, determining also the rights of the parties, but directing *an account to be taken*, is not final in *any* respect, between the parties *retained in court*, and their legal representatives; but is subject to revision in *every* part, at any time before a final decree, without the necessity of a bill of review. Templeman v. Steptoe, 1 Munf. 339.

For Conveyance with Condition.—In a suit by one partner against his copartner, for a settlement of the partnership accounts, and for a moiety of a tract of land purchased by the defendant in his own name, and paid for out of the partnership funds, a decree having been made declaring the land partnership property, and directing a settlement of the accounts, and the cause afterwards coming on to be further heard upon the report of the commissioner, the court decrees that the plaintiff pay to the defendant a sum of money appearing due by the report, and that the defendant thereupon convey to the plaintiff a moiety of the land; but if the plaintiff shall not, within six months from the date of the decree, pay the said money, that the marshal sell the moiety of the land, and out of the proceeds of sale, after defraying the expenses, pay to the defendant the money so decreed, and the residue, if any, to the plaintiff. And the court further decrees that the outstanding debts due to the firm be equally divided between the parties, and that the costs of the suit be equally borne by them. *Held*, this decree is interlocutory, and it may be reviewed upon an appeal, although there has been such lapse of time between the rendition of the decree and the appeal, as would preclude its being reviewed if the decree were final. Cocke v.

Gilpin, 1 Rob. 20; approved by Miller v. Cook, 77 Va. 806.

For Sale Unless Sum Due Is Paid—Leave Given to Apply to Court.—In a suit brought to subject land to the payment of notes given for its purchase price, the court ascertained the indebtedness of the defendants to the plaintiffs to be a certain sum and a certain other sum to become due at a future time. The court decreed that unless the sum then due be paid in 30 days, certain commissioners should sell the land, which was subject to the vendor's lien of the two named sums, to pay the one then due. In this decree leave was given the plaintiff to apply for a decree to enforce the payment of the sum not yet due, under an attachment of other property of the defendant, the sale of which had not been prayed for in the bill. This was an interlocutory decree, and it may be reviewed on appeal after five years from its date. Camden v. Haymond, 9 W. Va. 680.

c. EVIDENCE AFTER.

General Rule—Rest in Discretion of Court.—There is no rule of practice or of law which precludes the party from taking new evidence upon a question of fact passed upon by an interlocutory decree, even before a rehearing is obtained. The introduction of such evidence depends on the sound discretion of the court, and all the circumstances of each particular case. Summers v. Darne, 31 Gratt. 791, citing Dunbar v. Woodcock, 10 Leigh 628; Moore v. Hilton, 12 Leigh 1.

After an interlocutory decree upon a hearing has been rendered, deciding matters in issue between the litigant parties, neither of them has the absolute right of introducing new evidence in respect to the matter so decided, but the right to introduce and use such evidence, as ground for changing or setting aside such decree, depends on the sound judicial discretion of the court to which it is offered. Moore v. Hilton, 12 Leigh 1.

On Exceptions to Commissioner's Report.—An interlocutory decree in chancery, deciding a question of fact in litigation, pronounced in the progress of an account upon exceptions to a report, or instructions to a commissioner, as to the propriety of items of debit or credit, is not such a final decree as precludes a party from taking new evidence touching the same question of fact, without having obtained a review or rehearing of the decree, and without showing that the new evidence had been discovered since the decree. Dunbar v. Woodcock, 10 Leigh 629.

Under Va. Code of 1873—Foundation for Motion or Petition to Rehear.—Under Va. Code of 1873, ch. 172, § 36, where there has been an interlocutory decree in a chancery cause, a deposition taken thereafter cannot be read as to any matter thereby adjudicated, unless it be as a foundation for a motion or petition to rehear the cause. A deposition taken and returned before a final hearing, as to any matter not adjudicated, whether there be an interlocutory decree or not, may be read. Richardson v. Duble, 33 Gratt. 730.

When Error to Refuse to Open Decree—After-Discovered Evidence.—It was held in Roberts v. Cocke, 1 Rand. 121, to be an error for the chancellor to refuse an application to open an interlocutory decree, founded upon affidavits of a discovery of important matter since such decree was rendered.

d. REHEARINGS OF.

Discretionary with Court—On Bill Confessed.—It is well settled upon authority that where an interlocutory decree has been entered in a case on a bill taken for confessed, before a hearing on the merits, and there are other circumstances tending to excuse the default, the defendant may be allowed a rehearing of the decree in the discretion of the court, if he shows a meritorious defence. Spilman v. Gilpin, 93 Va. 698, 25 S. E. Rep. 1004.

Same—Confirming Commissioner's Report.—Whether an interlocutory decree confirming a commissioner's report shall be modified or wholly set aside, or not, is generally a matter resting in the sound judicial discretion of the chancellor, exercised according to the particular circumstances of each case. Newberry v. Stuart, 86 Va. 965, 11 S. E. Rep. 880, citing Kendrick v. Whitney, 28 Gratt. 646; Fultz v. Brightwell, 77 Va. 742.

By Petition.—An interlocutory decree may be reheard upon petition. Purdie v. Jones, 32 Gratt. 827; Fultz v. Brightwell, 77 Va. 742.

An interlocutory decree may be altered or reversed upon rehearing, without the assistance of a supplemental bill in the nature of a bill of review, if there is sufficient matter to reverse it appearing upon the former proceedings. When there is no defect to be supplied, the new investigation is usually brought on by petition for a rehearing. Hyman v. Smith, 10 W. Va. 298.

The appropriate method of applying for a rehearing of an interlocutory decree, rendered on the merits, to enable a party to introduce additional evidence, is by petition, which must not only allege that the matter sought to be introduced was discovered after the rendition of the decree, but it must appear by affidavit that this new evidence could not have been produced by reasonable diligence at the date of the decree. Trevelyan v. Lofft, 83 Va. 141, 1 S. E. Rep. 901.

Or Motion.—A bill of review ought not to be granted to an interlocutory decree, but if such decree be erroneous, it may be corrected by motion, or petition to the court. Banks v. Anderson, 2 H. & M. 20.

No Statutory Bar to Filing Petition.—There is no statutory bar to the time within which an error in an interlocutory decree may be corrected by filing a petition to rehear. Kendrick v. Whitney, 28 Gratt. 646; Todd v. McFall, 96 Va. 754, 32 S. E. Rep. 472; Wayland v. Crank, 79 Va. 602; Staples v. Staples, 85 Va. 76, 7 S. E. Rep. 199.

For Fraud, Surprise or Mistake—Original Bill.—Interlocutory decrees, not entered by consent, but procured by fraud, surprise or mistake of the parties, cannot be set aside by petition to rehear a bill in the nature of a bill of review, but only by an original bill. Anderson v. Woodford, 8 Leigh 316; Manion v. Fahy, 11 W. Va. 482.

e. APPEALS FROM.

Former Law—Statutory Change.—It was formerly the law of Virginia that no appeal lies from an interlocutory decree of the chancery court. Grymes v. Pendleton, 1 Call 54; Gibson v. Randolph, 2 Munf. 310.

For appeals from interlocutory decrees in certain cases, by statutory provision, see Code of Va., § 3454; Code of W. Va., ch. 135, § 1.

Time of Appeal from Interlocutory Decree.—When interlocutory decrees settle the principles of a cause parties thereby aggrieved might appeal therefrom, but they are not obliged to do so, but may wait until after a final decree. There is no limitation upon the time wherein an appeal will lie from such an interlocutory decree; such running only against a final decree. Jameson v. Jameson, 86 Va. 51, 9 S. E.

Rep. 480; Harper v. Vaughan, 87 Va. 426, 12 S. E. Rep. 785.

Statutory Provisions.—By virtue of § 3454 of the Va. Code, the right is given to a party to appeal from certain interlocutory decrees if he desires to do so, still he is not bound to appeal from such decrees at the time they are rendered, but he may do so at any time within a year after a final decree has been rendered in the cause, provided all the other requisites for an appeal exist. Southern Ry. Co. v. Glenn, 98 Va. 309, 36 S. E. Rep. 395, citing Jameson v. Jameson, 86 Va. 51, 9 S. E. Rep. 480; Harper v. Vaughan, 87 Va. 426, 12 S. E. Rep. 785.

Only in a chancery case is a party authorized to appeal from a decree or order which is not final, and then only from such decree or order as is provided in § 3454 of the Va. Code of 1887. Unless the decree or order, not being final, falls within this description, the court of appeals has no jurisdiction of appeal, because it has no jurisdiction to review any interlocutory decree in chancery, except what is given by statute. Elder v. Harris, 75 Va. 68. See ch. 139, § 1, of Code of West Virginia.

Kind of Interlocutory Decree That Is Appealable.—An interlocutory decree that is appealable as one adjudicating the principles of a cause is one which adjudicates, not some, but all the questions raised in the pleadings or otherwise, and so far adjudicates that it determines the principles and rules by which relief is to be administered to the parties, so that it is only necessary to apply such principles and rules to the facts in order to decree the relative rights of the parties in the subject-matter of the suit. Wood v. Harmison, 41 W. Va. 376, 23 S. E. Rep. 560.

Sustaining Exceptions.—An appeal does not lie from an interlocutory decree sustaining exceptions to an answer for insufficiency, and requiring a defendant to answer over. Pleasants v. Lorton, 2 P. & H. 8.

By Judge in Vacation.—A judge in vacation cannot grant an appeal from an interlocutory decree. Dawney v. Wright, 2 H. & M. 12; Fairfax v. Muse, 2 H. & M. 557.

Reinstating Injunction and Directing New Trial.—A decree of a superior court of chancery, which reinstates an injunction and directs a new trial of an issue at law, is not an interlocutory decree from which an appeal can be allowed. Price v. Strange, 2 H. & M. 615.

May Be Granted at Subsequent Term.—The power of chancery courts to grant appeals from interlocutory decrees in certain cases is not limited to the term of the court at which such decrees were rendered, but this authority may be exercised at any subsequent term. Wright v. Dawney, 3 H. & M. 259.

Court of Admiralty.—No appeal lies upon an interlocutory decree from a court of admiralty. Dawson v. Graves, 4 Call 127.

2. FINAL.

a. IN GENERAL.

Suggestions for Delay.—When the defendant in a cause, against whom final decree is about to be entered, suggests that the plaintiff is dead, which in the opinion of the court was done merely for the purpose of delay, the court may disregard such suggestion and render the final decree then ready to be entered. Gillespie v. Bailey, 12 W. Va. 70, 29 Am. Rep. 445.

Suspending Order to Final Decree.—At the conclusion of a decree, which was final in form and substance, a suspending order was attached, directing that the decree be suspended until a cause pending in the same court between the plaintiff and defendant of this suit and another party shall be decided. The object of this order was not to reserve any question in the first case for future decision, but to prevent the enforcement of the decree until the second suit was decided. This does not convert the decree into an interlocutory one, but it still remains final. Fleming v. Bolling, 8 Gratt. 292.

Cannot Be Part Final and Part Interlocutory as to Same Party.—A decree cannot be in part final, and in part interlocutory in the same cause, for or against the same parties who remain in court. Ryan v. McLeod, 32 Gratt. 367.

Final as to One and Not as to Another.—A suit was brought to construe a will and to divide the land among the parties entitled thereto. To this suit the father and the two surviving children were made parties defendant, and a decree was entered therein, adjudging that the land be divided between the two children and that the father had no interest in it. It was subsequently contended in a suit brought by a creditor to set aside a deed, made after the decree, on the ground of fraud, and subject the land to the payment of the father's debts, that the doctrine of *res judicata* had no application, because the decree of partition was not a final one. But as to the father the decree was final, though it was not as to the other parties. It settled the question that he had no interest in the land and that was the only question in which he was concerned. It has been repeatedly decided by the courts of Virginia that a decree may be final as to one party and not as to another. Gardner v. Stratton, 89 Va. 900, 17 S. E. Rep. 553. See Royall v. Johnson, 1 Rand. 421; Noel v. Noel, 86 Va. 109, 9 S. E. Rep. 584.

b. WHAT CONSTITUTES.

General Rule.—A decree, which settles all the principles of a cause, directs a disbursement of the fund in the hands of the administrator, directs the payment of costs, and leaves nothing else to be done in the cause, and upon its face declares that "this decree is final," is a final decree. There was nothing left to be adjudicated, and the finality of such a decree comes within the very definition of the authorities, as laid down by the Virginia court of appeals in repeated decisions. Thomson v. Brooke, 76 Va. 160; Parker v. Logan, 82 Va. 376, 4 S. E. Rep. 613; Tennent v. Pattons, 6 Leigh 196; Cocke v. Gilpin, 1 Rob. 20; Harvey v. Branson, 1 Leigh 108; Ruff v. Starke, 3 Gratt. 134; Vanmeter v. Vanmeters, 3 Gratt. 148; Fleming v. Bolling, 8 Gratt. 292; Ambrouse v. Keller, 22 Gratt. 769; Rogers v. Strother, 27 Gratt. 417; Rawlings v. Rawlings, 75 Va. 76; Norfolk Trust Co. v. Foster, 78 Va. 413; Sims v. Sims, 94 Va. 580, 27 S. E. Rep. 436.

Executions—Leave Given for Future Aid of Court.—It is a general rule that a decree entered upon hearing, which settles all the matters in controversy between the parties, is final though much remains to be done before it can be completely carried into execution, and even though to effectuate such execution the cause is retained and leave is given to the parties to apply for the future aid of the court. Thorntons v. Fitzhugh, 4 Leigh 209; Davenport v. Mason, 2 Wash. 200; Harvey v. Branson, 1 Leigh 108; Vanmeter v. Vanmeters, 3 Gratt. 148; Ruff v. Starke, 3 Gratt. 134; Tennent v. Patton, 6 Leigh 196; Fleming v. Bolling, 8 Gratt. 292; Rogers v. Strother, 27 Gratt. 417; Core v. Strickler, 24 W. Va. 689; Rawlings v. Rawlings, 75 Va. 76.

Order of Dismissal.—A decree which dismisses a

suit was in these words: "The plaintiff failing to prosecute his suit, it is ordered that the same be dismissed." This decree is final, and after the end of the term at which it was rendered, it can only be set aside on appeal, or by bill of review. These remedies, however, must be pursued within the time limited by statute. Jones v. Turner, 81 Va. 709.

Same—Payment of Costs.—A decree, dismissing a bill as to a defendant, is as to such defendant a final decree. Dick v. Robinson, 19 W. Va. 159. A decree which dismisses a suit and directs the payment of costs, is a final decree, and the fact that two suits were heard together, the parties to which were not, and could not have been originally bound in one controversy, will not affect the finality of the decree. Home Bldg., etc., Co. v. London, 98 Va. 152, 35 S. E. Rep. 362.

Omission of Unimportant Claim.—A decree which settles all matters of dispute in a cause, but which omits to decree upon a claim set up in the bill, which after circumstances render unimportant and which the plaintiff did not insist upon, is a final decree. Ruff v. Starke, 3 Gratt. 134.

Payment of Money.—A decree which provides for the distribution and payment of money is a final decree, and is subject to the statute of limitations relating to appeals, bills of review, and motions to correct nonappealable errors. Kearfott v. Dandridge, 45 W. Va. 673, 31 S. E. Rep. 947.

Reservation in Decree of Ended Cause.—A final decree was entered in a cause, whose object was for the sale of land for the payment of a legacy; it was stricken from the docket, and remained for more than twenty-eight years among the ended causes of the court. The said final decree provided that "any of the parties to this suit have leave reserved to them at the foot of this decree to ask any such further order as may be necessary to enforce the same." This was held insufficient to authorize the revival of the suit. Riely v. Kinzel, 85 Va. 480, 7 S. E. Rep. 907.

Directing Conveyance by One Defendant.—In a suit in chancery against several defendants, a decree was entered that the complainant recover from one of them the residue of the land claimed and owned by that defendant under the will of his father, after taking therefrom the portions sold by him to the other defendants, also that he give possession and execute a conveyance of the same in fee, "without which conveyance, however, the title is to be in the said complainant by force of this decree." This will not be a final decree until the suit is disposed of as to all the defendants. Chapman v. Armistead, 4 Munf. 383.

Allowing Amendment in Specified Time.—An order sustaining a demurrer to a bill, and giving the plaintiff leave to amend in a specified time, cannot be regarded as a final order, and as settling the principles of the cause, until after the time limited therein for the plaintiff to amend his bill has expired. London-Va. Min. Co. v. Moore, 98 Va. 256, 35 S. E. Rep. 722, citing Commercial Bank of Lynchburg v. Rucker (Va.), 24 S. E. Rep. 388.

Unauthorized Removal from Docket by Clerk.—Where a cause was removed from the docket, not by the order of the court, but by the clerk, and the decree was marked by him "final decree," because in his opinion there was nothing more to be done in it, this did not make it a final decree. The words marked on it do not determine its character and effect, the contents alone do this—and as there was nothing in the decree to show that the court intended to put an end to the cause, it was competent for the court to order it to be reinstated, and to take cognizance of the matters set forth in the petition filed in the suit. Ward v. Funsten, 86 Va. 359, 10 S. E. Rep. 415.

Confirmation of Accounts.—A bill was filed by the legatees and devisees of an intestate asking for a settlement of accounts of his administrator. A full and complete settlement was duly made and filed without exception, being subsequently confirmed by the court. This decree of confirmation was final as to the administrator, and will not be reviewed on petition after three years. Bradley v. Bradley, 83 Va. 75, 1 S. E. Rep. 477.

Arbitrators.—When the parties to a suit in equity agree to refer the matter in controversy to arbitrators, whose award is to be entered as the decree of the court, and the award is made and entered: this is a final decree, which can only be reversed or altered by bill of review. Davis v. Crews, 1 Gratt. 407.

Confirmation of Sale and Disbursement and Conveyance Ordered.—A suit was brought to recover $758, evidenced by negotiable notes, given for the purchase price of a tract of land, which was attached. The case was matured and after being heard a decree was rendered for $718. This was declared a lien on the land, and it was decreed to be sold. The sale was confirmed, the money ordered to be collected and disbursed, and the commissioner was ordered to execute a deed to the purchaser, and the sheriff was ordered to deliver possession. This was a final decree, the whole matter being disposed of and nothing remaining for the court to do. McKinney v. Kirk, 9 W. Va. 26.

Disposal of Whole Subject—Sale.—A decree in chancery, disposing of the whole subject, deciding all questions in controversy, ascertaining the rights of all parties, and awarding the costs, though it appoint a commissioner to sell part of the subject and account for and pay the proceeds to the parties, with liberty to them to apply to the court to add or substitute new commissioners, or for a partition of the subject directed to be sold in kind, is a final decree. Harvey v. Branson, 1 Leigh 108.

Cause "Stricken from the Docket."—Where land was sold by a commissioner as ordered, and the proceeds of the sale distributed and a final report was made, which showed a completion of his collections and a balance in his hands for final distribution, the cause was heard upon the papers formerly read and the report of the commissioner without exceptions. The court confirmed the report and decreed in conformity with it, and that "the cause should be stricken from the docket." This means that in the opinion of the court the cause is ended—that no further action of the court in the cause is necessary. That is the established definition of a final decree. It is, and in the nature of things must be an adjudication that everything has been done in the cause that the court intends to do, and there is no longer any necessity of retaining it on the docket. The unconditional order striking from the docket, appended to such a decree, absolutely and unequivocally imports judicial determination and a final disposition of the pending cause. The decree may be erroneous, but the error does not render it less final. The court by its order has put the cause beyond its control, and it cannot upon discovery of the error recall it in a summary way and resume a jurisdiction which has been exhausted. Battaile v. Maryland Hospital, 76 Va. 63.

Amendment and Continuation for Report.—A bill was filed against an administrator for the settle-

ment of his account. A decree was rendered against him and his sureties in favor of a receiver, who was to execute a bond before he received any money thereunder. Subsequently this decree was amended, as to the amount and costs, and execution was directed to issue thereon, and the cause was continued for a report from the receiver. This was a final decree as nothing remained to be done in the cause. Serles v. Cromer, 88 Va. 426, 13 S. E. Rep. 859.

Limitation of Appeal—Order of Application of Property to Debts.—A legatee brought suit against the purchaser of real estate from an executor, and the sons of the deceased surety of the executor on his bond, holding the estate of the surety. The testator bequeathed an annuity to the legatee and the residue of his estate, which was ample to satisfy all legacies, after the payment of debts, to his son, who was the executor. The latter sold the real property, wasted the personal, and died insolvent. It was decreed in this case that the sons of the surety should each pay one-half of the annuities in arrear, and the costs of the suit, reserving liberty to the plaintiff, if the decree should prove unavailing against either, to resort to the court for a further decree against the other, and ordering the cause to be retained for the purpose of taking further accounts as to the annuities to accrue in the future. Notwithstanding the reservation this was a final decree, from which no appeal can be taken after the lapse of three years, and although the legacy was charged both on the real and personal property, yet the latter was primarily applicable to the legacy, and the decree was correct in subjecting the surety of the executor, before the purchaser of the real estate. Thorntons v. Fitzhugh, 4 Leigh 209.

Inquiries Directed "In the Cause."—Where by a decree certain inquiries "in the cause" were directed to be made by a commissioner of the court, it was consequently not a final decree. Barker v. Jenkins, 84 Va. 895, 6 S. E. Rep. 459.

Where Rights of Others Not Affected.—Where the rights or responsibilities of several parties to a suit are perfectly distinct and several, and where a final disposition of the cause as to one, with a direction as to the payment of costs as between him and the adverse party, does not in any degree affect the rights or interests of any other party, and where nothing which can be brought into the cause by any other party or which can be done by the court as to the other party, can by possibility affect the rights or interests of the party as to whom such decree has been made, such decree has never been considered as interlocutory, but is final. Royall v. Johnson, 1 Rand. 421.

c. SUBSEQUENT PROCEEDINGS.

After Final Decree Subsequent Ones Erroneous and Void.—Where a final decree was entered in a suit, the cause was ended and the court could proceed no further. It had no further jurisdiction of the subject-matter or of the parties in that proceeding, and any subsequent decree was a nullity, where it was rendered in the absence of the defendant upon the mere motion of the plaintiff by attorney, and without notice to any one. Johnson v. Anderson, 76 Va. 786. See Camden v. Haymond, 9 W. Va. 680.

After a final decree has been entered in a cause, upon proceedings regularly had, and to which no exceptions have been taken, it is error to allow an answer to be filed, and after reversing the former decree, to hear the case *de novo*. Crim v. Davisson, 6 W. Va. 465.

After a final decree, which settles the rights of all the parties, and disposes of the whole case made by the pleadings, any subsequent decree in the same cause is not made in a pending cause, although it be retained on the docket, the final decree is not thereby made interlocutory, the subsequent decree is erroneous and void, and will be reversed. Nelson v. Jennings, 2 P. & H. 369; Battaile v. Maryland Hospital, 76 Va. 63; Johnson v. Anderson, 76 Va. 766; Smith v. Powell, 98 Va. 431, 36 S. E. Rep. 522; Ruhl v. Ruhl, 24 W. Va. 279.

Where a bill has been dismissed with costs upon the hearing by a decree, this must of necessity be final, and if rendered in vacation, under the statute, it takes effect from the time it is entered of record by the clerk. The judge pronouncing it cannot, by subsequent action impart to it a different character. Pace v. Ficklin, 76 Va. 292.

d. HOW REVERSED.

By Bill of Review.—Where a decree is final, a bill of review is the proper remedy to correct it, and where the decree is interlocutory, a bill in the nature of a bill of review and petition for a rehearing is proper. Hyman v. Smith, 10 W. Va. 298.

Or Appeal.—A final decree may be set aside by bill of review or by appeal. Battaile v. Maryland Hospital, 76 Va. 63.

Fraud—Original Bill.—Where a final decree has been procured by fraud, it should be annulled or modified, not by a bill of review proper, but by an original bill, or by an original bill in the nature of a bill of review. Anderson v. Woodford, 8 Leigh 316; Manion v. Fahy, 11 W. Va. 482.

No Reversal without Benefit to Appellant.—Because certain interlocutory decrees were not reheard and amended before a final decree was entered, which was inconsistent with them, the final decree will not be reversed for this technical reason where the appellant would not be ultimately benefited by such reversal. Booton v. Booton (Va.), 29 S. E. Rep. 823.

3. FOR ACCOUNT.—See monographic *note* on "Commissioners in Chancery" appended to Whitehead v. Whitehead, 23 Gratt. 376.

a. IN GENERAL.

Who May Take—Judicial Act.—An attorney in the case, a party to the suit or a creditor is not a competent person to take an account ordered by a decree, as the commissioner acts in a judicial capacity. Dillard v. Krise, 86 Va. 414, 10 S. E. Rep. 430; Etter v. Scott, 90 Va. 762, 19 S. E. Rep. 776; Bowers v. Bowers, 29 Gratt. 697; Davis v. Beazley, 75 Va. 491; Smith v. Mayo, 83 Va. 910, 5 S. E. Rep. 276; Shipman v. Fletcher, 91 Va. 481, 22 S. E. Rep. 458; Fayette Land Co. v. Louisville, etc., R. Co., 93 Va. 274, 24 S. E. Rep. 1016; Findley v. Smith, 42 W. Va. 299, 26 S. E. Rep. 370.

No Account without Issue.—In a chancery cause, where a replication has been entered, and afterwards withdrawn, it is an error for the court to order an account before a new issue is made up. Clarke v. Tinsley, 4 Rand. 250.

Decree against Plaintiff.—On a settlement of accounts in a court of equity, a decree will be rendered against the plaintiff for a balance of account appearing to be due to the defendant. Fitzgerald v. Jones, 1 Munf. 150; Hill v. Southerland, 1 Wash. 128.

Decree for General Account.—After a decree for a general account in a creditors' suit, all the other creditors may come in and prove their debts before the commissioner to whom the cause is referred. Simmons v. Lyles, 27 Gratt. 922; Piedmont, etc., Ins. Co. v. Maury, 75 Va. 508; Beverly v. Rhodes, 86 Va.

415, 10 S. E. Rep. 572; 1 Barton's Ch. Pr. (2d Ed.) 286 *et seq.* It is the duty of the creditor or some one authorized by him to lay his claim before the commissioner in order that it may be reported. The usual practice in such cases is to require the creditor to accompany the claim with an affidavit that the debt is due. Conrad v. Fuller, 98 Va. 16, 34 S. E. Rep. 893.

b. WHEN IMPROPER.

As to Improvements When None Are Claimed.—In a suit for partition, and also for the rents and profits of land, the defendant does not claim in his answer that he has made any improvements on the land, nor is there any evidence to that effect. It was not an error for the court to refuse to direct a decree for an account of the improvements. Ogle v. Adams, 12 W. Va. 213.

Where Executor Admits Assets Sufficient to Pay Demands.—Where in a suit against an executor it appears that he was properly chargeable with, and admitted in his answer assets more than sufficient to pay all the legatees, it is not necessary to order an account before rendering a decree against the executor. McRae v. Brooks, 6 Munf. 157. It would have been error to decree against the executor in the absence of an account, or an admission showing sufficient assets to satisfy the decree. Wills v. Dunn, 5 Gratt. 384. In this case there was an admission. Sharpe v. Rockwood, 78 Va. 24.

Bill Not Sustained by Proof.—In a creditors' suit where the answer is responsive to the bill, and denies all of its material allegations, and there is no proof to sustain the bill, the suit ought to be dismissed, since a court of equity will never decree an account for the purpose of furnishing evidence to support the bill. But the rule is not applicable to a case where the answer is not sufficiently responsive to the bill, as where it sets up new and affirmative matter, which it is incumbent on the defendant to sustain by proof. Porter v. Young, 85 Va. 49, 6 S. E. Rep. 803.

c. EFFECT.

Suspends Statute of Limitations.—A decree for an account of liens entered in a suit stops the running of the statute of limitations against the demands only of such creditors as come in under the decree, or otherwise become parties to the suit; as to all others the statute continues to run. Callaway v. Webster (1901), 7 Va. Law Reg. 40, and cases cited. But see Repass v. Moore, 96 Va. 147, 30 S. E. Rep. 458.

In Creditors' Bill—Suspends Other Pending Suits.—It is well settled that in a creditors' suit an order of reference operates to suspend all other suits of creditors, who must come in under the decree, and this order may be made in the first case ready for hearing, although it is not the first suit brought. Paxton v. Rich, 85 Va. 378, 7 S. E. Rep. 531; Stephenson v. Taverners, 9 Gratt. 398; Kent v. Cloyd, 30 Gratt. 555; Woodyard v. Polsley, 14 W. Va. 211; Laidley v. Kline, 23 W. Va. 565.

Lien Begins from Entry.—Where a suit is brought by one judgment creditor for the purpose of enforcing his lien upon the real estate of the defendant, such becomes a lien creditor's bill from the date of the entry of the decree, referring the cause to a commissioner for an account of the real estate of the defendant, the liens thereon and the order of priority. Repass v. Moore, 96 Va. 147, 30 S. E. Rep. 458.

4. BY CONSENT.

a. WHAT CONSTITUTES.

Complainants "Assented" to Decree Asked by Defendants.—In a suit where the question was whether land should be sold or rented to pay the debts chargeable on it, in the decree for rental it was "asked to be done" by the defendants, and the complainants "assented thereto," this is a consent decree to that question. Rose v. Brown, 17 W. Va. 649.

Appearing before Commissioner of Accounts.—When the parties to a suit in response to a decree of the court, appear before a commissioner and make a statement of their accounts, this does not amount to an acquiescence in the settlement, and does not justify the entering of a decree, based on such settlement, if it would not be authorized to do so, unless by consent of parties. Hall v. Taylor, 18 W. Va. 544.

Endorsement "Submitted to Us."—A decree was endorsed by the counsel in a cause, "submitted to us." All that this means is that it has been shown to counsel. It does not follow that they have not opposed or do not oppose it in every way they can, and it was not regarded at all as a consent decree. Gibson v. Burgess, 82 Va. 650.

b. VALIDITY AND EFFECT.

Infants Cannot Consent.—It is an error to give a joint decree in favor of all the plaintiffs, some of whom are infants, for the aggregate of all their debts against the defendants, notwithstanding it is stated to have been by consent of complainants, because infants are incapable of giving consent for want of discretion, and such consent decree is invalid; nor can their next friend give consent for them. Armstrong v. Walkup, 9 Gratt. 372; Daingerfield v. Smith, 83 Va. 81, 1 S. E. Rep. 599.

By Counsel Adverse to Infants.—It is an error to allow counsel who represent interests adverse to infant parties to consent to a decree for them, and in such case a decree will be held invalid. Walker v. Grayson, 86 Va. 338, 10 S. E. Rep. 51.

Decree for Sum in Lieu of Dower.—It was held in Blair v. Thompson, 11 Gratt. 441, that there cannot be a decree for a specific sum in lieu of dower without the consent of all the parties interested.

Dismissing Bill with Costs.—A consent decree which dismisses a bill with costs, with no saving therein as to the right to bring another suit, is an adjudication of the merits of the cause. Lockwood v. Holliday, 16 W. Va. 651.

Consolidation—Decree for Sale—Irregularities Not Cured.—Where two cases were amalgamated by consent, and a decree for sale entered in the first case is made a decree for both cases by like consent, any error in decreeing a sale will not be cured thereby, as that consent merely cured any irregularities in the formalities of bringing the cases, consolidating the same and in making the decree. Buchanan v. Clark, 10 Gratt. 164.

Insufficiencies Cured.—The insufficiencies in a bill may be cured by consent decrees. Scott v. Dameron (Va.), 32 S. E. Rep. 415.

c. HOW SET ASIDE.

By New Suit.—A decree which has been entered in a cause by consent of parties is binding, and can only be set aside by a new suit, alleging improper procurement by surprise, fraud, or mistake of parties, and in a suit where a consent decree by some of the parties has been entered as by consent of all, leave should be given to any of the parties who did not consent thereto to bring a suit in a reasonable time to nullify it. Estill v. McClintic, 11 W. Va. 399.

After Term Only by Consent in Same Cause—By Original Bill.—After the close of a term at which a

consent decree is entered, it can never be set aside by any proceedings in the cause except by consent, though it had been entered by mistake or by the fraud of one of the parties; an original bill is necessary and proper to annul such consent decree whether it be interlocutory or final. Armstrong v. Wilson, 19 W. Va. 108; Rose v. Brown, 17 W. Va. 649; Manion v. Fahy, 11 W. Va. 482; Seiler v. Union Mfg. Co. (W. Va.), 40 S. E. Rep. 547.

Clerical Mistakes Corrected by Bill of Review or Petition to Rehear.—From the very nature of the consent decree it cannot be altered or modified except by consent, unless there has been a clerical mistake, which mistake is corrected by a bill of review if the decree is final, or by a petition to rehear if it be interlocutory. Manion v. Fahy, 11 W. Va. 482; Morris v. Peyton, 29 W. Va. 201, 11 S. E. Rep. 954; Stewart v. Stewart, 40 W. Va. 65, 20 S. E. Rep. 862; Seiler v. Union Mfg. Co. (W. Va.), 40 S. E. Rep. 547.

Fraud—By New Suit.—A consent decree may be annulled, when it was obtained by fraud of the other party or by his mistake, by a new suit brought for that purpose. Manion v. Fahy, 11 W. Va. 482.

Consent by Some of Parties—Rest May File Original Bill.—In a suit to settle a decedent's estate, and to charge it with the payment of his debts, a consent decree which was entered by the plaintiffs, the administrator and a preferred creditor, none of the other creditor parties to the suit being consulted, cannot be modified by subsequent proceedings in the cause, but leave should be granted to those parties who did not consent to file an original bill to set it aside. Manion v. Fahy, 11 W. Va. 482.

Court Cannot Set Aside in Construing Decree.—The court in its decrees carrying into execution a consent decree may construe the same when necessary, but it cannot set aside such consent decree, and enter one totally different therefrom, under the guise of construing it. Seiler v. Union Mfg. Co. (W. Va.), 40 S. E. Rep. 547.

5. BY DEFAULT.

a. APPEALS FROM.

Motion to Correct Must Be Refused in Lower Court.—The defendant, before appealing from a decree which was rendered by default, should apply to the court in which the decree was rendered, or to the judge thereof to correct the errors, before appealing to an appellate court. He has no right of appeal until a motion is made in the lower court, and is refused, either in whole or in part. As this was not done no appeal can be entertained, and will be dismissed as being improperly taken. Baker v. Western M., etc., Co., 6 W. Va. 196; Forest v. Stephens, 21 W. Va. 316; Bock v. Bock, 24 W. Va. 586. See §§ 5 and 6, ch. 134 of the W. Va. Code.

Variance between Process and Bill.—Where neither the subpœna nor the decree *nisi* required the defendants to answer any such bill as was exhibited, and the parties named in the decree *nisi* are different from those between whom the decree was made and a decree by default was entered against those parties, they were not in contempt by any proper process, and such decree will be reversed on appeal. Frazier v. Frazier, 2 Leigh 642.

b. RELIEF FROM.

Neglect of Case by Defendant.—A defendant upon whom process has been served, and who neglects his defence, or contents himself with merely writing to a lawyer who practices in the court to defend him, without giving him any information about his defence, or inquiring whether he is attending to the case, is not entitled to relief from a decree by default, on the ground of surprise, however grossly unjust the decree may be. Hill v. Bowyer, 18 Gratt. 364. See also, Hubbard v. Yocum, 30 W. Va. 755, 5 S. E. Rep. 875; Post v. Carr, 42 W. Va. 72, 24 S. E. Rep. 585.

False Return by Officer.—As to whether a court of equity can grant relief from a judgment procured on a false return by the officer, where it appears from the process and the record to have been duly served, has been the subject of much judicial contention, and the arguments and discussions on both sides of the question appear to be equally balanced. But the Virginia court in Preston v. Kindrick, 94 Va. 760, 27 S. E. Rep. 588, has adopted the view that a court of equity cannot give relief from a decree by default against a defendant, where such decree was entered on a false return by the sheriff, unless such return was procured or induced by the plaintiff, or he can in some way be connected with the deception. For a full collection of the authorities upon this point, see *note* appended to the above case in 3 Va. Law Reg. 435.

Set Aside for Good Cause.—A final decree by default may be set aside at a subsequent term for good cause shown, in a case where relief cannot be given by bill of review, or bill to impeach the decree for fraud in obtaining it. Erwin v. Vint, 6 Munf. 267.

One Party Cannot Object Where No Process Was Served on the Other.—A decree by default is entered against a guardian and his sureties although process had not been served upon one of the sureties. Upon a bill by the guardian and the other sureties to open the decree, no objection can be raised by them to the decree on this ground. Hill v. Bowyer, 18 Gratt. 364.

6. PRO CONFESSO.

a. IN GENERAL.

Proof Necessary for Final Decree.—In equity if the defendants make default, and a decree *pro confesso* is entered against them, yet the plaintiffs cannot have final decree without proof. Anonymous, 4 H. & M. 476.

Answer Not Responsive—Motion.—Where an answer is not responsive to a material allegation of the bill, the plaintiff may except to it as insufficient, or may move to have that part of the bill taken for confessed. But if he do neither, he shall not on trial avail himself of any implied admission by the defendant, for where the defendant does not answer at all, the plaintiff cannot take his bill for confessed without an order of the court to that effect, and have it served upon the defendant, and this is the only evidence of his admission. Dangerfield v. Claiborne, 2 H. & M. 17.

b. WHEN PROPER.

Statutory Rule in West Virginia.—The Code of West Virginia, ch. 125, § 30, provides: "If a demurrer be overruled, there shall be a rule upon the defendant to answer the bill. And if he fail to appear and answer the bill on the day specified in the order, the plaintiff shall be entitled to a decree against him for the relief prayed for therein." In a suit in which a demurrer was overruled, on motion of the plaintiff a rule was awarded against the defendant to file his answer, but no specified day was named. A decree entered afterwards, settling the merits of the case, must be overruled and annulled. A decree of this kind can only be entered after the statute has been complied with, and the defendant has failed to answer on the day specified. Moore v. Smith, 26 W. Va. 379.

Dismissal of Both on Defence by One.—Upon a bill

in chancery by a distributee against an administrator and his surety, alleging that the administrator has not duly accounted, and praying an account, a decree *pro confesso* is taken as to the administrator, but the surety answers, and proves, that the plaintiff, in a full and final settlement, has released the administrator, and so is not entitled to an account; upon which the chancellor dismisses the bill with costs as to both defendants. *Held*, the bill was properly dismissed as to both defendants. Cartigne v. Raymond, 4 Leigh 579.

In a creditors' bill, the administrator of the decedent was made party defendant, and called upon to answer under oath the allegations of the bill. All the defendants made default, except the administrator, who demurred, and answered under oath denying the charges of fraud, and averring that the transactions complained of were *bona fide*, and founded upon a valuable consideration. The plaintiff was not entitled to the decree *pro confesso* taken as to the other codefendants, as the answer of the administrator enures to their benefit, and it would be without reason, and doubtless without a precedent to enter a decree for the plaintiff, when the record shows he is not entitled to one. Terry v. Fontaine, 83 Va. 451, 2 S. E. Rep. 743, citing Anon., 4 H. & M. 476; Findlay v. Sheffey, 1 Rand. 73; Cartigne v. Raymond, 4 Leigh 579; Ashby v. Bell, 80 Va. 811.

Allegations Not Controverted.—Every material allegation of a bill not controverted by an answer shall for the purposes of the suit, be taken as true and no proof thereof shall be required. Sec. 36 of ch. 125 of Code of West Virginia; Gardner v. Landcraft, 6 W. Va. 36.

Implied Admissions—Motion Necessary.—It is not proper to enter a decree *pro confesso* as to allegations in a bill, which are not denied in the answer. In this case the plaintiff may except to the answer as insufficient, or may move to have that part of the bill taken for confessed; but if he does neither he shall not avail himself of any implied admission, without an order of the court to that effect, served on the defendant. Clinch River Mineral Co. v. Harrison, 91 Va. 122, 21 S. E. Rep. 660.

Same—Old Rule.—It was formerly held that when an answer controverts part of the plaintiff's claim, and does not deny the residue, a decree *pro confesso* may be entered for that part, and the rest set aside. Thompson v. Strode, 2 H. & M. 19.

Demurrer Overruled—No Answer—Rule Necessary.—In equity the court never pronounces a decree against a defendant on overruling his demurrer, there being no answer in, but must award a rule to answer before the bill can be taken for confessed. Hays v. Heatherly, 36 W. Va. 613, 15 S. E. Rep. 223.

c. RELIEF FROM.

West Virginia Rule—Motion under Statute.—The West Virginia courts have repeatedly decided that a defendant, as to whom a decree has been entered upon a bill taken for confessed, cannot have such decree reviewed, until he shall have first applied to the court below to have such decree corrected in the manner prescribed by section 5, of ch. 134 of the Code. McKinney v. Hammett, 26 W. Va. 628, citing Baker v. W. M. & M. Co., 6 W. Va. 196; Dickinson v. Lewis, 7 W. Va. 673; Bock v. Bock, 24 W. Va. 586; Steenrod v. R. Co., 25 W. Va. 133.

Petition to Rehear.—If in a suit in equity against an absent defendant, alleged to be indebted to the plaintiff, and a home defendant having effects in his hands, a decree *pro confesso* be entered against the absent defendant, without any proof that the plaintiff is his creditor, there can be no redress obtained by appealing from the decree; he must seek it in the mode prescribed by the statute, that is, he must petition to have the cause reheard in the court which pronounced the decree. The decree will not be set aside as soon as answer is filed, but upon rehearing such decree will be made as may be just. Platt v. Howland, 10 Leigh 507.

Reversal on Motion—Statutory.—Under the Virginia Code of 1873, ch. 177, § 5, it is provided that, the court which renders any decree as confessed, may upon motion reverse it for any error for which an appellate court might reverse it. This section requires that every motion under this chapter shall be after notice to the other party, but it is nowhere required that the notice shall specify the errors on the face of the record for which the reversal is asked. Saunders v. Griggs, 81 Va. 506.

Qualified Consent to Decree on Bill Taken as Confessed—Remedy.—There was no appearance in a cause except to make a qualified consent to a decree, which was on a bill taken for confessed. No appeal can be taken from that which is consented to, and all matters not consented to may be remedied in the lower court upon notice and motion, being on a bill taken for confessed. Hunter v. Kennedy, 20 W. Va. 343.

Construction of West Virginia Statute.—For a construction of §§ 5 and 6, of ch. 134, of W. Va. Code, in reference to appeals from decrees on bills taken for confessed, see Watson v. Wigginton, 28 W. Va. 533.

VI. IN PARTICULAR CASES.

1. AGAINST INFANTS.—See monographic *note* on "Infants" appended to Caperton v. Gregory, 11 Gratt. 505.

a. IN GENERAL.

May Set Aside Decree before Majority.—A suit was brought by an infant through his next friend before he had attained the age of twenty-one years, in order to set aside a decree adverse to him which had been rendered in the proceeding, which he set out in his bill. It was claimed that this suit was prematurely instituted and that the plaintiff should have waited until he had attained the age of twenty-one years. This question was disposed of by the supreme court of Virginia in Harrison v. Wallton, 95 Va. 721, 30 S. E. Rep. 372, where it was held that when an infant was aggrieved by a decree which was adverse to his interest, it was not necessary for him to wait until he reached his majority before he might seek to set aside the decree. Lockhart v. Vandyke, 97 Va. 356, 33 S. E. Rep. 613.

Guardians Cannot Waive Benefit.—It is not competent to guardians of infant parties to waive any benefit to which the infants are entitled in a decree; and it is error to decree on such consent. Hite v. Hite, 2 Rand. 409.

Guardian Ad Litem Necessary.—It is error to enter a decree against infant defendants, without assigning them a guardian *ad litem*; and though the infancy did not appear in the original proceedings, yet, if it be alleged in a petition for a rehearing, the decree being interlocutory, a guardian *ad litem* ought to be appointed. Roberts v. Stanton, 2 Munf. 129.

b. RESERVATIONS.

Of Day to Show Cause.—It was formerly held that a decree against infants, which did not reserve for them a day after the attainment of full age, in which they might show cause against the decree, was erroneous. Lee v. Braxton, 5 Call 459; Brax-

ton v. Lee, 4 H. & M. 376; Jackson v. Turner, 5 Leigh 127; Tennent v. Pattons, 6 Leigh 196.

Same—Statutory Change.—It is now provided in both Virginia and West Virginia by statutory provisions that it is not necessary to insert in any decree or order a reservation to an infant in which he might show cause against it, but in any case in which such provision would have been proper, the infant may, within six months after attaining his majority, show cause in the same manner as if the decree or order had contained the provision. Va. Code, § 3424; W. Va. Code, ch. 132, § 7.

Limitations of Cause.—The right of an infant to show cause against a decree which affected his interest, after he arrived at age, must be limited to this extent, to show cause existing at the rendition of the decree, and not such as arose afterwards. The question always must be, can any cause be shown why the decree, at the time it was rendered, was not a legal and binding one. Lafferty v. Lafferty, 42 W. Va. 783, 26 S. E. Rep. 262; Walker v. Page, 21 Gratt. 636; Durrett v. Davis, 24 Gratt. 308; Zirkle v. McCue, 26 Gratt. 531; Morriss v. Va. Ins. Co., 85 Va. 588, 8 S. E. Rep. 383; Lancaster v. Barton, 92 Va. 623, 24 S. E. Rep. 251.

c. EFFECT.

When Decree Is Beneficial.—Although it is a general rule that an infant defendant is not bound by a decree, if he can show error in it when he becomes of age, yet, where a decree is obviously for his benefit, his rights may be absolutely bound by it. Brown v. Armistead, 6 Rand. 593; Harman v. Davis, 30 Gratt. 461; Morris v. Va. Ins. Co., 85 Va. 588, 8 S. E. Rep. 383.

Same as against Adults.—The law recognizes no distinction between a decree against an infant and a decree against an adult. An infant can impeach a decree only upon grounds which would invalidate it in the case of another person—such as fraud, collusion, or error. The mere fact of infancy confers in such a case no special rights or privileges. Therefore the same general presumption and inference which applies in favor of decrees against adults, applies in favor of decrees where the rights of infants are involved. Pennybacker v. Switzer, 75 Va. 688; Zirkle v. McCue, 26 Gratt. 517; Harrison v. Wallton, 95 Va. 721, 30 S. E. Rep. 372; Turk v. Skiles, 38 W. Va. 404, 18 S. E. Rep. 561; Dickel v. Smith, 38 W. Va. 635, 18 S. E. Rep. 721; Lafferty v. Lafferty, 42 W. Va. 785, 26 S. E. Rep. 263.

2. AGAINST EXECUTORS AND ADMINISTRATORS.—See generally, monographic *note* on "Executors and Administrators."

a. IN GENERAL.

For Payment at Future Periods.—It is error to decree against an executor absolutely, that he shall pay money at fixed future periods, in respect to funds not in hand, but which shall then come into his hands. Hite v. Hite, 2 Rand. 409.

For Rents and Profits Received by Testator.—A decree against an executor for rents and profits, received by the testator, ought expressly to direct that he pay the sum in question out of the assets in his hands to be administered; otherwise it will be understood as against him personally and therefore erroneous. Hite v. Paul, 2 Munf. 154.

Against One Only.—In a suit brought against two administrators, a decree may be rendered against only one, if it appear that only one has the assets, Templeman v. Fauntleroy, 3 Rand. 434.

b. EFFECT.

Decree against Administrator d. b. n. of Heir of Executor.—In a suit by legatees against the administrator *d. b. n.* of the heir of the executor of the decedent, a decree against the administrator *d. b. n.* conclusively establishes against the heir and all his representatives, the indebtedness of the executor's estate to the legatees of his testator, that they had a right to follow the assets in the hands of the heir, that a sufficiency of such assets came to his hands, and that his representatives, who had received his assets, are accountable to said legatees for the assets so received. Sheldon v. Armstead, 7 Gratt. 264.

Against Executor on Heir or Devisee.—When the lands of an ancestor are charged by his will or bond, in equity the creditors must exhaust the personal estate before they can resort to the lands, and in such case, a decree against the executor is not conclusive, but *prima facie* only against the heir or devisee. Garnett v. Macon, 6 Call 308.

On Suit for Contribution against Legatees.—After a decree is rendered by a court of competent jurisdiction without fraud or collusion against an executor, he may bring a suit in equity against the legatees for contribution to satisfy such decree, without paying the money himself and without appealing to a higher court, although requested and advised to do so. Bower v. Glendening, 4 Munf. 219.

Estoppel.—In a suit by an administrator *d. b. n.*, against the representative of the first administrator, for the settlement of the first administrator's accounts, it is irregular to decree payment to the administrator *d. b. n.* But if the distributees are parties to the suit and do not complain, so that a payment to the administrator *d. b. n.* would be a valid discharge to the representative of the first administrator, he will not be heard to complain of irregularity in an appellate court. Morris v. Morris, 4 Gratt. 293.

c. PERSONAL DECREES.

Receipt of Depreciated Money.—Where one of two joint executors received in payment of bonds of his intestate depreciated money, it was error to decree against both for the amount of loss to the estate, but the decree should be against him only who received it. Myrick v. Adams, 4 Munf. 366.

On Confession of Sufficient Assets.—Where a decree is entered against executors for a legacy, upon their confession of assets sufficient to satisfy the same, without specifying whether such assets consist of money or other property, such decree may direct that they pay the legacy and interest, with the costs of the suit, out of the said assets, if so much thereof they have; and if they have not, then out of their own estates. McRae v. Brooks, 6 Munf. 157.

Where suit is brought against an executor and his sureties, and the executor confesses assets, it is competent for a court of equity to decree immediately against the executor; and liberty should be reserved to the creditor to proceed against the sureties by motion, if necessary. Jones v. Hobson, 2 Rand. 483.

Improper Payment of Assets.—Where a decree is made against an executor for having paid the assets improperly, he may be subjected in the first instance, without resorting so those who have so improperly received the assets. Ruth v. Owens, 2 Rand. 507.

Decree for Balance De Bonis Propriis.—When a balance is found in the hands of an executor or administrator, the decree should be *de bonis propriis*, and an acknowledgment of assets, with other circum-

tances, will have the same effect. Templeman v. Fauntleroy, 3 Rand. 434.

A decree and execution thereupon against an executor, or administrator for a balance due on his administration account, should not be against the goods and chattels of the decedent in his hands to be administered, but against his own goods and chattels. Moore v. Ferguson, 2 Munf. 421; Sheppard v. Starke, 3 Munf. 29.

When Personal Decree against Administratrix Proper.—An administratrix entered into a personal agreement, whereby she bound herself to sell a portion of her intestate's land to the plaintiff for a valuable consideration, which, by said agreement under seal, she acknowledges to have been paid to her, and possession was delivered in pursuance of the agreement. Subsequently finding herself unable to carry out said illegal agreement, she assumes to take the land back, and enters into possession of it, and promises to return the purchase money. *Held*, there is no error in rendering a personal decree against her for said purchase money, with interest. Hall v. Wilkinson, 35 W. Va. 167, 12 S. E. Rep. 1118.

Improper When Sued in Representative Character.—A personal decree against an executor or administrator, who is sued in his representative character only, is fatally erroneous. Jones v. Reid, 12 W. Va. 350, citing Spotswood v. Price, 3 H. & M. 123; Humphreys v. West, 3 Rand. 516; Pugh v. Jones, 6 Leigh 299; Wills v. Dunn, 5 Gratt. 384.

Charging with Debts When Due—Receipt—Interest—Negligence.—A decree is erroneous which charges the executor with debts, either old or new, due to the estate at the time when they became due, except in those cases where the debts were lost by his negligence or improper conduct. They should be charged to him at the time when actually received. It is also erroneous if it charges the executor with interest from the time the debts became due, without any proof of having been then received. An executor, except as to debts lost by his negligence or improper conduct, is chargeable with interest only on his actual receipts. Cavendish v. Fleming, 3 Munf. 198.

d. TAKING ACCOUNTS.

Object—Unnecessary When Sufficient Assets Appear.—The only object of taking an account in a suit against an administrator, is to show that sufficient assets have come into his hands to meet the debts of his intestate. Hence it is not error in such a suit to decree against the sureties of an administrator before accounts have been taken, where it appears that he has already received sufficient assets for that purpose. Morrison v. Lavell, 81 Va. 519.

No Decree against an Administrator Prior to Account.—Where a bill was brought against the administrators of a guardian asking for an account and a personal decree was entered against them, it was error to do so without first having ordered an account of their testator's estate. Lincoln v. Stern, 23 Gratt. 816.

In a suit in equity against executors it is not regular to enter a decree against them to be levied out of the goods of the testator without an account. McRae v. Bates, 4 H. & M. 400.

Of Intestate's Receipts.—A decree is erroneous which directs an account to be taken of money received by an intestate, unless his personal representative has been properly brought before the court. Donahoe v. Fackler, 8 W. Va. 249.

3. IN JUDICIAL SALES.—See monographic *note* on "Judicial Sales" appended to Walker v. Page, 21 Gratt. 636.

a. IN GENERAL.

When Commissioner May Use Discretion.—Where a decree directs real property to be sold or rented, without directing whether it shall be offered as a whole or in parcels, the commissioner must in the interest of the parties in his discretion offer it for sale or rental in that manner, which will in his judgment bring the most money. Rose v. Brown, 17 W. Va. 649.

Two Decrees on Same Day against Same Land.—If there be two decrees on the same day against the defendant's land, the whole and not a moiety only of it ought to be directed to be sold. Coleman v. Cocke, 6 Rand. 618.

Currency in Which Deferred Payments Are Payable.—Land is sold at a judicial sale and it is contended that the notes of the defendants for the deferred payments are payable in the currency of the time of the contract. But it was held that in the absence of express stipulation the notes should be paid in the currency of the time when they fell due. Kraker v. Shields, 20 Gratt. 377.

Sale Decreed When Part of Purchase Money Not Due.—It was not erroneous in a decree of sale to enforce a vendor's lien, to state that a part of the purchase money was not yet due. And this is especially true if when a resale is ordered the whole of the amount had then become due, because this does not constitute an error to the prejudice of the appellants. Moore v. Green, 90 Va. 181, 17 S. E. Rep. 872.

Dower Rights.—It is not an error to decree the sale of land, without ascertaining the right of dower therein. There is nothing to prevent the widow from bringing her suit against the proper parties, claiming their lands, and having her dower set out in them. Hunter v. Hunter, 10 W. Va. 321.

b. JURISDICTION.

Trustee Necessary in Suit to Enforce a Trust.—In Conrad v. Fuller, 98 Va. 16, 34 S. E. Rep. 893, it was held to be error to enter a decree directing the sale of a decedent's real estate before the trustee in a deed of trust conveying the same land to secure a debt had been made a party to the suit. He was a necessary party, and the court ought not to have entered a decree for sale until he was brought before it.

Land Chargeable in Equity—Amount of Debt.—A court of chancery ought not to direct the sale of land for the payment of debt, unless the creditor asking the sale shall show that the land is legally chargeable in equity, for such payment, and not even then until the amount of the debt shall be ascertained. Smith v. Flint, 6 Gratt. 40.

All Persons in Interest Must Be Parties.—It is error to decree land to be sold, in which a person not a party to the suit has an interest, legal or equitable. Barrett v. McAllister, 33 W. Va. 738, 11 S. E. Rep. 220.

Equitable Title Should Not Be Sold.—It is a general rule that a court of equity ought not to decree a sale of an equitable title in land, but if a decree for sale of the land be proper, it should first direct that the legal title be perfected, and then decree a sale of that. Goare v. Beuhring, 6 Leigh 585.

c. LIENS AND PRIORITIES.

No Decree Prior to Fixing of Liens and Priorities.—It is the established rule in Virginia and West Virginia that no decree for the sale or rental of real estate should be entered, until the liens thereon, with their priorities, are fixed and determined, so that the land may bring a better price, in

that the prospective buyers may make intelligent bids, without fear of subsequent litigation. Scott v. Ludington, 14 W. Va. 387; Cole v. McRae, 6 Rand. 644; Daingerfield v. Smith, 83 Va. 81, 1 S. E. Rep. 599; New v. Bass, 92 Va. 383, 23 S. E. Rep. 747. See monographic *note* on "Judicial Sales" appended to Walker v. Page, 21 Gratt. 636, for full list of authorities. Nor will the defect be cured by the creditor, whose lien was not ascertained, consenting to the decree, as the debtor and other creditors are interested in having the amount of liens and their priorities fixed before a sale. Beard v. Arbuckle, 19 W. Va. 135.

And if a decree of sale has been entered, and subsequently, before advertisement under this decree, it was suggested that there were other liens than those reported, a decree then entered referring the cause to a commissioner for a further account of liens, operated to suspend the decree of sale. Harris v. Jones, 96 Va. 658, 32 S. E. Rep. 455.

In Beard v. Arbuckle, 19 W. Va. 135, it was held to be an error to leave the amounts of liens on a tract of land in uncertainty before the sale, by recommitting the report to the commissioner with leave to the debtor within 60 days to reduce the amounts of any of the liens by proving payments.

What Land Is Liable.—There should not be a decree for sale in an action brought for the purpose of subjecting lands to satisfy a judgment, until the priorities of the parties are adjusted, and until it has been ascertained what portion of lands appearing by deeds filed with the bill to belong to the debtor, was included in a certain deed of trust. Buchanan v. Clark, 10 Gratt. 164.

Other Liens Must Be Provided for.—It is error to decree the sale of land to pay the judgment of the plaintiff, without at the same time providing for the payment of other judgment liens, appearing in the record, although these lienors have not answered the bill, and have not asked to have the land sold to pay these judgments. Scott v. Ludington, 14 W. Va. 387.

It is error to decree the sale of land, which is subject to prior encumbrances. Scott v. Ludington, 14 W. Va. 387.

Plaintiff's Rights Should Be First Ascertained.—It is error for the court to provide, in its decree for sale, for further relief, should it appear that a certain reduction in the judgment was incorrect. It is the duty of the court to definitely fix the amount to which the plaintiff is entitled before ordering a sale. Scott v. Ludington, 14 W. Va. 387.

d. RENTS AND PROFITS.

Sufficient to Pay Interest—No Sale.—Where the annual rental of land descended is more than sufficient to pay the interest on the bond debt of the ancestor, a court of equity will not decree a sale of such land in possession of his heirs to satisfy the debt, the land not being subject to any specific lien or encumbrance in favor of the creditor. Wilders v. Chambliss, 6 Munf. 432.

Inquiry as to Rent before Sale.—In a suit in equity to enforce the lien of a judgment, there was no averment in the bill, nor admission, nor proof that the rents and profits of the lands of the debtor would not pay the debt in five years. It was error to decree a sale of the land before this inquiry had been made. But as the decree appealed from in this case was interlocutory, it will be amended and affirmed. Price v. Thrash, 30 Gratt. 515; Southwest Va. M. Co. v. Chase, 95 Va. 56, 27 S. E. Rep. 826.

Sale of Land Improper if Rent Will Satisfy in Short Time.—Upon a bill by creditors of a decedent against his administrators and heirs to marshal the assets, the court may decree a sale of the lands descended to the heirs; but it is not bound, and ought not to decree such sale, if the rents and profits of the lands will satisfy the debts in a reasonable time, especially if the heirs be infants. Tennent v. Pattons, 6 Leigh 196.

e. PERSONAL DECREES.

Where Vendor's Lien.—In a suit brought to enforce a lien reserved on land for the purchase price thereof, there may be a personal decree for the purchase money before the sale, and not merely for the balance remaining due after crediting the proceeds from the sale of the land. Dellinger v. Foltz, 93 Va. 729, 25 S. E. Rep. 998; Fayette Land Co. v. L. & N. R. Co., 93 Va. 274, 24 S. E. Rep. 1016.

When Personal Decree and Decree for Sale Both Proper.—In a suit brought to enforce a vendor's lien, it is plainly within the jurisdiction of the court of equity, to enter a personal decree against the defendant, and also a further decree for the sale of the land, if the personal decree be not satisfied. Fayette Land Co. v. L. & N. R. Co., 93 Va. 274, 24 S. E. Rep. 1016.

Purchase by Tenant in Common.—At a sale of property held by tenants in common, one of them becomes the purchaser, but fails to comply with his contract. In a suit for specific execution of his contract there is a personal decree against him, and for a sale of the whole property, but it was held on appeal that the purchaser at the sale bought only the moiety of the other tenant in common, and the lien of the decree only extended to that moiety though the whole property was sold under the decree. Johnson v. Bank, 33 Gratt. 473.

Personal Decree for Balance Due—Enforcement.—It is proper in a suit to enforce a vendor's lien to give the plaintiff a personal decree against the purchaser for the balance due, and the court in its discretion may authorize the enforcement of this decree before subjecting the land to the lien. Carskadon v. Minke, 26 W. Va. 729.

Same—Reservation for Sale under Deed of Trust.—The sale of a house and lot under a deed of trust to secure the deferred payments was enjoined on the ground that the sale was made with reference to Confederate States currency. The bill was dismissed and a personal decree entered. It was irregular to dismiss the bill. The decree should reserve liberty for application to the court for sale under the deed of trust, if the personal decree fail to produce the money. Kraker v. Shields, 20 Gratt. 377.

f. ERRORS AND OMISSIONS.

Sale Must Follow Decree.—A decree for the sale of lands was made against adult and infant defendants. The marshal to make sale was instructed by the adults to sell in a different manner from the decree, and obeyed these instructions, and not the decree. The sale was irregular. Tennent v. Pattons, 6 Leigh 196.

Confirmation Cures Unauthorized Execution of Deed.—Where a decree, which directs commissioners to sell land, did not authorize them to execute a deed to the purchaser, yet as they did execute the deed and a final decree subsequently entered, ratified and confirmed it, this order of confirmation gave full effect and validity to such deed, and related back to its date, so as to invest the purchaser with the legal title of the original owner. Evans v. Spurgin, 6 Gratt. 107.

Errors Should Be Objected to in Lower Court.—A decree confirming a sale of real estate will not be reversed for an error in the decree ordering the sale, when no steps have been taken in the court below before the confirmation to reverse said decree. This rule applies in some cases to a party to the suit, who is a purchaser of lands sold under a decree, as well as to a stranger. Dick v. Robinson, 19 W. Va. 159.

Sale Improper—Cloud on Title.—When a decree directs property in which absent defendants are interested to be sold, and these defendants have not been summoned by due process, this objection may be made by other defendants, who may also be affected by this decree, because the property would be placed under a cloud, and would not sell to the advantage it would have done if no such cloud rested upon it. McCoy v. McCoy, 9 W. Va. 443, citing Craig v. Sebrell, 9 Gratt. 133.

Same—When Payments Thereunder Due before They Were under the Contract.—A decree is erroneous by which the last payment on the property when sold, might become due before the last instalment of the purchase money due the complainants; it is error to decree the sale of land on terms in any case which would have this result. Gates v. Cragg, 11 W. Va. 300.

Same—Of Land in Hands of Receiver before an Account.—In a creditors' suit, where the lands of the defendant have been for some time in the possession of receivers, statements of their transactions should be completed before a decree is entered, and it is error to decree a sale of the land for the payment of debts before the amount received in their transactions as receivers had been fully ascertained and credited on the debts. Strayer v. Long, 83 Va. 715, 3 S. E. Rep. 372.

Same—Rights of Tenant in Possession Unascertained.—In a chancery suit for the sale of land, it is an error to decree a sale thereof before the rights of a tenant who is in possession has been ascertained and before any provisions have been made for his protection. Moore v. Bruce, 85 Va. 139, 7 S. E. Rep. 195.

Exceptions to Decree for Sale.—If a decree direct the sale of real estate under circumstances which injure the sale, the parties injured should except to the report of the commissioner, and apply to the court to set aside the sale. A bill of review after a final decree is not the proper remedy. Vanmeter v. Vanmeters, 3 Gratt. 148.

4. AGAINST MARRIED WOMEN.—See monographic *note* on "Husband and Wife."

When Personal Decree Erroneous.—A personal decree against a married woman for a debt contracted during coverture is erroneous and void, and a clause in the decree that it is to be levied of her separate estate and goods and chattels, not limiting it to the property before the court in the suit, does not cure the error. This was before ch. 3, § 15, Acts 1893. Turk v. Skiles, 38 W. Va. 404, 18 S. E. Rep. 561.

For Specific Performance.—When a married woman contracts in writing for the sale of her separate estate in land, a personal decree for specific performance may be enforced against her under § 2289 of Va. Code. Gentry v. Gentry, 87 Va. 478, 12 S. E. Rep. 966.

5. AGAINST NONRESIDENTS.

No Appeal by Nonresident—Petition Proper.—It is well established that if a judgment or decree has been obtained against a nonresident by publication, his remedy is not by appeal or supersedeas to an appellate court, but he must file his petition and make defence in the court in which the judgment or decree was rendered, Meadows v. Justice, 6 W. Va. 198.

Statutory Remedy from Decree against Nonresidents.—It is well settled that a nonresident defendant, against whom a decree has been rendered upon publication, is confined to the remedy prescribed by the statute and that he cannot in the first instance appeal from such decree. Vance v. Snyder, 6 W. Va. 24; Meadows v. Justice, 6 W. Va. 198; Lenows v. Lenow, 8 Gratt. 349; Handy v. Scott, 26 W. Va. 710.

Reversal of Joint Decree.—An attachment proceeding was instituted against two persons as jointly indebted to the plaintiff. One of them appeared and answered the bill, and the other was regularly proceeded against as an absent defendant, and there was a joint decree against both. The absent defendant had no right to appeal on account of any error in the decree against him as he did not appear; but the decree, which was joint, being erroneous, will be reversed as to both upon the appeal of the defendant, who did appear and file his answer, the defence being in no respects a personal one. Lenows v. Lenow, 8 Gratt. 349.

Expiration of Time to Show Cause.—The time allowed by a decree against an absent defendant, within which he might show cause against it, having expired, the plaintiff is entitled to the benefit of the decree without giving the security originally required by it. Ross v. Austin, 4 H. & M. 502.

Attachment under 1 Rev. Code.—It was held in Horton v. Horton, 4 H. & M. 403, that where a decree was pronounced against a person out of the commonwealth, under 1 Rev. Code, p. 115, directing the method of proceeding against absent defendants, that an attachment cannot be awarded against him after his return, until twelve months have elapsed from the time of service of a copy of such decree.

The statutory provisions in 1 Rev. Code, pp. 475-6, § 4, which provide that a decree made against an absent defendant shall after seven years stand absolutely confirmed against him, does not protect a decree procured by fraud, after the death of the absent defendant, without suggesting his death or reviving it against his representatives or heirs. The statute in question intends to quiet the possession of property acquired under decrees fairly obtained against the absent parties to bar any further litigation in the matter of the suit so decided, after seven years from the date of the decree. It does not intend to quiet parties in the enjoyment of property acquired under a decree obtained by fraud. Evans v. Spurgin, 11 Gratt. 615.

Conclusive after Seven Years.—Decrees against absent defendants have the same effect as against absent debtors. And so far as the decree operates upon a subject within the jurisdiction of the court, the interests of such absent defendants therein are conclusively bound by the decree, unless he shall appear and petition for a rehearing in seven years. Rootes v. Tompkins, 3 Gratt. 98.

Same—Exception as to Personal Demands.—A decree against an absent debtor so far as it reaches beyond the cause or thing subject to the jurisdiction of the court, and purports to operate *in personam*, so as to create a personal charge alone, is not of such binding and conclusive character as to preclude all enquiry into the merits thereof, notwithstanding more than seven years have elapsed since it was pronounced. But it may be shown to be erroneous

either upon its face or by evidence *aliunde*. Rootes v. Tompkins, 3 Gratt. 98.

Against Dead Defendant Set Aside—Answer of Absentee Received on Terms.—Where a motion was made to set aside a decree of the prior term of a court, as to one of the defendants, who was then dead, and to file the answer of another defendant against whom there was a decree, as being out of the country, the court set aside the decree as to the defendant who was dead at the time it was rendered; but the answer of the absent defendant was not received, but upon security for costs, unless the plaintiff will consent that the answer may be filed without such security. Hooe v. Barber, 4 H. & M. 439.

Attachment—Personal Decree against Nonresident on Making Appearance.—Where the effects of a nonresident have been attached, and an order of publication has been issued as to him, if he appears, there may be a personal decree against him, without disposing of the attachment, or there may be both a personal decree against him, and a decree subjecting the attached property. Coleman v. Waters, 13 W. Va. 278; Chapman v. P., etc., R. Co., 18 W. Va. 184; Wetherill v. McCloskey, 28 W. Va. 195; O'Brien v. Stephens, 11 Gratt. 610.

Same—No Personal Decree unless Defendant Appears.—Where an attachment proceeding was instituted against the property of an absent defendant and he does not appear in the case, there cannot be a personal decree against him, but the attached property alone can be subjected to the debt. O'Brien v. Stephens, 11 Gratt. 610; Wetherill v. McCloskey, 28 W. Va. 195; Mahany v. Kephart, 15 W. Va. 609; Barrett v. McAllister, 33 W. Va. 738, 11 S. E. Rep. 220. But in Williamson v. Gayle, 7 Gratt. 158, and Schofield v. Cox, 8 Gratt. 533, it was held that a personal decree could be had against an absent debtor in an attachment proceeding where he made no appearance.

6. FOR INTEREST.—See monographic *note* on "Interest" appended to Fred v. Dixon, 27 Gratt. 541.

Decree for Money—General Rule.—In all cases where a decree is rendered for the payment of money it shall be for the aggregate of principal and interest due at the date of the decree, with interest from then, except when otherwise provided. Baer, etc., Co. v. Cutting, etc., Co., 42 W. Va. 359, 26 S. E. Rep. 191.

A decree for money should state the amount which the defendant is required to pay, and the date from which interest is to be computed, and it is not sufficient to direct that the plaintiff recover "the amounts of their respective notes and judgments, with interest thereon, as separately and specifically set out in the bill." Spoor v. Tilson, 97 Va. 279, 33 S. E. Rep. 609.

Bond at Three Per Cent.—Decree for Payment Should Bear the Same Interest.—A decree for the payment of a bond which bears three per cent. interest from date, should be for the aggregate sum due, and then the decree should provide for the payment of interest thereon at the rate of three per cent. until paid, and if it provides for interest at six per cent. on the required sum, it is erroneous. Pickens v. McCoy, 24 W. Va. 344.

On Annuities.—In a suit in equity for the arrears of an annuity, the decree should be for the sums due, with interest from the days when payable respectively. Marshall v. Thompson, 2 Munf. 412.

On Hires of Slave.—Where a purchaser of a slave bought with notice of a better title, in a decree entered against him to deliver up the slave with profits, interest should be charged against him on the amount of hires actually received by him from other persons from the dates of their receipts. Baird v. Bland, 5 Munf. 492.

VII. ERRORS AND OMISSIONS.

Decree Sufficient if Substantially in Favor of Plaintiff.—It is no objection to a decree that it is nominally in favor of one defendant and against another, if it be *substantially* in favor of the plaintiff. West v. Belches, 5 Munf. 187.

Payment Decreed before Due.—It is error to decree the payment of purchase money before the time fixed for its payment in the contract. Dunfee v. Childs, 45 W. Va. 155, 30 S. E. Rep. 102.

Two Defendants—Failure to State against Whom Recovery Is Had.—Where a suit is brought against two parties, a decree entered therein is erroneous if it does not state against whom the recovery of the complainant is had. Snyder v. Brown, 3 W. Va. 143.

Omission—Of Costs.—It is not error for decrees which are not final, though they do adjudicate the principles of the cause, to omit to decree costs, but reserve that question for further adjudication. Cooper v. Daugherty, 85 Va. 343, 7 S. E. Rep. 387.

Same—Of Refunding Bond.—In Handly v. Snodgrass, 9 Leigh 284, a different rule was established from the former one, which was that a decree in favor of a legatee against an executor, omitting to require a refunding bond, would be considered erroneous and reversed. This was held to be an abuse of justice to reverse a decree for a mere omission or oversight, and not for error in the actual judgment of the court.

Same—Of Depositions.—The record of a cause shows that depositions were taken by both parties, who were present at the taking of the depositions, and cross-examined the witnesses. The entry of the clerk shows that they were filed in the cause before the hearing, and the decree being evidently founded upon the evidence, it is fair to presume that the omission to refer to them in the decree was a clerical mistake in drawing the decree and that the cause was heard upon the depositions. Day v. Hale, 22 Gratt. 146. See, in accord, Turnbull v. Clifton Coal Co., 19 W. Va. 299, distinguishing Shumate v. Dunbar, 6 Munf. 431, and Nelson v. Cornwell, 11 Gratt. 741. See also, Renick v. Ludington, 20 W. Va. 533, in approval, distinguishing Camden v. Haymond, 9 W. Va. 690.

Omission to Direct Deed.—The more usual practice in cases where a sale is ordered by an interlocutory decree is to withhold by express provision a conveyance of the title until after the coming in of the report. It is not error in such a decree to omit to direct a deed to be made. Goddin v. Vaughn, 14 Gratt. 102.

No Day to Redeem Given.—Where a decree, in a suit to enforce a lien of the vendor for unpaid purchase money, gives no day to the appellant to redeem the property by paying up the amount charged upon it, this constitutes an error. And it also should direct a sale for a reasonable credit, instead of for cash. Kyles v. Tait, 6 Gratt. 44.

VIII. AMENDMENT, CORRECTION AND ENTRY IN VACATION.

1. WHAT PROCEEDINGS PROPER IN GENERAL.

Motion and Appeal—Against Person Not a Party.—When a decree has been entered against a person,

who is not a party to the suit, it may be corrected by motion in the lower court, and can be corrected in the appellate court. Boggess v. Robinson, 5 W. Va. 402.

Motion or Bill of Review.—A decree which is final in all respects, except that "liberty is reserved to the parties, or either of them, to resort to the court for its further interposition, if it should be found necessary," may be amended on motion in a summary way or by bill of review. Sheppard v. Starke, 3 Munf. 29.

Counsel May Correct Decrees.—Where there were palpable errors in a decree, and the counsel for the beneficiaries under it directed the clerk by endorsement on any execution that might be issued on it, to correct these errors, these mistakes were obvious and every correction was a matter of course. The counsel for the parties in whose favor the decree was made had full authority to bind their clients by making the corrections. Hill v. Bowyer, 18 Gratt. 364.

Motion under Statute.—Where a decree is entered in a cause, the pleadings and proofs in which did not authorize such, it is a mere error of the court where it has jurisdiction of the parties and of the subject-matter, and it does not exceed its jurisdiction in rendering a personal decree, it only commits an error for which relief could have been had under § 3451, of the Va. Code. Preston v. Kindrick, 94 Va. 760, 27 S. E. Rep. 588. See Code of W. Va., ch. 134, § 5, for correction in lower court, and § 6, same chapter, for correction in appellate court. Erroneous amounts may be corrected in this way. Pumphry v. Brown, 5 W. Va. 107.

Statutory Release of Error.—A decree will not be reversed because of error in it, if the amount of the error has been released according to Code Va., § 3451. Dickinson v. Clement, 87 Va. 41, 12 S. E. Rep. 105.

No Correction by Original Suit.—The superior court of chancery cannot correct errors in a decree of an inferior court by an original suit, although in that way it may impeach such a decree for fraud, and under peculiar circumstances would lend its aid to carry a decree of an inferior court into effect. Banks v. Anderson, 2 H. & M. 20.

2. OF INTERLOCUTORY DECREES.

Directing Sale Instead of Payment Out of Rents.—An interlocutory decree directed a sale of land to satisfy a debt, in a case where it might have been proper to decree satisfaction out of the rents and profits. This was not in controversy in the court below nor was it brought to the notice of the court although the party had ample opportunity to apply for an alteration of the decree. On appeal the decree will not be reversed for such cause, but affirmed with directions that the cause be remanded, the decree corrected and that the debt be satisfied out of the rents and profits, if it can be done so within a reasonable time. Manns v. Flinn, 10 Leigh 93.

Petition to Rehear.—The proper method for bringing an interlocutory decree before the court of appeals for correction is by a petition to rehear. Smith v. McLain, 11 W. Va. 654.

No Appeal from Unless Lower Court Refuses to Correct.—A cause was heard upon the report of a commissioner which had not been returned for the legal period. The decree was interlocutory and the error should have been corrected by applying to the court below. It is not a ground for an appeal unless, on an application to the lower court, it refuses to correct it. Armstrong v. Pitts, 13 Gratt. 235.

Improper Entry of Decree of Sale.—A suit was instituted having for its object the enforcement of the lien of a certain judgment against the defendant, asking that his land be sold to satisfy the same. A decree of sale was entered as by confession, and on the same day an answer was filed in the cause. Whatever may have been the propriety in the decree when entered, when on the same day it appeared to have been improperly entered, it should have been amended or suspended, and steps taken to settle the rights of the parties, in order to sell the land at its best price and to prevent a sacrifice. Ogden v. Brown, 83 Va. 670, 3 S. E. Rep. 236.

3. DURING TERM.

Court Has Complete Control.—During the term of the court at which a decree is entered, it is completely under the control of the court, and may on motion, or at the suggestion of the court without motion, be modified or annulled. A decree procured by fraud may be so set aside during the term at which it was made, but not afterwards. Manion v. Fahy, 11 W. Va. 482.

Until the court adjourns for the term, no one, unless expressly authorized to do so, can act under a decree entered at that term, except at his peril. During the term all the proceedings are in the breast of the court and under its control, and liable to be stricken out, altered or amended during the term, without notice to the parties, who are conclusively presumed to know that a decree entered at an early day of the term of the court has been modified by the decree, entered at a later day. Clendenning v. Conrad, 91 Va. 410, 21 S. E. Rep. 818.

A judgment creditor filed his bill against a husband and wife, seeking to set aside, as fraudulent and void, a conveyance of lands from the husband to the wife. The cause was heard upon the bill taken for confessed, and a decree was entered annulling the conveyance and directing a sale of the land. During the same term the decree was set aside on motion of the defendant and they were allowed to answer the bill. A decree, during the term of the court at which it was entered, is completely under its control, and may be modified or annulled on motion, or at its own suggestion without motion, and it was not error in this case to allow the defendants to answer the bill after setting aside the decree. Kelty v. High, 29 W. Va. 381, 1 S. E. Rep. 561.

On Overruling a Demurrer—Motion under West Virginia Statute.—When a decree is entered under § 30 of ch. 125 of the Code of W. Va., upon the overruling of a demurrer to a bill, such a decree cannot be corrected by the same court on motion under § 5 of ch. 134 of the Code of W. Va., as that applies only when bills are taken for confessed. When a demurrer has been filed and overruled, no decree can be taken against him, as on a bill taken for confessed. Gates v. Cragg, 11 W. Va. 300.

4. AFTER TERM.

Petition for Rehearing.—After the close of the term of the court, in which a decree is rendered settling any of the principles of a cause, though such decree be interlocutory the court cannot set aside or disregard such decree, unless it is done upon a petition for a rehearing. Davis v. Demming, 12 W. Va. 246.

Bill of Review—Impeachment—Appeal.—A decree once passed, and the term ended, can only be disturbed by petition, bill of review, bill to impeach, or by appeal. Nelson v. Kownslar, 79 Va. 468.

Not by Motion under West Virginia Statute.—Where

a decree has been rendered in a cause upon a demurrer to the bill, an answer, a supplemental and amended answer, and replication thereto, upon depositions taken, and the report of a commissioner, which has been excepted to, the exception acted upon, and the principles of the cause have been adjudicated, such decree cannot be reversed upon motion under chapter 134 of the Code of W. Va. Rader v. Adamson, 37 W. Va. 582, 16 S. E. Rep. 808.

5. IMMATERIAL ERRORS.

In Mere Details.—Errors in mere details of a decree for an account are not a proper subject for appeal and correction in an appellate court. They may be corrected by exceptions to the commissioner's report. Humphrey v. Foster, 13 Gratt. 653.

Costs.—If the decree of an inferior court appealed from is correct in all respects except as to the costs, that is a question which will not be looked into by the appellate court and the decree reversed, but it will be corrected and affirmed. Jones v. Cunningham, 7 W. Va. 707.

No Replication.—A decree will not be reversed for want of a replication where the defendant has taken depositions as if there had been a replication. Bierne v. Ray, 37 W. Va. 571, 16 S. E. Rep. 804; Moore v. Wheeler, 10 W. Va. 35.

6. JUDICIAL ERRORS.

In Amount—Result of Calculation by a Party—Original Bill.—When the error complained of is the insertion of a particular amount in a consent decree as the result of a calculation by one of the parties upon a basis, which other parties regard as not in accord with the understanding of the parties, such error is not a clerical error, but a mistake of parties, and, if it be an error, it can be corrected only by original bill. Morris v. Peyton, 29 W. Va. 201, 11 S. E. Rep. 954.

Deed Void Only as to Creditors Declared Void in Toto.—If the decree, in a suit brought to set aside a deed as tending to hinder, delay and defraud creditors, sets aside the conveyance as void *in toto*, when it is void only as to creditors, whose debts were contracted before the time of making the conveyance, it constitutes an error, which is not sufficient to reverse the decree, but which may be corrected, and affirmed as corrected. Linsey v. McGannon, 9 W. Va. 154.

7. CLERICAL ERRORS.

Amount Too Large—Release of Excess under Statute—By Motion.—When by a clerical error a party to a cause has obtained a verdict larger than he is entitled to, he may release the excess in the same court or at any future term by a writing filed in the cause, the release being for the benefit of the adverse party. This is expressly provided by Code of W. Va. ch. 134, § 5. Shipman v. Bailey, 20 W. Va. 140. See Va. statute to same effect, § 3451, Code of 1887, as amended by Acts 1893-4, p. 376.

Under § 5, ch. 177 of Code of Va. 1873, the court in which a decree was entered may on motion, after notice to opposite party or his agent, correct any clerical error by amendment when there is something in the record by which to amend. See § 3451 of Code of 1887, as amended by Acts 1893-4, p. 376. See § 5, ch. 134, Code of W. Va. 1899, to same effect.

By § 5, ch. 134 of Code of W. Va., clerical mistakes in decrees may be corrected on motion at a subsequent term. Manion v. Fahy, 11 W. Va. 482.

An erroneous entry of a decree may be rectified upon motion at a succeeding term; and any mistake committed by the officers of the court or gentlemen of the bar may be likewise corrected. Marr v. Miller, 1 H. & M. 204.

Includes Errors of County Clerk—Excludes Conclusion of Court.—Sec. 3451 of the Code of Virginia providing for the correction of errors in a decree on motion, was held in Shipman v. Fletcher, 91 Va. 473, 22 S. E. Rep. 458, to cover errors of the clerk, and not errors in the reasoning and conclusion of the court, making the judge an appellate tribunal over himself. The purpose of the statute was to provide a prompt and inexpensive remedy for the correction of errors by the court that made them.

Mistake in Name.—In a decree, on account of a clerical error, the name "I. K. Menefee" is inserted in the place of "I. K. Menefee & Co." This is no ground for reversal, and will be corrected in the appellate court. Henley v. Menefee, 10 W. Va. 771.

Misrecital of Sum.—A mistake or misrecital of a sum in a decree will be corrected on motion after notice, under § 5, ch. 134, Code 1891. Shumate v. Crockett, 43 W. Va. 491, 27 S. E. Rep. 240.

8. MISTAKE OR SURPRISE.

By Petition or Original Bill.—A petition was filed to open an original decree which had been rendered without an appearance by the petitioner, on the grounds of alleged accident and surprise. Such a proceeding may be either by petition, or by original bill. In either form it is an original proceeding and may be commenced without the previous leave of the court. Hill v. Bowyer, 18 Gratt. 364.

Original bill is the proper remedy in a decree which has been obtained by surprise or mistake. Anderson v. Woodford, 8 Leigh 316.

9. ENTRY IN VACATION.

By Consent of Parties—West Virginia Rule.—A decree adjudicating adverse claims or rights, entered by the judge of a circuit court in vacation, by consent of parties previously given in court and entered on record, is erroneous. Gilmer v. Baker, 24 W. Va. 72; Monroe v. Bartlett, 6 W. Va. 441; Johnson v. Young, 11 W. Va. 673; Rollins v. Fisher, 17 W. Va. 578.

Same—Virginia Rule.—A decree which confirms a report of liens disposes of the cause on the merits, and cannot be entered in vacation except by consent of the parties as provided in § 2437 of the Va. Code of 1887. Harris v. Jones, 96 Va. 658, 32 S. E. Rep. 455.

By Judge without Consent Decree.—Where no order that by consent of parties a cause may be decided in vacation was entered, the decree of a judge in vacation is unauthorized and void. Johnson v. Young, 11 W. Va. 673.

By Authority of Statute.—A court has no power to enter a decree in vacation, unless authorized to do so by statute. Kinports v. Rawson, 29 W. Va. 487, 2 S. E. Rep. 85.

It was held in Tyson v. Glaize, 23 Gratt. 799, that the circuit court has no authority to make a decree in a cause in vacation, except in those cases which are authorized by statute, and that the consent of parties cannot give jurisdiction. This case was followed by Chase v. Miller, 88 Va. 795, 14 S. E. Rep. 545. This rule has been abrogated by statutory provisions. See § 3427, Va. Code 1887, as amended by Acts 1895-96, p. 177, and Acts 1897-98, p. 754.

IX. CONSTRUCTION AND OPERATION.

1. CONSTRUCTION.

In Executing Consent Decree.—The court in its decrees carrying into execution a consent decree must necessarily construe such consent decree. But it should not put a construction upon any clause therein until it is called upon to enter such a decree

as renders it necessary to construe such a clause. Morris v. Peyton, 29 W. Va. 201, 11 S. E. Rep. 954.

Obedience Refused to Uncertain Decree—No Attachment Awarded.—An attachment ought not to be awarded against a party for refusing obedience to a decree, which as yet remains general and uncertain, and the extent of which, as it relates to him, he cannot ascertain without applying to the court for a further decree. Birchett v. Bolling, 5 Munf. 442.

For Specific Performance of Contract of Sale—Title.—A decree in chancery, which declares the court's opinion that an agreement for the sale of a tract of land should be specifically performed by both the parties, and which directs the vendee to execute a mortgage of the same land to secure the purchase money, is to be understood, as requiring the vendor, in the first place, to make a title to him. Mayo v. Purcell, 3 Munf. 243.

Obtained by Confederacy and Collusion—Held Inoperative.—Where a suit was prosecuted, and the decree obtained under the circumstances of suggestion of falsehood and suppression of truth, of imposition practiced on the court in which it was rendered, and of confederacy and collusion, the decree may, and must, if necessary, for the protection of those interested, be held to be wholly inoperative as to them. Young v. McClung, 9 Gratt. 336.

Not by Implication.—Decrees are not to be construed as adjudging by mere implication, and a decree will not be construed to so adjudge that a trust deed was fraudulent, or had been satisfied, when no decree expressly adjudges this, and if it did so, it would be in direct opposition to express evidence to the contrary. Fisher v. Dickenson, 84 Va. 318, 4 S. E. Rep. 737.

No Direction of Warranty—Special Warranty.—Where a decree for a deed does not direct specially whether a general or special warranty deed should be made, the defendants can only be required to make a deed with special warranty. Boggess v. Robinson, 5 W. Va. 402.

Literal Interpretation—Opposed to Principles.—When the *principles* of a decree seem to be opposed to its *letter*, the literal interpretation ought not to be relied on as a binding precedent. Lewis v. Thornton, 6 Munf. 87.

Recitals—That Cause Was Regularly Matured.—It is the better practice for a decree to show on its face, that the cause was regularly matured for hearing, but it is not error to enter a decree in a cause which does not show this, if the cause was in fact matured for hearing. Riggs v. Lockwood, 12 W. Va. 133.

No Recital of Overruling Demurrer.—A decree which fails to mention the overruling of a demurrer to a cross bill, is not erroneous, if it in effect disposes of the demurrer, though it does not do so in express words. Smith v. Profitt, 82 Va. 832, 1 S. E. Rep. 67.

Depositions Not Recited Cannot Be Read.—Where the decree of the lower court expressly says that the cause was heard "upon the decrees heretofore rendered and bill and exhibits therewith filed, and the answer of the defendant, and the general replication thereto," and there was also appended to the record several depositions, designed to sustain the allegations of the answer, but the decree shows it was not heard on these depositions, they cannot be read or considered in an appellate court. Camden v. Haymond, 9 W. Va. 680.

If it be stated in the transcript of a decree in chancery that "the cause came on to be heard on the bill, answer and exhibits," such hearing must be understood to have been in exclusion of the depositions contained in the record; no proof appearing of notice of the time and place of taking those depositions. Shumate v. Dunbar, 6 Munf. 430.

2. OPERATION.

a. AS A LIEN.

(1) When It Begins.

Entered during Term Relates to First Day.—The lien of a decree, entered during a term of a court, becomes binding on the real estate of the debtor from the first day of the term. Hockman v. Hockman, 93 Va. 455, 25 S. E. Rep. 534. See § 3557 of Va. Code; ch. 139, § 5 of W. Va. Code.

Cause Must Be Ready for Trial on First Day.—Though a decree relate to the first day of a term, yet if the case was not ready for hearing or trial, and therefore no judgment or decree could have been given on such first day, it does not relate to the first day, but has the date of its actual entry of record. Dunn v. Renick, 40 W. Va. 349, 22 S. E. Rep. 66.

(2) What It Binds.

For Payment of Money—Real Estate.—In a suit to subject land to the payment of debts, the commissioner of sale was directed, after his report of sale had been confirmed, to pay out of the funds in his hands the debts of the creditors named in the decree. He failed to do this, became insolvent and then transferred his land to secure one of his creditors. The first and second sections of ch. 18 of the Virginia Code 1873, provided that a decree requiring the payment of money shall have the effect of a judgment for so much money. The sixth section makes such judgment a lien on the real estate of the person who is directed to make the payment of said money. Under the operation of these provisions the above decree constitutes a valid lien upon the lands of the commissioner of sale. Lee v. Swepson, 76 Va. 173.

In Foreign Attachment Lien on Land.—Where a personal decree is entered against a defendant in a suit in the nature of a foreign attachment, this decree is a lien on the debtor's land, and the creditor may come into equity to subject the land, although the decree has not been revived against the administrator of the debtor and no execution has ever been issued upon it. Burbridge v. Higgins, 6 Gratt. 119.

Against Court Receiver—Lien on Land.—Under §§ 1 and 2 of ch. 139 of the Code of West Virginia, a decree against a receiver of the court in favor of a party to the cause, has the effect of a judgment and is a lien on his lands, and the party entitled to the benefit of the decree is a judgment creditor. Rickard v. Schley, 27 W. Va. 617.

Attorney at Law Has Lien on Judgment or Decree Obtained.—An attorney at law has a lien on a judgment or decree obtained by him for his client for services and disbursements in the case, or in a case so connected with it as to form the basis on which such judgment is rendered, or essential to realizing such judgment or decree, but not for services in other cases. Fowler v. Lewis, 36 W. Va. 112, 14 S. E. Rep. 447.

b. OF ENTRY.

On Sunday Void.—A decree rendered in vacation, and entered by the clerk in the chancery order book on Sunday is void because it is improperly entered. Lee v. Willis (Va.), 37 S. E. Rep. 826.

Vacation Decree—Effective from Entry in Order Book.—A vacation decree only becomes effective from the time it is entered in the chancery order book of the clerk's office of the court in which the case is pend-

ing. See § 3427, Va. Code, as amended by Acts 1897-98, p. 754; Lee v. Willis (Va.), 37 S. E. Rep. 826.

c. AS EVIDENCE.

Extracts of Decrees—Injunction Cause.—On the trial of an action of debt on an injunction bond, extracts from the record of the injunction cause of the decrees in the cause, are competent and sufficient evidence, without producing the whole record. White v. Clay, 7 Leigh 68.

Decree in Suit by Committee against Sureties of Former Committee.—A decree in a suit in equity by a committee of a lunatic against the sureties of a former committee, is evidence in a suit by the sureties who have satisfied the decree, against a purchaser from the first committee of bonds belonging to the estate of the lunatic, to show that they have been required to answer for the default of the first committee, and in such collateral proceeding the propriety of the decree cannot be inquired into. Edmunds v. Venable, 1 P. & H. 121.

Decree in Suit between Other Parties.—In tracing a title to land in controversy, a decree in a suit between other parties is not evidence against a person claiming under neither of them, that one of those parties was, in fact, as therein described, the eldest son and heir of a former proprietor, it being incumbent upon the party wishing to avail himself of such fact to prove it by evidence *aliunde*, but such decree may be received as a link in the chain of evidence to prove the fact that it was rendered. Lovell v. Arnold, 2 Munf. 167.

Of Fact That it Was Rendered and Its Consequences.—A decree is always evidence of the fact that such decree was rendered and of the legal consequences of that fact, whoever were the parties to the suit in which it was rendered; and where a title is derived under a decree, it is necessary to establish its existence in order to show the legal validity of the deed made under its authority. The admissibility of the record for that purpose as a fact, introductory to a link in the chain of the title, and constituting a part of the muniments of the party's estate, is a matter of familiar recognition and constant practice. Baylor v. Dejarnette, 13 Gratt. 152.

Decree of Partition—Link in Title.—Where a decree of partition is a necessary link in a chain of title, and the decree and the report of the commissioners appointed to divide the lands on which the decree is based, it being sufficiently descriptive of the land referred to in the decree, they are competent evidence without the production of the whole record. Wynn v. Harman, 5 Gratt. 157.

Decree Directing Conveyance—Link in Title.—A decree, which directs a conveyance of land by an officer of the court, being a necessary chain of title, is not of itself competent evidence to show the authority of the officer to convey lands embraced in his deed, unless it designates the land directed to be conveyed. But the whole record, or so much of it as will show what land was directed to be conveyed, must be produced with the decree. Masters v. Varner, 5 Gratt. 168, 50 Am. Dec. 114.

Against Person Not a Party.—A decree is not conclusive against persons who are not parties to the suit, and even as against a party a decree is held to be conclusive only upon what was brought directly in issue and not upon a matter incidentally brought into the controversy. As to those who are not parties, a decree is always evidence to prove that it was rendered, yet it is not a medium of proof of ulterior facts upon which it was founded or which may be recited in the record. Early v. Garland, 13 Gratt. 1.

d. OF LIMITATION.

To Appeal from Interlocutory Decree.—Although an interlocutory decree is rendered more than two years before a petition for appeal was presented, yet this petition was not barred by the statute of limitations as prescribed by the Va. Code of 1873, ch. 178, § 3. Hendricks v. Fields, 26 Gratt. 447.

Appeal Bond Not Given in Five Years.—Upon an appeal from a final judgment, decree, or order, if the appeal bond is not given within five years from the date of said judgment, decree or order, the appeal will be dismissed. Yarborough v. Deshazo, 7 Gratt. 374.

From Final Decree—Two Years.—No error in a final or appealable decree will be considered upon an appeal not taken within two years from its date. Shumate v. Crockett, 43 W. Va. 491, 27 S. E. Rep. 240.

Appeals Do Not Review Decrees Entered over Two Years before.—An appeal taken in time from a decree will bring up for review every former order or decree not itself appealable, no matter when entered, and every appealable decree entered not more than two years before the appeal; but it will not bring up for review any appealable decree or order entered more than two years before the appeal. Nor can any error in the decree or order appealed from in time be reviewed, if that error be based solely on an appealable decree or order entered more than two years before the appeal; and furthermore, of course, no error in an order or decree back of such appealable decree, dating over two years back, can be reviewed, no matter what the character of the order of decree in which it was committed. Stout v. Philippi Manfg. & Mercantile Co., 41 W. Va. 339, 23 S. E. Rep. 571.

Suit for Conveyance Thirty Years after Decree Entered in Another State.—A decree of a court of another state for the conveyance of land in Virginia, will not be enforced in equity against *bona fide* purchasers without notice, or even against the heirs of a party against whom the decree was rendered, after the lapse of thirty years from the date of the decree before the institution of the suit. Massie v. Greenhow, 2 P. & H. 255.

Suit in One State of No Effect on Statute of Limitations in Another State.—A decree in a suit brought in Virginia against heirs to sell the lands descended to them and pay the debts of the ancestor and satisfy the widow's dower, will not save such debts from the statute of limitations for the purposes of a suit prosecuted against lands in West Virginia. Hull v. Hull, 35 W. Va, 155, 13 S. E. Rep. 49.

X. COLLATERAL ATTACK.

General Jurisdiction—Collateral Impeachment.—A judgment or decree of a court of competent jurisdiction over the subject-matter thereof is conclusive against the parties thereto until it is set aside or reversed by some proceeding in the case, in the same, or an appellate court. It cannot be set aside or annulled in any collateral proceeding. Ballard v. Thomas, 19 Gratt. 14. See, to the same effect, Fisher v. Bassett, 9 Leigh 119; Devaughn v. Devaughn, 19 Gratt. 556; Durrett v. Davis, 24 Gratt. 302; Hill v. Woodward, 78 Va. 765, approving Wimbish v. Breeden, 77 Va. 324, and *note* appended to Pulaski County v. Stuart, 28 Gratt. 872, collecting authorities on this point.

Where a petition in a chancery suit refers to a decree entered therein, it must be taken as estab-

lished by the petition itself that such a decree was entered, and it is very clear that that decree cannot be collaterally assailed in this proceeding. Perkins v. Lane, 82 Va. 59.

Voidable Proceedings of a Court Cannot Be Collaterally Attacked.—The general and well-settled rule of law is, that when erroneous proceedings of a court are collaterally drawn in question and it appears that the subject-matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities of any court are to be corrected by some direct proceeding either before the same court to set them aside, or in an appellate court. This principle is well settled by MR. JUSTICE MILLER in Cornett v. Williams, 20 Wall. (U. S.) 249, as follows: "The settled rule of law is, that jurisdiction having attached in the original cause, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the right of the parties unless impeached for fraud." Pennybacker v. Switzer, 75 Va. 671.

When Adequate Remedy at Law—No Collateral Attack.—A decree which is entered in a chancery suit, the bill in which alleges no sufficient grounds for its jurisdiction, and the complainant has a complete remedy at law, is not void and liable to collateral attack. The decree is merely erroneous, but is conclusive until reversed or vacated. And the appellate court cannot determine whether the case was one of equitable jurisdiction or not without enquiring into the facts, and where enquiry is necessary the decree, however erroneous, is not void. Lemmon v. Herbert, 92 Va. 653, 24 S. E. Rep. 249.

Erroneous Decree Cannot Be Examined in a Court of Law.—If a decree is erroneous and conclusive as between two parties to a suit, these subjects are matters which cannot be examined in a collateral proceeding in a court of law. To undertake to do this would be to usurp the province of a court of chancery. All these are matters purely of equitable cognizance, with which a court of law had no concern. As long as such a decree remains unreversed, it has the force and effect of an adjudication upon the entire estate and is conclusive in a proceeding at law. Baylor v. Dejarnette, 13 Gratt. 152.

Death of Defendant Not Suggested—Final Decree Cannot Be Attached Collaterally.—Where the death of a defendant has not been suggested on the record, the validity of a final decree entered in the cause cannot be impeached by evidence of his death before the decree, given in another collateral action. This error in giving a decree after the death of the defendant should be shown in some proceeding by the proper parties to set aside said decree for that cause. Evans v. Spurgin, 6 Gratt. 107.

Erroneous Execution Authorized—No Collateral Attack.—If a decree in chancery erroneously authorizes execution to issue on the foot of the decree, this is error, which may be corrected by an appeal on other direct proceeding, but the decree cannot be attacked in a collateral proceeding. Bank v. Hays, 37 W. Va. 475, 16 S. E. Rep. 561.

Voidable Decree—Purchase by Fiduciary—No Collateral Attack.—At a sale of the land of two idiots, it was purchased by their committee. The report of the commissioner, which shows this, was confirmed and he was directed to convey the land to the committee. Though the decree confirming the sale to the committee was erroneous, as he is forbidden by statute to purchase or own the land during the incompetency of the idiots, yet the decree is not void but voidable and cannot be impeached collaterally and until it is reversed, must be held to be valid, and as passing a good title. Cline v. Catron, 22 Gratt. 378. See Spilman v. Johnson, 27 Gratt. 41; Lancaster v. Wilson, 27 Gratt. 630.

Jurisdiction Exceeded—Collateral Attack.—When a court exceeds its jurisdiction its decree is void and may be collaterally attacked. Seamster v. Blackstock, 83 Va. 232, 2 S. E. Rep. 36.

XI. ENFORCEMENT.

Equity Enforces Its Own Decrees—Manner.—It is well established that a court of equity always has jurisdiction to carry into effect its own decrees, and is not *functus officio* until the decree is executed by the delivery of possession. And where a person, not a party to the suit, is in possession of the property, and refuses to give it up, the usual course of the court is to make a rule upon such person, and unless he shows a paramount right in himself, to order the property to be delivered up, and to enforce such order by attachment, if necessary. Trimble v. Patton, 5 W. Va. 432. The enforcement of decrees may be accomplished in the same manner as judgments. See Va. Code 1887, ch. 174 *et seq.*; W. Va. Code 1899, ch. 139 *et seq.*

Courts of equity will enforce their decrees by appointing a commissioner to convey a legal title outstanding in parties before the court to the party having the equitable title, and entitled to the legal title. Goodwin v. McCluer, 3 Gratt. 291.

A court of equity has always jurisdiction to carry its own decrees into effect. Newman v. Chapman, 2 Rand. 93, 14 Am. Dec. 776.

When Clerk Cannot Issue Execution.—In a suit to subject land for the payment of the purchase money, there is a decree against the defendant for a sum certain, and if he shall fail to pay it within thirty days, a commissioner is directed to sell the land upon terms prescribed in the decree. Though circumstances may exist which will warrant the court, or a judge in vacation, to allow process of execution on such an interlocutory decree, these circumstances must be shown, and if not shown, it is improper to allow it. The clerk has no authority to issue an execution on this decree, without an order of the court, or the judge in vacation. Shackelford v. Apperson, 6 Gratt. 451.

XII. OF COURT OF APPEALS.

See monographic *note* on "Appeals."

1. IN GENERAL.

New Party after Cause Remanded.—After a decree by an appellate court remands a cause to the lower court, new parties may be admitted. Anderson v. Anderson, 1 H. & M. 11.

Correction of Decree Injurious to Appellee.—On an appeal from a decree in chancery, an error to the injury of the appellee ought to be corrected, although he did not appeal. Day v. Murdoce, 1 Munf. 460.

Where Judges Are Equally Divided.—When a decree in chancery is affirmed, the court of appeals being equally divided in opinion, it should be "without prejudice to the legal remedies of the parties." Martin v. Welch, 4 Munf. 60.

2. JURISDICTION.—See monographic *note* on "Jurisdiction."

Pecuniary Decree for Less Than $100.—Where a decree is merely pecuniary for not over one hundred dollars, and is reversed on bill of review, or a petition for rehearing, an appellate court has no jurisdiction of an appeal from the decree of reversal. Deaton v. Mitchell, 45 W. Va. 670, 31 S. E. Rep. 968.

Objection to Commissioner's Report Must Be Founded on Exceptions Taken in Lower Court.—It has been uniformly held by the Virginia courts that objections to a decree for errors in the report of a commissioner, not appearing on the face of it, cannot avail in the appellate court unless founded on exceptions taken to the report in the court below. Simmons v. Simmons, 33 Gratt 451, and *note* collecting cases; Liberty Sav. Bank v. Campbell, 75 Va. 534; Peters v. Neville, 26 Gratt. 549; Coffman v. Sangston, 21 Gratt. 263; Cole v. Cole, 28 Gratt. 365; Wimbish v. Rawlins, 76 Va. 48; Ashby v. Bell, 80 Va. 811; Nickels v. Kane, 82 Va. 309; McComb v. Donald, 82 Va. 903, 5 S. E. Rep. 558; Cralle v. Cralle, 84 Va. 198, 6 S. E. Rep. 12; Morrison v. Householder, 79 Va. 627; Shipman v. Fletcher, 91 Va. 483, 22 S. E. Rep. 458; 2 Robinson's Old Pr. 383.

Appeal Improvidently Awarded.—Where a court of appeals is of opinion that an interlocutory decree, which has been appealed from, should have been proceeded in further before the appeal was allowed, it will dismiss the same as improvidently awarded. Hughes v. Johnston, 12 Gratt. 479.

Production of New Matter Unknown at Time of Decree.—Where a decree has been affirmed by an appellate court, a bill of review ought not to be granted to reverse it for any errors upon the face of the proceedings. But if new matter be produced, which was unknown to the party applying at the time of the decree, the court of appeals may, and if the evidence warrants it, ought to grant such bill of review. McCall v. Graham, 1 H. & M. 13.

3. WHEN IT WILL AFFIRM.

No Appeal unless Party Is Prejudiced.—It is a rule of practice that although a decree may be erroneous as to the party appealing, it will not be reversed if he is not prejudiced thereby, but if it is reversed for error assigned by the appellees, they must pay their costs against the appellant, because they substantially prevailed in the appeal. Little v. Bowen, 76 Va. 724. See also, James v. Gibbs, 1 P. & H. 277; Handly v. Snodgrass, 9 Leigh 484; Kuhn v. Mack, 4 W. Va. 186; Handy v. Scott, 26 W. Va. 710, citing Clark v. Johnston, 15 W. Va. 804; McCandless v. Warner, 26 W. Va. 754.

Pending an appeal from a decree against the surviving partners and the executor of a deceased partner, one of the survivors died. The death not being suggested, the decree was reversed and the plaintiff's bill was dismissed as to the surviving partners. A motion to set aside the decree because of the death of one of the surviving partners before the hearing was offered and overruled because there was still a surviving partner before the court, who represented the whole interest and because the appellee cannot complain of a decree in favor of the deceased party. Cunningham v. Smithson, 12 Leigh 33.

A party defendant has no right by bill of review or appeal to contest a decree, dismissing a bill, for in such case the decision is in his favor. If he desires any relief he should have filed a cross bill. Hopkins v. Baker, 2 P. & H. 110.

Conflicting and Contradictory Evidence.—If the evidence, on which the decree of the lower court is based, is conflicting and contradictory to such an extent that reasonable men may differ as to the true preponderance thereof, the appellate court will not reverse the finding of the circuit court. To secure such reversal the evidence must plainly preponderate against the decree. Camden v. Dewing (W. Va.), 34 S. E. Rep. 911; Yoke v. Shay (W. Va.), 34 S. E. Rep. 748; McIntosh v. Augusta Oil Co. (W. Va.), 35 S. E. Rep. 860; Fitzgerald v. Phelps, etc., Co., 42 W. Va. 570, 26 S. E. Rep. 315; Chrislip v. Teter, 43 W. Va. 356, 27 S. E. Rep. 288, affirming Smith v. Yoke, 27 W. Va. 639.

Where a record is confused and the proof is vague, the decree of the lower court will not be reversed by the court of appeals, unless it is clearly wrong. Hickman v. Painter, 11 W. Va. 386.

Incompetent Testimony Not Disposed of.—Where a decree is plainly right, the failure of the circuit court to dispose of exceptions to incompetent testimony is not sufficient to cause the reversal thereof. Woods v. Stephenson, 43 W. Va. 149, 27 S. E. Rep. 309.

Correct Decree on Incorrect Reasons.—When the lower court correctly decrees in a cause, but assigns incorrect reasons for it, if it is a proper decree for other reasons, it will be affirmed. Boyd v. Cleghorn, 94 Va. 780, 27 S. E. Rep. 574; Vance Shoe Co. v. Haught, 41 W. Va. 275, 23 S. E. Rep. 553.

Errors of Form.—Upon an appeal from an interlocutory decree, the principles of the decree, and not the mere informalities in the form thereof, are the proper subjects of the consideration of the appellate court; the decree will not be reversed for such errors of form, but will be affirmed without prejudice to the right of the appellant to move the lower court for the modification of the decree in these respects. Woodson v. Perkins, 5 Gratt. 345.

Erroneous as to Costs—Palpable Error.—It is a rule of practice in the appellate courts, that when the decree of the lower court is found to be right upon the merits, not to interfere with the decision with respect to costs, unless it is a case of palpable error. Wimbish v. Blanks, 76 Va. 365; Boggess v. Robinson, 5 W. Va. 402.

Decree of Dismissal Where Bill Radically Defective.—Where a bill in chancery is defective, not only for want of proper parties, but in other respects, so that no decree for the plaintiff can be entered, a decree which dismissed the bill altogether, ought to be affirmed; but where it appears probable that something might be recovered under a new bill properly drawn, such decree ought to be affirmed *without prejudice* to any other suit the plaintiff might bring. Stott v. Baskerville, 6 Munf. 20.

Warranty in Deed in Absence of Directions.—Where a decree directs heirs to make a deed under a contract of their ancestors, but does not state whether it shall be made with special or general warranty, it will not be reversed, as they could only be required to give special warranty, and it cannot be construed to require general warranty. Boggess v. Robinson, 5 W. Va. 402.

Proof of Order of Publication by Certificate of Printer—No Exception below—No Ground for Objection.—In a suit in chancery against absent defendants, the only proof of the order of publication was a certificate of the printer, which was not verified by oath. No exception was taken to this, and the court declared that the plaintiff had proceeded regularly and gave him a decree against the absent defendants. Upon an appeal from this decree neither party can object to the want of proof of the publication. Cunningham v. Smithson, 12 Leigh 33.

Irregularities in Revival Cured by Recital.—An appellant has no right to complain that there was an irregularity in the revival of a suit, if it sufficiently appears from a recital in the decree that the cause had been duly revived in the name of the heirs of the appellee, who were parties to and defending the appeal. Mustard v. Wohlford, 15 Gratt. 329.

No Day Given an Infant to Show Cause.—It is not a sufficient ground for reversing an interlocutory decree, that no day was given to an infant defendant to show cause against it, after he should become of age, because such omission may be corrected in the final decree. Pickett v. Chilton, 5 Munf. 467.

4. WHEN IT WILL AMEND.

Directing Conveyance with No Provision for Payment of Purchase Money.—An infant sells land to one person, and on coming of age sells to another person avoiding the first sale. The second purchaser sues for a recovery, and the decree directs a conveyance by the first purchaser, but does not provide for the payment of the purchase money due from the plaintiff. An appellate court will amend the decree and affirm it. Mustard v. Wohlford, 15 Gratt. 329.

Modification of Decree Appealed from by Consent.—After an appeal has been allowed in a cause, a consent decree is made modifying in one respect the decree appealed from. The appellate court may amend the decree appealed from in that respect and affirm it. Peters v. Neville, 26 Gratt. 549.

Omission to Direct Dismissal.—The appellate court will affirm and amend a decree which has been entered in a superior court of chancery, reversing that of an inferior court, but omits to direct that the bill be dismissed. Heffner v. Miller, 2 Munf. 43.

Decree Not Perpetual in Toto.—Where a decree by which an injunction is made perpetual in part, is considered erroneous, to the injury of the appellee in not having made it perpetual *in toto*, the court of appeals will affirm so much as allows him his costs in the court of chancery; and reversing the residue, and making such decree as that court should have made, will also allow him his costs in this court. Defarges v. Lipscomb, 2 Munf. 451.

Its Own Decree after Expiration of Term.—It was held in Southern Ry. Co. v. Glenn, 7 Va. Law Reg. 532, that it was not within the power of the supreme court of appeals to amend its own decree for a mistake due to clerical error, where the application for relief was filed after the expiration of the term at which the decree was rendered, or where the period within which a petition for a rehearing is proper has expired.

5. WHEN IT WILL REVERSE.

A Cause Not Heard in Open Court.—Each party to a suit is entitled to be heard before the court upon the questions involved, and to have its judgments after such hearing, and when a cause was not heard in open court, and a final decree was entered, the appellate court should reverse the decree, and remand it to the lower court for trial. An appellate court must go by the record, and as this is incomplete, great injustice might be done, if it were to pass upon the merits of the case, before the cause was first heard and acted upon below. Monroe v. Bartlett, 6 W. Va. 441.

No Final Decree Rendered by Circuit Judge in Vacation.—Under the principle laid down by the West Virginia court in Monroe v. Bartlett, 6 W. Va. 441, it is held fatal to a decree for it to be rendered in vacation by a judge of the circuit court, which purports to be final as to any matter embraced in it. On an appeal taken from such a decree the appellate court will not dismiss the appeal because the decree was rendered without sufficient authority by the judge, but will take jurisdiction of the case and decree only as to the reversal, and will remand the cause to the lower court there to be proceeded with and determined according to the rules and usages governing courts of equity in this state, because it is not proper for the appellate court to determine and decree upon the merits of a case before it has been heard and acted upon by the court below. Rollins v. Fisher, 17 W. Va. 578; Johnson v. Young, 11 W. Va. 673. See also, Gilmer v. Baker, 24 W. Va. 72, and Kinports v. Rawson, 29 W. Va. 487, 2 S. E. Rep. 85.

Against Administrator—On Admission That Sufficient Debts Are Due.—It is an error to decree that an administrator *d. b. n.* shall pay a debt of his testator out of the assets in his hands, upon an admission in his answer that there are debts *due* the estate more than sufficient to pay all the debts. Such decree will be reversed on appeal. Kent v. Cloyd, 30 Gratt. 555.

Same—Without Refunding Bond by Legatee.—It is error, although the bill be taken for confessed, to decree against an administrator *d. b. n.*, that he shall pay a legacy, without requiring the legatee to give bond and security for refunding his "due proportion of any debts, which may hereafter appear against the estate of the testator, and the costs attending the recovery thereof," and on appeal it will be reversed. Rootes v. Webb, 4 Munf. 77; McRae v. Brooks, 6 Munf. 157; Clay v. Williams, 2 Munf. 105; Stovall v. Woodson, 2 Munf. 303; Sheppard v. Starke, 3 Munf. 29.

Reversal of Joint Decree on Appeal by One—West Virginia Statute.—At common law, a judgment erroneous as to one is erroneous as to both and must be reversed as to all; but in equity, under the West Virginia statute (§ 26, ch. 135, Code), if only one appeal from a joint decree, and the rights of parties stand on a different and separable ground, there may be a reversal only in part. Vance Shoe Co. v. Haught, 41 W. Va. 275, 23 S. E. Rep. 553.

An appellate court, when it reverses a joint decree against defendants, one of whom was not before the court and the other had, however, appeared and answered, will reverse it as to both. Lyman v. Thompson, 11 W. Va. 427.

Appeal by One of Two Defendants.—A suit in chancery was brought against A and B in which there was a decree entered against A for debt, and against B declaring a conveyance by A to him fraudulent as against the plaintiffs. B appealed from the decree so far as it affected him, and it was reversed to that extent, but it was held that it could not be reversed against A who had not appealed, though the court of chancery has no jurisdiction to make a decree against him. Tate v. Liggat, 2 Leigh 84.

In Favor of Informal Party—Estoppel.—Where a decree is rendered against the plaintiff in favor of a defendant, who is informally introduced in the case, this decree will be reversed on appeal, unless it appears that the plaintiff was present at the time, and made no objection; and that the cause was fully and fairly heard on its merits. McMullen v. Eagan, 21 W. Va. 233.

Cause Decided without Replication Which Is in Record.—Where a cause was decided upon the bill and answer, and the record shows that there was a replication, and the case made by the bill and answer was different from that made when the replication was taken into consideration, the appellate court will reverse the decree entered upon the bill and answer. No decree will be entered upon the bill, answer and general replication thereto as such had never been before the lower court and had never been acted upon for it. The cause will be remanded to the lower court to be proceeded upon, as

if there had been no decree in the cause. Armstrong v. Town of Grafton, 23 W. Va. 50.

Interest on Aggregate of Principal and Interest Prior to Decree.—It is error to decree interest on the aggregate of principal and interest from a time anterior to the decree, yet if the difference is less than $100 and that is the only error appearing by the record, the decree will be reversed and a proper one will be entered. Lamb v. Cecil, 25 W. Va. 288.

Allegata Must Correspond with Probata.—The *allegata* of a bill must correspond with the *probata*, and a decree will be reversed which is founded on allegations other than those which are stated in the bill. In this case it cannot be amended so as to justify any decree thereon, but the bill must be dismissed. Bier v. Smith, 25 W. Va. 830.

No Order of Publication against Absent Defendants.—Before a decree will be rendered in a cause, all parties materially interested therein must be before the court, either in person, or they must have been proceeded against by order of publication, if absent defendants, and if as to the absent defendants there has been no order of publication executed, and they were material parties, the decree will be reversed. Scott v. Ludington, 14 W. Va. 387; Morris v. Peyton, 10 W. Va. 1.

Proper Parties Absent.—It is immaterial in what manner it is brought to the attention of the court that the decree complained of was rendered in the absence of proper parties; the cause will be reversed and remanded, in order that proper parties may be made. Gallatin, etc., Co. v. Davis, 44 W. Va. 109, 28 S. E. Rep. 747; Graves v. Hedrick, 44 W. Va. 550, 29 S. E. Rep. 1013. Unless the objection was expressly relinquished in the lower court. Sheppard v. Starke, 3 Munf. 29.

Same—Essential Facts Omitted.—The court of appeals will reverse a decree which has been entered in favor of the plaintiff, where he had shown a right to recover against parties before the court, but had failed to state the facts necessary to justify a decree in his favor, or has omitted to make other necessary parties. In the lower court the bill should not be dismissed but the plaintiff should be allowed to amend his allegations and bring in the necessary parties. Welton v. Hutton, 9 W. Va. 339.

Same—Rights and Liabilities Not Ascertained.—The decree of a circuit court will be reversed when the proper parties were not before the court, and when the rights and liabilities of the parties were not properly ascertained and adjusted in the suit. Hoge v. Vintroux, 21 W. Va. 1.

6. ITS EFFECT.—See "Res Judicata," *supra*.

Decree of Court of Appeals Is Final.—The decree of the court of appeals upon a question decided by a lower court is final and irreversible, and upon a second appeal in the same cause, the question decided upon the first appeal cannot be reversed. This rule holds good whether the decree of the lower court be final or interlocutory, as all decrees of the appellate court are in their nature final. Campbell v. Campbell, 22 Gratt. 649; N. Y., etc., Co. v. Clemmitt, 77 Va. 366; Stuart v. Preston, 80 Va. 625; Alex. Savings Inst. v. McVeigh, 84 Va. 41, 3 S. E. Rep. 885; Krise v. Ryan, 90 Va. 711, 19 S. E. Rep. 783; Turner v. Staples, 86 Va. 300, 9 S. E. Rep. 1123; Henry v. Davis, 13 W. Va. 235; Mason v. Harper's Ferry, etc., Co., 20 W. Va. 223; Seabright v. Seabright, 33 W. Va. 152, 10 S. E. Rep. 265.

A question is not open to the consideration of the trial court when it has been passed upon by the court of appeals, at least upon the ground on which it is assailed. To that extent it is the law of the case, and is final and irreversible. Rosenbaum v. Seddon, 94 Va. 575, 27 S. E. Rep. 425, citing Holleran v. Meisel, 91 Va. 148, 21 S. E. Rep. 658; Norfolk, etc., R. Co. v. Mills & Fairfax, 91 Va. 625, 22 S. E. Rep. 556; Cahoon's Case, 21 Gratt. 822; Campbell v. Campbell, 22 Gratt. 649; Bank v. McVeigh, 29 Gratt. 554; New York, etc., Co. v. Clemmitt, 77 Va. 366; Effinger v. Kenney, 79 Va. 553; Findlay v. Trigg, 83 Va. 539, 3 S. E. Rep. 142; W., etc., R. Co. v. Cazenove, 83 Va. 744, 3 S. E. Rep. 433; Turner v. Staples, 86 Va. 300, 9 S. E. Rep. 1123.

A chancery court cannot correct on motion or by bill of review, any error apparent on the face of the proceedings, in a decree which has been affirmed by the court of appeals. Campbell v. Price, 3 Munf. 227.

A court of chancery cannot upon the same facts alter a decree of the court of appeals. Price v. Campbell, 5 Call 115. Nor change its terms. White v. Atkinson, 2 Call 376.

Overruling Exceptions by Appellate Court Is Conclusive.—Upon an appeal from a final decree made upon a report of a commissioner, to which there were various exceptions made, the appellate court overruled all the exceptions of the appellant to the report except one, and the decree was reversed and the cause remanded for the proper inquiries in regard to that exception. This decree is conclusive upon all the other questions. Deneufville v. Travis, 5 Gratt. 28.

When Dismissal as to One Is Dismissal as to All.—A and B were codefendants in a suit in chancery for a recovery of slaves and an account of their profits. B claimed the slaves under a mortgage to him by A. There was a decree for the slaves and profits against both defendants. B alone appealed from the decree and the court held that the plaintiffs had no right, considered the whole cause before it, and dismissed the bill as to A as well as to B. Dickenson v. Davis, 2 Leigh 401.

Where a suit for specific performance was brought against two joint owners of land under a joint contract made by them for its sale, a defence was set up by the answer of one, which was equally applicable to both, and as to the other, the bill was taken for confessed. When the decree was rendered against both parties, the one as to whom the bill was taken for confessed may appeal, and if the decree was erroneous it will be reversed as to both. Purcell v. McCleary, 10 Gratt. 246.

Of Equal Division of Opinion.—Where a decree of the lower court was affirmed in consequence of an equal division of opinion in the higher court, this is a decision which settles the principles of the cause involved in the decree of the lower court. Philips v. Williams, 5 Gratt. 259.

Of Reversal of a Subsequent Decree Based on Prior.—It is an inevitable consequence that when a subsequent decree is based solely upon a previous decree in the same cause, the reversal of the latter will necessarily result in the reversal of the former. Jones v. Gillespie, 32 W. Va. 343, 9 S. E. Rep. 235.

Of Reversal in Part and Affirmance in Part.—It is a familiar doctrine that where a decree is reversed in part and affirmed as to the residue, the reversal in part does not destroy the lien of so much of the decree as is unreversed or affirmed; and one prominent reason for this is, that equity looks to the substance, and not to the mere form. Knifong v. Hendricks, 2 Gratt. 212; Moss v. Moorman, 24 Gratt. 97; Shepherd v. Chapman, 83 Va. 215, 2 S. E. Rep. 273.

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July Term, 1854, Lewisburg.

1. **Injunctions—Against Execution—Jurisdiction.**—A defendant in an execution files a bill to enjoin the execution on the ground that a previous execution sued out on the same judgment had been levied by the sheriff on the property of another defendant in the execution, sufficient to discharge it. In such case the bill must be filed in the county in which the judgment was recovered; and the Circuit court of another county has no jurisdiction of the case.

2. **Same—Same—Same—When Objection Made.***—In such case it is not necessary that the objection to the jurisdiction should be made by demurrer or plea; but it may be taken at the hearing of the cause.

3. **Same—Same—Same—Case at Bar.**†—Where the debtor in an execution objects that a previous execution has been levied by the sheriff upon sufficient property to satisfy the judgment, and that he has improperly misapplied the proceeds of the sale of the property, or if he insists that payment has been made to the sheriff which has not been credited on the execution, if he has an opportunity to apply to the court of law from which the execution issued, for redress, he has no right to come into equity for relief.

This was a suit in equity by Alfred Beckley against W. Palmer, William Tyree and another. The bill was addressed to the judge of the Circuit court of Raleigh county. It alleged that the appellee Palmer had recovered a judgment for a large amount in the Circuit court of Fayette county, against the appellant and one Waite. That upon said judgment an execution issued and a forthcoming bond was given by the defendants, with a third person as surety: that said bond was forfeited, and execution was awarded thereon; and that after the issuing of the execution the whole amount of the debt had been paid to the sheriff into whose hands the same had been placed. That subsequently another execution had issued, and had been placed in the
626 hands of the sheriff of Raleigh *county, who was about to levy the same and make the money a second time. The bill therefore prayed an injunction to restrain Palmer and the sheriff from proceeding any further upon said execution or judgment. The injunction was allowed on the 27th of August 1852, and was perfected, and the bill filed in the Raleigh Circuit court. Palmer answered, putting in issue the material allegations of the bill; and upon his motion, on the 12th of April 1853, the injunction was dissolved. The appellant thereupon filed an amended bill, alleging that the sheriff, to whom the execution on the forthcoming bond had been delivered, had levied the same upon property sufficient to satisfy it, and that he had sold the same, and misappropriated the proceeds, and had falsely returned that they had been applied to other executions having priority. It also alleged that the sheriff had received a sum of three hundred and forty dollars from Waite, in the sale of a negro, for which credit should be given on the execution; and it prayed a reinstatement of the injunction. The complainant exhibited with his bill copies of the judgment and the various executions sued out upon it, directed to the sheriff of Fayette, upon the last of which a return was made that the property had been sold, and the proceeds applied to executions having priority. He also exhibited the execution sent to Raleigh county. The injunction was accordingly reinstated. Tyree the sheriff of Fayette, answered. He insisted that the return on the execution complained of was true, and that the property had been sold and the proceeds applied to other executions having priority to that in favor of Palmer, and which they were insufficient to satisfy. He denied any misappropriation of any part of the same. He denied that the price of the negro referred to was applicable to the execution of Palmer, and claimed that it was properly paid on older executions. He
627 also *alleged that Waite was largely indebted to him individually upon a settlement which had been made between them, in which he had received all credits to which he was entitled.

No evidence was filed on either side, and the cause was heard on the 19th of September 1853, when the court, expressing the opinion that the injunction had been improvidently reinstated, and that there was no sufficient equity disclosed by the original or the amended bill, dismissed the same with costs. And from this decree an appeal has been allowed.

***Equity Practice—Jurisdiction—When Objection May Be Made.**—For the proposition that, where the bill does not state a case proper for relief in equity, or if suit is brought in the wrong jurisdiction, the court will dismiss it at the hearing, though no objection has been taken to the jurisdiction by the defendant in his pleadings, the principal case is cited and approved in the following cases: Graveley v. Graveley, 84 Va. 151, 4 S. E. Rep. 218; Trout v. Trout, 86 Va. 299, 9 S. E. Rep. 1121; Green v. Massie, 21 Gratt. 362, and *note*; Jones v. Bradshaw, 16 Gratt. 361, and *note*. See the principal case cited in Muller v. Bayly, 21 Gratt. 530, 533, 534, and distinguished. See, in accord with principal case, Hudson v. Kline, 9 Gratt. 379; Pollard v. Patterson, 3 H. & M. 67; Salamone v. Keiley, 80 Va. 86.

†**Same—Same—Adequate Remedy at Law.**—For the proposition that equity will not take jurisdiction of a cause where there is a plain and adequate remedy at law the principal case is cited and approved in Coleman v. Anderson, 29 Gratt. 427, and *note*.

In Va. Mining Co. v. Wilkinson, 92 Va. 100, 22 S. E. Rep. 839, it is said: "All of these grounds constitute legal defences, and could be availed of in the suit at law. 4 Minor's Inst. (4th Ed.) pt. 1, p. 645. The bill sets forth no ground why the complainant could not have made its defence there. It is a settled principle that equity will not grant relief where there is a plain and adequate remedy at law. 1 Barton's Ch. Prac. 13; Story's Eq. J., sec. 33; Pomeroy's Eq. J., sec. 217; Haden v. Garden, 7 Leigh 157; Morrison v. Speer, 10 Gratt. 228; *Beckley v. Palmer, 11 Gratt. 625, 634;* Great Falls Man. Co. v. Henry's Adm'r, 25 Gratt. 575, 582; and Coleman's Adm'x v. Anderson, 29 Gratt. 425."

See monographic *note* on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518.

Price, for the appellant.
Caperton, for the appellee.

LEE, J. The first question that seems to require consideration in this case is, whether the Circuit court of Raleigh county had jurisdiction of the cause. It was a bill praying an injunction to a judgment of the Circuit court of Fayette county, upon the ground of payment or satisfaction by levy on sufficient property of the principal debtor, whilst a previous execution was in the hands of the sheriff of Fayette county. It did not call in question the equity of the judgment originally, but insisted that it was now inequitable that it should be further executed.

The solution of this question depends on the true construction of section fourth of ch. 179 of the Code, p. 677. This section provides, that "jurisdiction of a bill of injunction shall be in a Circuit, County or Corporation court of a county or corporation, in which the judgment is rendered, or the act or proceeding is to be done, or is doing, or apprehended, except that a County or Corporation court shall not award an injunction to a judgment or proceeding of any other court." And as this was a bill seeking relief against a judgment of the Circuit court of Fayette county
628 at *the suit of a defendant in the judgment, and praying an injunction to restrain the plaintiff and the sheriff from any further proceeding upon it on the execution sued out thereon, (though the latter was directed to and sought to be levied in Raleigh county,) it would seem to be directly within the terms of the provision, and that the jurisdiction of the bill was in the Circuit court of Fayette. But it is supposed there may be a distinction between the case of an injunction to a judgment for matter of equity existing anterior to the judgment, and for matter arising subsequently, such as payment or the like, which renders any further proceeding to enforce the judgment by execution improper and inequitable; and that in the latter case, if the execution be sent to a different county from that in which the judgment was rendered, and is about to be levied, the defendant may prosecute his bill for an injunction in the court of the county in which the levy is about to be made; the injunction in such case being not to the judgment, but to restrain an act or proceeding contrary to equity, about to be done in that county, within the meaning of the law. But I can perceive no good reason for any such distinction. It is in either case an injunction to the judgment; and in both, the relief is afforded by perpetually enjoining the judgment, in whole or in part, according to the nature of the case. In strictness, there is no such thing as an injunction to a judgment, because the court of chancery does not act upon the law court, and neither reverses, rescinds nor annuls the judgment. It acts upon the party only, restrains him from enforcing the judgment by execution, and punishes him as for a contempt for any violation of its mandate. Ashby v. Kiger, Gilm. 153. But in common legal parlance, and for the sake of brevity, its order in such a case is called an injunction to a judgment; and what is always meant is an injunction to proceedings on the
629 *judgment; and such it will be seen is the language used in § 10, p. 678, and § 13, p. 679.

For the purpose of determining the court which shall have jurisdiction of a bill of injunction, and of ascertaining what shall be the condition of the injunction bond, and before what clerk it shall be given, the act in effect classifies injunctions under two heads. First, injunctions to judgments; second, other injunctions to independent or collateral acts or proceedings, having no relation to judgments, which are to be done or are doing or apprehended. See § 4 and § 10. Of the latter class are injunctions to stay waste, to prevent a nuisance, to arrest a sale improperly about to be made by a trustee, to restrain the doing of an unlawful act prejudicial to the complainant, and for which, if done, he could have no adequate compensation in damage, and the numerous other matters having no reference to any previous judgment at law, which constitute the proper subjects of injunction; and these are plainly the matters contemplated by the act when it speaks of acts or proceedings about to be done or apprehended. In the latter cases, the jurisdiction is assigned to the courts of the county in which the act or proceeding is about to be done or is apprehended: the injunction bond is to be given before the court in which the injunction suit is instituted, and the condition of the bond is to be such as the court or judge awarding the injunction shall prescribe. In the former the jurisdiction is to be in the court of the county in which the judgment was rendered, the bond is to be given before the clerk of the court in which the judgment is, and it is to be with condition to pay the judgment (in case the injunction be dissolved) and all costs that may be awarded and all damages that shall be incurred, and with a further condition, if a forthcoming bond have been given, to indemnify the sureties in such forthcoming bond.

630 *To the case which has been suggested by way of illustration, a ready answer may be given. It is the case of a judgment in a particular county upon which an execution has been sued out, directed to the sheriff of a different county, and which the sheriff has undertaken to levy upon property; e. g. a slave, belonging to a third person, a citizen of the latter county, who is no party to the judgment, and who and whose property is in no manner bound by the judgment or the execution issued thereon. Can he not, it is asked, obtain an injunction and prosecute his suit in his own county to restrain the sheriff from illegally seizing and selling his property to pay another man's debt? Must he leave his own county and go with his suit to the court of the county where the judgment was rendered? The answer is that he may get his injunction and prosecute his suit in the county where he lives, and where the sheriff is about to seize and sell his property. But his injunction is not to the judgment; he does not call it in question for any matter either existing before or occur-

ring since its rendition: he does not seek to stay it in any form, or to arrest its execution by a levy and sale of any property that may be properly liable to it. As to him there is no judgment, no execution, and what he seeks is to protect his property against the unlawful act of the sheriff who is about to seize it without shadow of authority. It is a collateral act or proceeding in pais that he seeks to enjoin, not the due and regular execution of the judgment against those liable to it. If the injunction be allowed, he is not required to give bond with condition to pay the judgment and costs and damages, and indemnify the surety in the forthcoming bond, if any; but the condition of his bond is such as the court or judge may prescribe; and he prosecutes his suit in the court of that county in which the unlawful act of the sheriff is about to be done.

631 *No doubt there may be cases in which the court of a particular county, having jurisdiction upon other grounds, may rightfully enjoin proceedings on a judgment of another county, where such a measure is appropriate to the relief proper to be administered in the cause; but where the sole ground of relief is the right to enjoin proceedings on the judgment whether for a matter of equity existing anterior to its rendition or subsequently arising, and it is sought by a party who or whose property is liable to execution upon it, I think it clear the case is one of an injunction to the judgment, within the meaning of the act, and that the jurisdiction of the suit is in the courts of the county in which the judgment was rendered; and that a court of another county to which the execution might chance to be sent, and in which it was levied on property of a defendant, has for that cause no right to entertain jurisdiction of the case.

I think the right to object to the jurisdiction was not lost to the defendants by their failing to plead to the jurisdiction, and that the case is not within § 19 of ch. 171 of the Code, p. 648. That section provides that where a bill shows on its face proper matter for the jurisdiction of the court, no exception for want of such jurisdiction shall be allowed, unless taken by plea in abatement, which shall not be received after answer filed, &c. Here the objection is not for want of matter proper for the jurisdiction of a court of equity, but because the jurisdiction in the case is expressly assigned to another court, because the court of Raleigh was usurping a jurisdiction pertaining to the court of Fayette. Or if this could be embraced by the term "matter proper for the jurisdiction of the court," then the bill on its face shows a case not proper for the jurisdiction of the court of Raleigh, and so is not within the terms of the section. It was the duty of the judge who allowed the

632 injunction, to direct his *order to the clerk of the Fayette court; but although he failed to do so, it was nevertheless the duty of the party to file his bill and perfect his injunction with the clerk of that court; and the court of Raleigh should have dismissed the bill whenever the objection was made. Such was the decree in the case of Randolph's ex'or v. Tucker, 10 Leigh 655.

The act of December 1818, 1 Rev. Code 1819, ch. 66, § 86, p. 214, was in broader terms than the present act. It provides that after answer filed and no plea to the jurisdiction, no exception for want of jurisdiction should ever afterwards be made. Yet it was held that it only applied to those cases in which upon the face of the bill the matter thereof is not proper for relief in equity. Pollard v. Patterson, 3 Hen. and Munf. 67; Hickman v. Stout, 2 Leigh 6. But that act excepted from its operation cases of controversy respecting lands lying without the jurisdiction of such court, and also cases of infants and femes covert.

But if I am in error on this point, let us briefly consider the case made. If the original bill could be supposed to have been maintainable upon the ground (not suggested by it however as a reason for invoking the aid of a court of equity) that there had been no sitting of the Fayette court since the execution complained of issued, and that there would be none in time to enable him to prevent a levy and sale of his property by a motion to quash, yet as the material allegation of payment of the whole amount of the execution to the sheriff was directly put in issue by Palmer's answer, and no proof offered to support it, the court could do no otherwise than dissolve the injunction. And though a levy might possibly have been made, yet no sale could have taken place under the execution before the next sitting of the Circuit court, which was to be on the 3rd day of September, the injunction having been allowed

633 on the 25th of August. *In the amended bill filed on the dissolution of the injunction, the ground of actual payment of the money by Waite to the sheriff is virtually abandoned. It alleges that the sheriff of Fayette had levied the execution upon property sufficient to satisfy it, but had appropriated the property to his own use, or if he had sold it, had failed to account for the proceeds, and had falsely returned that it had been sold and the proceeds applied in satisfaction of other executions against Waite having priority. It also alleged that the sheriff had received a sum of three hundred and forty dollars from Waite on the sale of a negro, for which credit should have been given on the execution. He thus stated a case which showed him entitled to full redress at law by a motion in the Fayette court to quash the execution, and an action at law for a false return. Now it may be questioned if all this matter could not have been proved under the allegations of the original bill; and if it could, then there was no reason why the court should have reinstated the injunction which it had just dissolved. But if they were new and original matters which could not have been proven upon the allegations of the original bill, then it was improper to reinstate the injunction upon the filing of the amended bill, because it did not and could not allege a want of full opportunity to obtain redress by setting them up in the court of law: for there had been two regular terms of the Circuit court of Fayette between the filing of the original bill and of the amended bill, commencing by law, the first on the 3rd of Sep-

tember 1852, and the second on the 3rd of April 1853; and no reason whatever was suggested in the amended bill why the party had failed to avail himself of the opportunity which they afforded. Now, I apprehend a party to be entertained in a court of equity upon a case of this character, ought to allege some reason why its aid is invoked, in-
634 stead of seeking *his remedy in the court of law. It should appear that the latter could afford him no remedy, or an inadequate one, or that he had been deprived of the opportunity of seeking it without any default on his part, or some circumstance should be shown furnishing a reason for withdrawing the matter from the cognizance of the appropriate tribunal, and carrying it into the court of chancery. Nothing of the kind is shown here; but for aught that appears, the matter might have been as well tried and as full redress afforded in the court of law as in the court of chancery.

The case of Crawford v. Thurmond, 3 Leigh 85, is not, I think, in conflict with these views. That case involved several complicated questions of law and fact, stated in the opinion of Judge Carr, and which he thought could be better tried in the court of chancery than the law court; and there was an equitable right involved more appropriate for the jurisdiction of the former tribunal than the latter. This case presents a mere question as to the regularity and propriety of the proceeding of the officer of the law court upon an execution placed in his hands, and is very distinguishable from that just cited. It more nearly resembles the case of Morrison v. Spear, 10 Gratt. 228, in which this court was of opinion the party had improperly sought relief in the court of chancery when his redress was in the court of law.

It may be added too that all the material allegations of both the original and amended bills were denied or directly put in issue by the parties upon whom their gravamen rested, and no proof whatever was offered in support of any of them.

In every view of the case, I think the Circuit court properly refused to grant the relief sought by the bill. I think, however, before dismissing the bill, the injunction should have been formally dissolved, and in that respect that the decree should now be
635 amended; *and so amended, should be affirmed with costs to the appellees.

MONCURE and SAMUELS, Js., concurred in the opinion of Lee, J.

ALLEN, P., concurred in affirming the decree on the first ground stated in the opinion of Lee, J.

DANIEL, J., concurred in affirming the decree.

Decree affirmed.

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636 *Noyes' Ex'x v. Humphreys.

July Term, 1854, Lewisburg.

Collateral Promises—Case at Bar.—N rents property to T, who undertakes to have certain improvements put up thereon; and he contracts with H to execute the work. H proceeds and does a part of the work, and receives some payments from T; but finding that T is embarrassed, he stops the work and declares that he will proceed no further with it. N then tells H to go on and finish the work, and he will pay him. H then goes on and does the work; and after it is done settles with T, and takes his bond for the balance due to him. T being unable to pay him, H sues N for the whole balance due him for the work. HELD:

1. **Same—Must Be in Writing.***—That T not having been released from his liability to H, the promise of N is a collateral promise, and not having been in writing, is void by the statute of frauds.
2. **Contract—Promise Entire but Partially Collateral—Effect.**†—That the promise alleged in the declaration being an entire promise to pay as well for that done before, as for that done after the promise, even if the promise would have been valid as to the work to be done, it was collateral as to that which had been executed, and being an entire promise, it is void as to the whole.

***Collateral Promises—Must Be in Writing.**—In Radcliff v. Poundstone, 23 W. Va. 734, it was held that a collateral promise not being in writing was void by the statute of fraud, the court citing the principal case, Waggoner v. Gray, 2 H. & M. 603, Cutler v. Hinton, 6 Rand. 509, and Ware v. Stephenson, 10 Leigh 155, to support the proposition.

Contract—To Pay Debt of Another—New and Original Consideration.—In Riffe v. Gerow, 29 W. Va. 468, 2 S. E. Rep. 107, it is said: "In Prime v. Koehler, 77 N. Y. 91, it was held that 'where the purpose of the promisor to pay the debt of a third person is to secure a benefit to the promisor, by relieving his property from a lien, or securing or confirming his possession, the promise is original, and not collateral, and so is not within the statute of frauds.' ANDREWS, J., in delivering the opinion of the court, said: 'The circumstances bring the case directly within the third class of cases enumerated in Leonard v. Vredenburgh, 8 Johns. 28, viz., where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm running between the newly-contracting parties. In this class of cases the subsisting liability of the original debtor is no objection to the recovery; and, where the purpose of the promise is to secure a benefit to the promisor by relieving his property from a lien, or securing and confirming his possession, the promise is original, and not collateral, although a third person may be personally liable for the debt, and the promise may be in form a promise to pay such debt, and although the performance of the promise may result in discharging the debt.' See, also, Waggoner v. Gray's Adm'r, 2 H. & M. 603; Cutler v. Hinton, 6 Rand. 509; Ware v. Stephenson, 10 Leigh 155; *Noyes v. Humphreys, 11 Gratt. 636;* Radcliff v. Poundstone, 23 W. Va. 724."

For further authority in accord with the proposition that, where the promise to pay the debt of another arises out of some new and original consideration, it is not within the statute of frauds, see Hopkins v. Richardson, 9 Gratt. 494; Wright v. Smith, 81 Va. 777, 782; Skinker v. Armstrong, 86 Va. 1015, 11 S. E. Rep. 977; 2 Va. Law Reg. 465.

†**Same—Entire Promise—Partially Collateral—Effect.**—Where a verbal promise is entire and relates in part to matter which render it necessary, under the statute of frauds, that the promise should be in

This was an action of assumpsit in the Circuit court of Kanawha county, brought by John R. Humphreys against Bradford Noyes, and upon his death revived against his executrix. On the trial it appeared by a written agreement, that Noyes had leased certain salt property to James M. Thompson for ten years, reserving rent to a large amount, and that Thompson undertook to make very considerable improvements upon the property; to aid him in doing which, Noyes was to advance to him the sum of two thousand dollars. Several witnesses testified that Thompson employed the plaintiff to execute a part of the work which he was bound by his agreement with Noyes to have done; but he being in embarrassed circumstances, the plaintiff,
637 after he had executed a part of *the work, apprehending that Thompson would not pay him, stopped his work, and refused to proceed with it under his contract with Thompson; alleging as a reason for his quitting the work, that he had ascertained that Thompson was in embarrassed circumstances, and unable to pay him; and that he could not afford to lose so much. In this state of things Noyes went up to the place, and said to the plaintiff, "The work is now commenced; it must go on. Go on and finish it: I will pay you for it;" or, "I will see it paid." The plaintiff then resumed his work and completed it, Noyes attending to its execution and giving directions about it all the time it was in progress, which was between four and six months.

A witness also testified, that whilst the plaintiff was at work, Thompson advanced to him from time to time four hundred and thirty-six dollars, the largest portion of which was furnished by Noyes; and when the work was completed, the plaintiff gave to Thompson his account, which Thompson entered in his book in the presence of the plaintiff, and deducting the amount he had advanced, ascertained the balance due to the plaintiff to be four hundred and fifty-four dollars and seventy-eight cents. For this balance Thompson gave the plaintiff his bond at nine months. This bond was drawn to be executed by two parties, but it was only executed by Thompson. This witness also testified that Noyes had advanced to Thompson upwards of four thousand dollars towards the completion of the improvements on the property.

It appeared further from the evidence, that the plaintiff had taken the benefit of the act for the relief of insolvent debtors, and had surrendered in his schedule the bond of Thompson; but had not named in his schedule any claim which he had upon Noyes. It also appeared that the debt upon which he had taken the benefit of the said act, had been paid off before this suit was instituted.

638 *The bill of particulars filed in this cause was a copy of the account given to Thompson, as before stated.

After all the evidence had been introduced, the defendant moved the court to give to the jury five instructions, which were given, with certain additions thereto. They are as follows:

1. If the jury are satisfied, from the evidence, that the plaintiff, after the promises supposed to have been made by the intestate Noyes, and laid in the declaration in this suit, took the insolvent debtors' oath as aforesaid, and in his schedule surrendered the bond of James M. Thompson for four hundred and fifty-four dollars and seventy-eight cents, the balance due from him on the work and labor sued for in this action, and did not set out in his schedule any claim of any kind whatever against the intestate Noyes, from such omission under the insolvent oath the jury may presume an admission on the part of the plaintiff, that at the time he took the oath the said Noyes was in nowise liable to him for money or property under any antecedent contract or engagement.

2. If the jury are satisfied from the evidence, that the work and labor sued for in this action was work which James M. Thompson was bound to perform, and for the doing of which he was liable by his contract with the plaintiff to pay him, no promise by the intestate Noyes, to pay for the same, or see it paid, is valid and binding on him, unless such promise is in writing, and signed by him.

3. If the jury believe that the plaintiff, by his parol contract with J. M. Thompson, had a right to recover from him for the work and labor sued for in this action, and that the said work and labor was such as the said Thompson was bound to execute, in such event the promise of the said intestate is collateral, and should be in writing to bind him.

4. If the jury shall be satisfied from the evidence, that James M. Thompson, by
639 parol contract, employed *the said plaintiff to execute for him the work sued for in this action, and that such contract was not rescinded; and when the plaintiff completed the work, the parties, Thompson and Humphreys, settled, and the said Thompson executed his bond or writing under seal, for the balance due on the work, to said Humphreys, that such bond extinguished the simple contract in law between them, as well as all parol promises by the intestate to guarantee the payment of such simple contract liability.

5. If the jury are satisfied that the contract between Thompson and plaintiff was not rescinded by agreement between them, the mere fact that Bradford Noyes may have

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writing (for example, where the promise, as in the principal case, is partially collateral), the whole promise is void. For, since the promise is entire and part of it is void, the whole is thus rendered defective. See the principal case cited in support of this proposition in Com. v. McCullough, 90 Va. 615, 19 S. E. Rep. 114; Engleby v. Harvey, 93 Va. 445, 25 S. E. Rep. 225.

Bill of Exceptions—Certification of Evidence—Old Rule in Virginia.—See principal case cited in Payne v. Grant, 81 Va. 169. See also, Gimmi v. Cullen, 20 Gratt. 439, and *foot-note*; Read's Case, 22 Gratt. 924, and *foot-note*; monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

agreed by parol to pay Humphreys, or see him paid, does not extinguish the contract with Thompson or his liability to pay the plaintiff.

The first instruction was given, with the following addition, viz:

That is, if the evidence and all the circumstances in the cause, taken and considered together, shall, in their opinion, warrant such presumption. The evidence in reference to the schedule, and the omission on the part of the plaintiff to mention any claim therein against Noyes, as well as all the evidence in the cause, is submitted to the jury, and it is for them to decide upon it, both as to its weight and effect, and to draw such conclusion from it as in their judgment it shall be entitled to.

The second instruction was given to the jury, with the following explanation:

But if the jury are satisfied from the evidence that the work sued for was not done under the contract between the plaintiff and James M. Thompson, but that the work was performed under an agreement between the plaintiff and Noyes and a promise on the part of Noyes to pay for it, and that such promise, was a direct promise, then and in that event such promise would be valid and binding without being put in writing.

640 *The third instruction was given, with this explanation:

But that if the jury were satisfied from the evidence that the work was not done under the contract between the plaintiff and Thompson, and that the plaintiff had abandoned under that contract, and that it was done under an original agreement between the plaintiff and Noyes, and that the promise to pay for it was a direct one, then such promise would be binding without writing.

The fourth instruction was given, with the following additions:

But if the jury were satisfied from the evidence that the work was not done by the plaintiff under the parol contract between him and Thompson, but under an original contract between him and Noyes, and that Noyes made a direct promise to pay him for the same, and that the plaintiff did do the work on the faith of that promise alone, then and in that event a settlement between Thompson and the plaintiff after the work was completed by the plaintiff, and the execution of his bond or writing under seal by Thompson to the plaintiff for the balance due on the work would not extinguish the simple contract so made between Noyes and the plaintiff, notwithstanding there may have been no rescission of the parol agreement between the plaintiff and Thompson, unless the plaintiff received said bond or writing under seal from Thompson as his bond or writing under seal for said work.

Fifth instruction given, with this addition:

But that although there was no rescission of the contract between plaintiff and Thompson, if the jury was satisfied from evidence, the work sued for was done for Noyes under an original contract between him and plaintiff, and that Noyes made a direct promise to pay for the same, that the work was done on Noyes' credit alone, and on the fact of his promise to pay, then such promise is binding on him.

641 *To the giving of these additions to the instructions the defendant excepted.

There was a verdict for the plaintiff for four hundred and fifty dollars, with interest thereon from the 18th of December 1844 until paid: Whereupon the defendant moved the court for a new trial, which was overruled; and the defendant again excepted. This exception, instead of stating the facts proved, referred to the evidence as stated in the first exception. There was then a judgment for the plaintiff; and the defendant applied to this court for a supersedeas, which was awarded.

McComas, for the appellant, insisted:

1. That the instructions asked propounded the law correctly; and that the additions thereto given by the court were calculated to mislead the jury. That the additions to the first instruction asked were inexplicable; and was further objectionable, because the court did not instruct the jury upon the law, but left the whole case to them. That the additions to the second and third instructions assumed a state of facts not authorized by the evidence; and moreover used the phrase "direct promise," without any explanation of its meaning; and thus leaving the jury to conclude that an express promise was an original promise.

2. That the undertaking of Noyes was a collateral and not an original undertaking, and not being in writing, was void by the statute of frauds. And he cited Cutler v. Hinton, 6 Rand. 509; and insisted that this case settled the principle that where there is an undertaking for another and both are bound, then it is not an original but a collateral undertaking, and must be in writing. He stated that other judges had classified the cases. First. Where the promise is made before the consideration for it is obtained.

Second. Where the promise is made

642 after the consideration is *obtained.

Third. Where there is a new consideration. The first two classes were held to be within the statute; and the third had been held not to be within it. Farley v. Cleveland, 4 Cow. R. 432. But this case showed that upon the last point there was a great conflict of authorities; and in fact it was not sustained by them. But however that might be, the case here did not come within it, as there was in fact no new consideration for the promise of Noyes. He made no new contract with Humphreys, but his promise was to pay for the work done under the contract made by Humphreys and Thompson, for which Thompson continued to be bound; and therefore, according to Cutler v. Hinton, the promise was collateral.

Fitzhugh and Doddridge, for the appellee, insisted:

1. That the instructions asked for by the defendant below, were based upon a partial view of the facts, and therefore calculated to

mislead the jury; and that the additions to them given by the court were only intended to give the law as applicable to all the facts proved in the cause. And they insisted that if the instructions were substantially correct, this court would not reverse the judgment for any mere verbal inaccuracies. Spencer v. Pilcher, 8 Leigh 565.

2. That the case did not come within the principles applicable to collateral promises. That there was in fact a new contract, and that upon a new consideration. They referred to Leonard v. Vredenburgh, 8 John. R. 23; in which Kent states the classes into which the cases are resolved. Of these the third is where there is a new consideration of benefit to the promiser or harm to the other party. Meech v. Smith, 7 Wend. R. 315; Farley v. Cleveland, 4 Cow. R. 432. In this last case the division is recognized, and numerous cases are cited to illustrate each class: And in the two last cited cases the original
643 party was still *bound. They referred also to King v. Despard, 5 Wend. R. 277.

They insisted further that Cutler v. Hinton was not at variance with these authorities. That case came clearly within the first class, and was within the words of the statute: That there, there was no new consideration. And they referred to Ware v. Stephenson, 10 Leigh 155, as not extending the principle as far as it was stated in Cutler v. Hinton. They insisted further that the question as to whom the credit had been given was one for the jury. Darnell v. Tratt, 12 Eng. C. L. R. 36.

ALLEN, P. The cases upon undertakings coming within the scope of that branch of the statute of frauds prescribing the mode in which the special promise to answer for the debt, default or misdoings of another person should be made, have been numerous, and many subtle, if not shadowy, distinctions have been taken. Every collateral promise to answer for the debt, default or misdoings of another person, is within the statute, and void if not in writing; but original undertakings need not be in writing, not being within the statute. The difficulty is in determining under which head the undertaking in any particular case is to be classed. Where the party undertaken for is under no original liability, the promise is an original promise, and binding though not in writing; the promiser is the party immediately liable, and the undertaking is to pay or answer for his own debt or default, and not for another's. But it has been settled in England that if the party undertaken for is liable, the promise must be in writing. This is the principle decided in the leading case of Birkmyr v. Darnell, 1 Salk. R. 27. There, in consideration that the plaintiff would deliver his horse to A, the defendant promised that A should return him safe. This case was held
644 to be a *collateral undertaking for another; for the undertaker comes in aid to procure credit for another; and there is a remedy against both; for the plaintiff could maintain detinue upon the bailment against the original hirer, as well as assumpsit on the promise against the defendant. In the note to Forth v. Stanton, 1 Wms. Saund. 211, it is said, "that it is clear the mere existence of the debt, default or miscarriage, is not sufficient to support the promise; there must be some consideration for it, and therefore the promise must in all cases be founded on a new consideration. The question indeed is, What is the promise? Whether it be a promise to answer for the debt &c. of another, for which that other remains liable, not what the consideration for that promise is; for it is plain that the nature of the consideration cannot affect the terms of the promise itself, unless it be an extinguishment of the liability of the other party."

The cases of Goodman v. Chase, 1 Barn. & Ald. 297, and of Williams v. Leper, 3 Burr. R. 1886, illustrate the last proposition. In the first case, the defendant, in consideration that the plaintiff would discharge his debtor arrested under a ca. sa. promised to pay the debt. It was held unnecessary that the promise should be in writing, for the debtor's liability ended on his discharge, so that the defendant was never liable for his debt; and in Williams v. Leper, the defendant having got possession of goods which were subject to distress for rent in arrear, promised the landlord he would pay him the rent, if he would desist from distraining. The judge considered the goods as the debtor; and therefore the promise was not to pay the debt of another, but the debt for which the goods were liable, of which goods the defendant was owner. Nor is it material at what time the promise to pay for the debt or default of another is made, if the debt is a continuing debt for which the debtor
645 remains liable. *In Matson v. Wharan, 2 T. R. 80, the court held that there was no distinction between a promise to pay for goods furnished for the use of another, made before they were delivered and after, if the person for whose use they were furnished is liable at all. Nor is there any distinction drawn by the cases referred to, as decided in the courts of England, whether the parol promise to pay the debt of another is supported by a consideration moving to the debtor or the promisee provided the original debt continues to subsist as a cause of action against the original debtor: Though in New York, in the cases of Farley v. Cleveland, 4 Cow. R. 432, King v. Despard, 5 Wend. R. 277, a different rule was adopted; those cases deciding that where there is a new and original consideration of benefit to the defendant or harm to the plaintiff moving to the party making the promise, the subsisting liability of the original debtor is no objection to the recovery. In Virginia, the cases of Waggoner v. Gray's adm'r, 2 Hen. & Munf. 603; Cutler v. Hinton, 6 Rand. 509, and Ware v. Stephenson, 10 Leigh 155, have recognized and adopted the rule as deduced from the English cases. In the first case, Judge Roane lays down the rule to be, "that where the person on whose behalf the promise was made, is not discharged, but the person promising agrees to see the debt paid,

so that the promisee has a double remedy, the promise is collateral."

In the case of Cutler v. Hinton, the defendant made the promise before the goods were delivered, saying he would pay for any goods sold to his son in law, or to any merchant of whom his son in law might purchase, that he would pay for him a certain sum. The promise was held to be collateral, and being verbal, void under the statute. Judge Carr, after a review of some of the leading English cases, concludes with the remark, "That these cases, out of a vast multitude, serve to exemplify the
646 general principle, that where *the promisee has a double remedy, both against the promiser and him in whose behalf the promise is made, such promise is collateral, and must be in writing."

In the last case of Ware v. Stephenson, the consideration for the promise was for the benefit of the promiser; the articles were delivered to a workman engaged in building a house for the defendant; and the question in the case upon which the judges differed, was, Whether the workman was liable and bound to pay for the articles delivered to him? Judge Brooke stated, that it was a well settled principle, that where the party to whom goods are delivered on the promise of a third person to pay for them, is bound to pay for them, the undertaking is collateral, and if not in writing within the statute; but he thought from the facts that there was no original liability on the workman, and that he was not bound to pay for the articles delivered. Judge Stanard, with whom the other judges concurred, thought that the workman was responsible for the articles delivered, and said, "That whatever doubts may at one time have existed respecting undertakings within the scope of the statute, it has long since been definitively settled, that when an undertaking is for a consideration to be received by, or articles to be supplied to, a third person, if the transaction be such that the third person is responsible to the person who supplies the articles, or from whom the consideration proceeds, the undertaking is collateral, and if oral not binding.

To apply these principles to the present case: It appears from the evidence certified as given upon the motion for instructions, and upon overruling the motion for a new trial, that the testator of the plaintiff in error, by a contract dated the 1st of January 1844, leased a salt property in Kanawha county to James M. Thompson, who bound himself to build a salt fur-
647 nace, *fixtures, &c., at his own expense. The testator of the plaintiff in error by the contract agreed to furnish Thompson the sum of two thousand dollars towards said improvements, and in part payment of their erection. In pursuance of the said contract, Thompson employed the defendant in error to build some cisterns, and to do the work for him under the lease. After doing a part of the work, he stopped it, announcing his determination to leave, declaring he was done with the job, and would not proceed with the work upon the faith or confidence of Thompson being paymaster for it. And thereupon, the said testator said to him the work was commenced; it must go on; and told him to go on and finish it, that he would pay him for it, or see it paid. The defendant in error thereupon resumed work and continued until it was finished.

The defendant in error further gave in evidence the declaration of said testator, shortly after the conversation aforesaid, that he would have to pay for the work done or doing by the defendant in error, and that he had already advanced Thompson two thousand dollars for improvements which the latter by his lease was bound to make.

It was further proved by the plaintiff in error, that her testator had advanced to Thompson more than two thousand dollars; that Thompson could not make said improvements without such advances, and that he was unable to pay the defendant in error for his work according to the contract, either at the time of making the same or at any time since. That when the work was finished, the defendant in error rendered his account, being the same stated by him in the bill of particulars filed in the suit, which Thompson entered in his book in the presence of the defendant in error; the several payments made by Thompson from time to time during the progress of the work were deducted, a balance ascertained, for which
648 Thompson executed *his bond at nine months. The bond is exhibited, and has two seals to it, but is signed by Thompson alone; and was drawn to be signed by the testator; but there is no proof that he ever agreed to sign it. The insolvent papers of the defendant in error, including the schedule, were also given in evidence, from which it appears that on taking the oath of insolvency on the 29th of July 1847, he surrendered said note on Thompson, but did not surrender any claim on the testator. This suit was brought in the year 1848; and it was proved that the debt upon which the defendant in error took the oath of insolvency, was paid before he instituted this suit.

After the evidence was closed, the plaintiff in error moved for five instructions, all of which were given, with certain explanations and modifications, to which she objected; but her objections being overruled, she excepted; and a verdict being found against her for the balance of the claim, she moved for a new trial, and her motion being overruled, she again excepted.

I think there was no error in the court's explanation to the first instruction moved for. By that instruction, the court was asked to tell the jury that from the surrender of Thompson's bond in the schedule and the omission to set out any claim against the plaintiff's testator, the jury might presume an admission on the part of the defendant in error, that at the time he took the oath the testator of the plaintiff in error was in nowise liable to him for money or property, under any antecedent engagement. The effect of the instruction, if given in the terms asked, might have been to have induced the jury to believe that they were

bound, from the facts stated in the instruction, to presume such admission, notwithstanding other circumstances in evidence might repel the presumption. The court informed the jury, that in forming their conclusion as to this presumed admis-
649 sion, they *should look not merely to the omission to surrender this claim in the schedule, but to all the facts in evidence. In this, I think, there was no error.

The second, third and fifth instructions were intended to present, and as I think, do present the real question involved in the case; and that is, whether, under the facts, the evidence tended to prove the undertaking was original or collateral? The second and third are the same in substance; and asked the court to instruct the jury, that if they were satisfied from the evidence, that the work and labor sued for was such as Thompson was bound to execute, and for which he was liable under his contract with the defendant in error to pay him, in such event the promise was collateral, and should be in writing to bind said testator. These instructions were not irrelevant. The evidence showed a contract between Thompson and the defendant in error; and that part of the work was performed under such contract before the promise by the testator. And the cases referred to establish, that whether the contract is collateral or original, depends on the liability of the party undertaken for. The court should have given the instructions as asked for, and without the qualifications annexed to them. The modifications were not warranted by the evidence, and were calculated to mislead the jury. There was no testimony proving or tending to prove that a portion of the work was not performed under the contract with Thompson before the promise of the testator. The promise declared upon was an entire promise covering the whole claim for the work performed by the defendant in error; and the court was not justified in assuming that there was any proof that the work sued for was not done under the original contract between Thompson and the defendant in error. The court was asked to tell the jury that if Thompson continued liable to the defendant in
650 error *upon the first undertaking, the promise of the testator was not binding unless in writing. The qualification of the court evades this proposition altogether, by informing the jury that if they were satisfied the work was not done under the contract between Thompson and the defendant in error, but under the agreement between the testator and said defendant in error, and the promise of the former to pay for it, and that such promise was a direct one, it would be binding, although not in writing. Although the work may have been done under the promise of the testator, and though the consideration of such promise was sufficient, that does not make it an original promise, if in fact the original contract was with a third person, who continued responsible to the defendant in error, notwithstanding the promise of the testator. By the qualification of the court, the jury were instructed that the defendant in error was entitled to recover from the promiser, notwithstanding the continued liability of the original contracting party, because the work was performed in consequence of the promise to be answerable for it. The terms used by the court were calculated to mislead the jury: It speaks of a direct promise, leaving it uncertain whether by that expression was meant an express promise by the testator to the defendant in error, or an original or collateral promise. An express promise to pay would probably be deemed by the jury a direct promise; and if it was intended to be equivalent to an original promise, that was a question of law arising upon the facts upon which the instruction was asked; whereas the qualification refers it to the jury to determine for themselves, whether under the facts it was a direct or original promise, or one merely collateral.

The fifth instruction asked the court to instruct the jury, that if the contract between Thompson and the defendant in error
651 was not rescinded by agreement *between them, the mere fact that the testator of the plaintiff in error may have orally agreed to pay or to see him paid, did not extinguish the contract with Thompson, or his liability to pay the defendant in error. This was given with the qualification, that although there was no rescission between Thompson and the defendant in error, yet if the work was done for the said testator, under an original contract between him and the defendant in error, that the said testator made a direct promise to pay for the same, and the work was done on his credit and the fact of his promise to pay, it was binding on him. This qualification has no relevancy to the instruction. The proposition it propounded was, that if there was no agreement between the original parties to rescind their contract, a promise by a third person to pay would not extinguish the liability of the first promiser. To this there could be no objection; and if the original liability continued, then the promise would be collateral. The qualification informed the jury that although there was no such rescission and extinguishment of liability, yet the promise, if made under the circumstances detailed, would be an original and not collateral promise. I think that in this the court erred.

The bill of exceptions to the decision of the court overruling a motion for a new trial, refers to and adopts the statement of evidence contained in the second bill of exceptions. That bill of exceptions states the evidence of the witnesses examined on the trial, instead of the facts appearing to the court to have been proved by such evidence; and is, therefore not well taken under the rule of Bennett v. Hardaway, 6 Munf. 125, unless it appears to the appellate court, that after disregarding all the parol evidence of the exceptor, and giving to that of the other party full credit, the decision was wrong: And that, I think, sufficiently appears here.

652 *The evidence of the defendant in error shows that Thompson, the lessee

of the property, had bound himself to the landlord to erect a salt furnace and other fixtures necessary to the manufacture of salt, at his own proper cost and charges; that he made the contract with the defendant in error to do the work for him under the lease; that the defendant in error, under this contract, had commenced and performed a portion of the work, the value of which does not appear; and that he then stopped work and refused to proceed with it under his contract with Thompson, alleging, as his reason for quitting the work, that Thompson was embarrassed, and unable to pay him. Thereupon, the testator of the plaintiff in error made the promise on which the suit was brought. The promise was made after the work had been commenced and a part had been executed. There was no distinct promise to pay for the work thereafter to be executed, as contradistinguished from what had been done. The promise was entire and extended to all work the defendant in error had contracted with Thompson to do. There was no new stipulation as to price, or the description of work or the mode of payment. The promise referred to the former contract which remained unchanged, and amounted to no more than an undertaking that if the defendant would go on and perform his contract with Thompson, the promiser would pay him for the work or see him paid. Thompson was no party to this undertaking. His liability to pay for the work was not extinguished or reduced by it. The undertaking, so far from annulling, provided for the fulfillment of his contract, and as his responsibility continued the promise, according to the decisions of this court, was collateral, and not binding unless in writing.

Viewing the evidence in the most favorable light, it could at most be held to establish an original undertaking
653 *for work thereafter to be done. The promise, however, embraced the whole of the work; that done, as also that to be done. The declaration on the special contract, charges it as one entire undertaking to pay for the whole of the work done under the contract; and the bill of particulars filed with the declaration, charges the said testator with the whole of it. Under the circumstances, proved by the evidence offered by the defendant in error, Thompson was not released; no notice of abandonment is proved; and the note for the balance shows he was held liable by the defendant in error for the whole of the work done. The debt had been incurred; and though there may have been a sufficient consideration of benefit to the landlord, in avoiding the loss of rents and the injury resulting from leaving the work in an unfinished state, to have supported a promise to pay for this liability of Thompson, the promise would have been collateral, though on a good consideration, and must be in writing to be valid. But where the verbal promise is entire, and part of it relates to a matter which renders it necessary under the statute that the promise should be in writing, the whole promise is void. Being entire and part of it void, the whole is defective. Chit. on Contract 61. In the case of Thomas v. Williams, 21 Eng. C. L. R. 142, the tenant was indebted for a quarter's rent: the defendant, an auctioneer, was about to sell the tenant's goods, which were on the demised premises, and the landlord being about to distrain for the quarter's rent due, the defendant verbally promised to pay not only the rent due but the rent which would become due the ensuing quarter. The court held that the promise was void. and being entire, not even the rent due was recoverable.

Under the case of Williams v. Leper, ubi supra, and cases of that character, where the party had surrendered the goods or dis-
654 charged the debt, such promise *was held valid though not in writing. But in the case of Thomas v. Williams, Lord Tenderden, C. J., said, "There is no case in which the promise of payment has gone beyond the amount of the right vested in the party to whom the promise was made, or beyond the assumed value of the fund out of which the payment was to be made." The right vested in the plaintiff and for which he could have distrained was the rent in arrear, but the promise of payment went beyond that, to the rent which would thereafter become due, and was void on that account as to all. So in Head v. Baldrey, 6 Adol. & Ell. 459, 33 Eng. C. L. R. 109, the promise was void by the statute of frauds for want of a written memorandum as to one of the subject matters, but as to the other no writing was necessary; but the court held the agreement was indivisible and bad altogether. To the same effect is Mechelen v. Wallace, 7 Adol. & Ell. 49, 34 Eng. C. L. R. 32; Lord Lexington v. Clarke, 2 Ventr. R. 223; Chater v. Beckett, 7 T. R. 201; Loomis v. Newhall, 15 Pick. R. 159. Upon both grounds it seems to me the verdict was not warranted by the evidence; and that there should have been a new trial.

The other judges concurred in the opinion of ALLEN, J.

Judgment reversed.

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655 *Yeager, Ex Parte.

July Term, 1854, Lewisburg.

1. **Tavern Licenses—Granting or Refusing—Discretion of County Court.***—The act, Code, ch. 96, § 3, p. 443, vests in the County courts a discretion to grant or refuse a license to keep a tavern; in the exercise of which discretion they cannot be controlled by the Circuit courts, either by *mandamus*, writ of error, or *certiorari*.

***Liquor Licenses—Discretion of Court in Granting.**—See the proposition laid down in the first and second headnotes approved in Hein v. Smith, 13 W. Va. 366. See, in accord, French v. Noel, 22 Gratt. 454.

The decision of the principal case is founded on sec. 3, ch. 96, Code of 1849, which gives the county court arbitrary discretion in granting liquor licenses. A later statute, Acts 1879-80, p. 148, according to Leigton v. Maury, 76 Va. 865, 868 (which cites the principal case), is mandatory in its term and the right of appeal to the circuit court is absolute and unconditional. But see Ailstock v. Page, 77 Va. 386,

2. **Same—Right to License Where Applicant Complies with Statutory Requirements.***—Though the applicant for a license to keep a tavern may bring himself fully within and up to all that the statute requires, so that the County court may properly grant him the license if they think fit, he does not thereby acquire any such right to a license, as that the County court may be coerced to grant it.

3. **License Applications—Refusal of Court to Act—Mandamus.**†—It seems that the County court is bound to act upon every application for a license which is made to it; and if it refuses to act, the Circuit court will coerce it by *mandamus*: But when the County court does act, its judgment and discretion is not to be controlled.

At the May term 1854 of the County court of Mason, Samuel Yeager applied to the court for a license to keep an ordinary at his house in the town of West Columbia, in the county of Mason. It appeared in evidence that the town of West Columbia is composed principally of a foreign population, amounting to above the number of nine hundred; and that they are principally engaged in mining coal, and loading and transporting it to Cincinnati; another portion of the population is engaged in the manufacture of salt. The other population in the village are engaged in various trades, such as coopers and other laborious trades. And there is and has been, and is likely to be, a large immigration to that place of persons as well transiently as permanently. The applicant had been a licensed tavern keeper for the previous two years; and he proved before the court, that he was then a sober man, of good character, and had kept and would probably keep a house useful and orderly, and such as the law
656 *requires. And he produced to the court the sheriff's receipt for the tax imposed by law on ordinaries.

It was also proved by intelligent and respectable witnesses, that two ordinaries were believed to be necessary in the village; and that there was not one. No complaint was made by any person against the applicant.

The County court rejected the application; and Yeager excepted. He then presented a copy of the record to the Circuit court, and applied to that court for a mandamus to the justices of the County court of Mason, to compel them to grant him an ordinary license, or show cause to the contrary; but the Circuit court rejected the application. Yeager thereupon applied to this court for a supersedeas, which was allowed. He also asked for a mandamus and a certiorari, in order that if the law afforded him any remedy, it might be enforced in the mode which the court might think most appropriate.

The case was elaborately argued by Fisher, for the petitioner, and Fry, who was counsel in a similar case, as amicus curiæ.

DANIEL, J. The legislative provision, on the proper construction of which the questions raised in this case mainly turn, will be found in chapters 38 and 96 of the Code of 1849.

The third section of the first mentioned chapter, p. 443-4 of the Code, provides that for a license to keep a house of entertainment the application shall be, when the house is in a town having a corporation court, to such court, and when it is not in any such town, to the court of the county wherein it is. If the court be of opinion that the applicant is sober and of good character, and will probably keep a house orderly, useful and such as the law
657 requires, it may *grant such license; and if the house be in a town, the court, when it grants the same, may, if the applicant desire it, dispense with the necessity of his providing for horses. If such application be refused, the refusal shall be entered of record; and a license shall not be granted to the applicant before the next May term, unless by a court composed of the justices to whom the first application was made, or a majority of the acting justices of the county or corporation.

The fourth section of chapter 38, p. 207 of the Code, provides, that no person shall, without license, keep either an ordinary, house of private entertainment or bowling saloon or alley. And the eighth section of the same chapter provides, that the receipt for the tax on such license as is mentioned in the fourth section, shall be produced to the court to which application is made for the license, before such application is considered. If the court reject the application, the tax shall be refunded to the person who paid it.

On the one hand it was insisted at the bar, that the terms "may grant such license," are either absolutely imperative, making it the duty of the County court to grant the license whenever the applicant produces the receipt of the proper officer for the tax imposed on such license, and brings himself within the requirements of the fourth section of the first mentioned chapter, or indicative of a purpose to enjoin a duty which is to be performed with discretion; a

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391, and *Ex parte* Lester, 77 Va. 663, 669, partially overruling Leigton v. Maury, 76 Va. 865, both cases citing principal case. See also, the principal case cited in Lester v. Price, 83 Va. 648, 653, 3 S. E. Rep. 529.

See monographic *note* on "Intoxicating Liquors" appended to Thon v. Com., 31 Gratt. 887.

Discretion of Inferior Courts—Not Subject to Review.—When the subject, upon which an inferior court has acted, is one within its absolute or pure discretion, its action cannot be reviewed. Welch v. County Court, 29 W. Va. 70, 1 S. E. Rep. 342, citing the principal case; Craig v. Sebrell, 9 Gratt. 132; Boggess v. Robinson, 5 W. Va. 402, 413; French v. Noel, 22 Gratt. 454; Hein v. Smith, 13 W. Va. 358. See, in accord, the principal case cited in State v. Wade, 15 W. Va. 537, along with United States v. Jones, 8 Pet. 384, Philadelphia, etc., R. Co. v. Stimpson, 14 Pet. 458, and Com. v. Pierce, 4 Rand. 432.

†**Mandamus.**—On the subject of Mandamus, see the principal case cited in Cowan v. Fulton, 23 Gratt. 579, 585, and *foot-note*; *foot-note* to Morris, *Ex parte*, 11 Gratt. 294; Page v. Clopton, 30 Gratt. 415, 419.

sound discretion, having a regard to public convenience, and looking to the objects contemplated by the act; and that the action of the justices in refusing to grant a license, may be revised and controlled in a superior court by means of a mandamus.

On the other hand it was insisted, that the word "may" is used in the statute in its popular sense. That it is permissive, and is employed to grant an authority coupled with a discretion, which latter, *from its very nature, does not admit of its being guided or superseded by the orders of any superior or appellate tribunal. 658

In considering these opposing views we may, I think, be greatly aided by a reference to previous legislation on the subject.

The fourth section of the act of 1705, 3 Hen. St. 376, after declaring that whosoever shall retail liquors in their houses without license first had and obtained, shall forfeit and pay a fine of two thousand pounds of tobacco, provides, that "any one intending to set up an ordinary or house of public entertainment, shall petition the county court; and they, by their discretion, shall judge whether it is convenient to suffer such a house to be set up; and whether the person petitioning be of ability sufficient to comply with the intent of the law in providing convenient lodging and diet," &c. The section then proceeds further to provide, that on "said petition being approved," the court shall take bond of the petitioner, with good and sufficient security, with condition to find and provide, constantly, good, wholesome and cleanly lodging and diet for travelers, and stablage, provender, &c., for horses: And that "the bond and security being thus taken, the court may grant their order," &c.

The act of 1748, § 1, 6 Hen. St. p. 71–2, after declaring that every person intending to keep an ordinary, shall first petition the County court, proceeds, "And the justices of the court to whom such petition shall be exhibited, shall thereupon consider the convenience of the place proposed, and the ability of the petitioner to keep good and sufficient houses, lodging and entertainment for travellers, their servants and horses," &c. "And if such petition shall appear reasonable, such court is hereby authorized, and may, if they think fit, grant the petitioner a license to keep an *ordinary for the term of one year next ensuing the date of such license, and from thence till the next court held for the same county, and no longer; which license shall be signed by the first justice sworn in the commission of the peace for such county; and may, upon petition, be renewed from year to year, if the court shall think fit. 659

The first of the above recited acts, as we have seen, commits, in terms, the granting of such licenses to the discretion, judgment and approval of the justices. And though the words of the act of 1748 are not exactly the same, they are not less expressive of a purpose to confer authority on the justices to consider and act in the matter, free from all control other than the dictates of their own judgment.

The language used in the act of 1792, in reference to the grant of the license, is identical with that employed in the act of 1748. The act of 1819 provides that every person intending to set up an ordinary or house of public entertainment, shall first petition the court of the county or corporation wherein such ordinary is intended be, and obtain a license for keeping the same; and the justices of the court to whom such petition shall be exhibited, shall thereupon consider the convenience of the place proposed, the character of the petitioner for good order, sobriety and honesty, and his ability to keep good and sufficient houses, &c.; and if such petition shall appear reasonable, and the court shall be satisfied and enter of record that the petitioner is a man of good character, not addicted to drunkenness or gaming, and shall be of opinion that he will keep an orderly and useful house of entertainment, they shall be and are hereby authorized to grant to such petitioner a license to keep an ordinary."—"Upon like petition and like entry on record, the license may be renewed from year to year, as long as the court shall be of opinion that the petitioner hath preserved his *good character, and continues to keep an orderly and useful house of entertainment," &c. 2 Rev. Code, ch. 240, § 1. 660

The same language is employed in the act of 1840. See ch. 21, sec. 13, Sess. Acts 1839–40.

It is obvious, I think, that there is no such variance in the provisions of these two last mentioned acts, from those found in the preceding acts we have cited, as would denote any change in the policy of the legislature.

Is anything to be found in the 3rd section of chapter 38 of the Code of 1849, from which to infer such a change of policy? It is true that the said section does not, in terms, require the court to consider "the convenience of the place proposed." But are we to infer, from the absence of these terms, a purpose on the part of the legislature to enjoin it as a duty on the justices to grant a license to every applicant who proves that he is sober and of good character, and will probably keep an orderly house, furnished and provided with the accommodations for travelers, servants, &c., required by the fourth section? Are all considerations of the convenience of the place proposed to be discarded? This would be to treat the word "useful," employed in the section, as of no importance, and to compel the County court to disregard a matter about which the law says they must be satisfied before they have any authority to grant the license. The probable utility of the house must depend not only on the character and conduct of the person who is to keep it, and on its being managed and kept in an orderly manner, and provided with the necessary diet, lodging, &c., but also on "the convenience

of the place proposed," the number of such houses already established at or near such place, and on a variety of other considerations, which will readily suggest themselves to the mind. And I apprehend that
661 *the right of the court to examine and weigh such considerations, in forming an opinion as to whether the applicant will probably keep a "useful" house, is just as clearly conferred as if given in express terms.

And when we look into the history of our legislation on this subject, instead of finding there anything from which to infer that the unjust or improper withholding by the justices of such licenses from the citizens applying for them, was an evil to be apprehended and guarded against, we shall find that convictions of the existence of present evil and fears of future mischief entertained by the legislature, were the result of views and considerations of a directly opposite nature.

An illustration of this is to be found in the act of 1666, 2 Hen. St. 286. The preamble recites, that "the excessive number of ordinaryes and tipling-houses set up for the advance of private gaine, had been found full of mischiefe and inconvenience," &c. And the act then proceeds to declare, "that the commissioners of each County court be required to take speciall care for the suppressing and restraint of the exhorbitant number of ordinaryes and tipling-houses in their respective counties, and not to permitt in any county more than one or two, and those near the court-house, and noe more unles in publique places, as ports, fferryes, and great roades, where they may be necessary for the accommodation of travellers, according as the said courts shall find the necessityes of their counties require," &c.

And so again: The act of 1676, 2 Hen. St. 361, after reciting that "it is most apparently found that the many ordinaries in severall parts of the country are very prejudiciall, and this assembly finde the same to be a generall grievance presented frome most of the counties," proceeds to enact, that "no ordinaries, ale-houses or other tipling-houses whatever, by any
662 of *the inhabitants of this country, be kept in any part of the country, except it bee in James City, and at each side of Yorke river, at the two great ferries of that river; provided, and it is hereby intended, that those at the ferries of Yorke river as aforesaid, be admitted in their said ordinaries to sell and utter man's meate, horse meate, beer and syder, and no other strong drink whatsoever; and that all other ordinaries, ale-houses and tipling-houses whatsoever, in the country (except as before excepted), be utterly suppressed," &c.

Numerous other instances of the like kind might be cited; and in nearly every law on the subject, if we do not find a preamble setting forth the existence of pernicious and hurtful consequences growing out of the multiplicity of such houses, and declaring the earnest desire of the legislature to guard against the evil, we shall find restriction after restriction on the authority given to the justices, showing manifestly, that the legislature had fears, not that the rights of applicants, or the convenience of the public, might suffer from a failure of the courts to allow the setting up and keeping of a sufficient number of such houses, but that the morals of the people might sustain injury from the granting of too many licenses.

It is difficult to conceive why the legislature of 1849, with a knowledge of the policy which thus marks our previous legislation in conferring power on the justices over the subject of granting licenses, should have employed terms, which, in common acceptation, are permissive and not mandatory, and which, in former laws, have been used in the first mentioned sense, if they did not mean to confide such authority to the discretion of the justices.

I can discover in the act of 1849 no indication of a change of legislative purpose; nothing to show that the fitness, propriety and reasonableness of all applica-
663 tions *for such licenses, are not still left to the consideration, discretion and judgment of the justices, as fully as by former laws.

With this view of the nature of the authority given to the County courts, I cannot see how, when they have heard an application, and, in the exercise of their discretion, have pronounced a judgment of refusal against it, the superior court can undertake to revise the judgment by means of a mandamus, without running counter to the law of the subject, as settled by numerous decisions of the courts, as well in England as in this country.

The principle on which the superior courts act, and the extent to which they go in controlling by mandamus the action of the inferior courts, in cases where the latter are authorized to act in matters of discretion, is concisely and clearly stated by the judges in the case of The King v. Justices of Kent, 14 East's R. 395. It appears from the statement of facts, that the justices were authorized by statute to fix the rate of wages of certain classes of laborers therein mentioned; and they refused to hear an application made by a number of persons, representing themselves to be millers, and asking the court to fix the rate of wages, on the ground that, according to a proper construction of the statute, the court had no authority to act, except on the application of servants employed in husbandry. The mandamus in that case was allowed, but with the following declaration of their opinions by the several judges:

Lord Ellenborough: "We do not, by granting this mandamus, at all interfere with the exercise of that discretion which the legislature meant to confide to the justices of the peace in session: We only say they have a discretion to exercise; and therefore they must hear the application; but having heard it, it rests entirely

664 *with them to act, or not, upon it, as they think fit."

Le Blanc, J.: "We only say that the justices have authority to act upon the subject matter of the application; and that they are to hear it, and then determine whether, in their discretion, they think proper to fix a rate of wages."

Bayley, J.: "We tell the justices that they are authorized by law to settle a rate of wages for the persons applying; but we do not say they are to exercise that authority in this instance." So in the case of Ex parte Nelson, 1 Cow. R. 419, the Supreme court of New York declared the doctrine to be, that when a discretion is vested in any inferior jurisdiction, and that discretion has been exercised, a mandamus cannot issue; that the superior court cannot control and ought not to coerce that discretion. The same principle is asserted in the case of Ex parte Benson, 7 Cow. R. 363, and in the case of Gunn's adm'r v. the County of Pulaski, 3 Pike (Ark. R.) 427. And in Pickett's Case, Spencer's N. Jer. R. 134, the court say they never direct in what manner the discretion of an inferior tribunal shall be exercised, though in a proper case they would require such tribunal to proceed to a decision, to the end that said decision may be reviewed in due course of law. And in two cases in 3 Texas R. 51, 88, the rule is stated to be, that the writ will not issue unless to control the performance of an act clearly defined and enjoined by the law, and which is therefore ministerial, and neither involves discretion nor leaves any alternative. In the cases in 1 Alab. R. 15, 1 Morriss Iowa R. 31, and 25 Maine R. 296, the same principle is declared.

Other cases of the like character might be referred to, but I deem it unnecessary to cite them, in as much as there are numerous

665 *bearing on the question we are considering. Thus, in the case of Rex v. Young & Pitts, 1 Burr. R. 556, which was the case of a motion for an information against justices of the peace for arbitrarily, obstinately and unreasonably refusing to grant a license to keep an inn, the doctrine is thus concisely and strongly stated by Lord Mansfield: "This court has no power or claim to review the reasons of justices of the peace upon which they form their judgment in granting licenses, by way of appeal from their judgment, or overruling the discretion entrusted to them. But if it clearly appears that the justices have been partially, maliciously or corruptly influenced in the exercise of this discretion, and have consequently abused the trust reposed in them, they are liable to prosecution by indictment or information; or even possibly by action, if the malice be very gross and injurious." He had previously declared, in the progress of the argument or the motion, that the argument ought to be "taken up upon the foot of criminality in the justices."—"For there was no pretence upon any other foot, to make a rule upon the justices, who have a discretionary jurisdiction given them by the law." Mr. Justice Denison also expressly "allowed the discretionary power of the justices in granting licenses without appeal from their judgments, or having their just and honest reasons reviewed by any body." He then proceeded to express the opinion, that in cases of clear and apparent partiality or willful misbehavior, they might be proceeded against by way of information. The other judges expressed themselves to the same effect.

The same principles were announced in the cases of Rex v. Davis & Williams, 3 Burr. R. 1317, and Rex v. Baylis, Id. 1318; both of which were also cases of motion for information against the justices for refusing to grant licenses. In the first of

666 these cases (in which *the information was granted), Lord Mansfield emphatically declared that the court granted the information against the justices, not for the mere refusing to grant the licenses, which he said they had a discretion to grant or refuse as they should see to be right or proper, but for the corrupt motive of such refusal.

And in the case of John Giles, 2 Strange's R. 881, in which a motion was made for a mandamus to the justices of Worcester to grant a license to Giles to keep an ale-house, the motion was overruled, with the brief declaration by the court, "There never was an instance of such a mandamus, and therefore we will not grant it."

The question has been presented in the same shape to the supreme courts of several of our sister states, and has, so far as we can find from reports of their decisions, been uniformly decided by them in the same way.

In the case of The People v. Norton & others, 7 Barb. R. 479, we find the singular instance of an indictment against commissioners of excise for improperly and corruptly granting such a license; and in that case the Supreme court of New York say, that "The justices, in granting or refusing licenses under the excise law, do not act solely as judicial officers. They have indeed a discretion, to exercise which this court will not control by mandamus. But their duties are so plainly defined, that if they disregard them, they are liable to an indictment."—"The duty of commissioners of excise in this state is extremely similar to that of justices of the peace in England in granting or refusing licenses to sell ale. The conduct of justices in that respect has frequently been the subject of investigation; and it seems to be clear, says Mr. Russell, that though upon this matter they have a discretionary jurisdiction given them by the law, and though discretion means the exercising the best of their judgment

667 upon the occasion *that calls for it, yet if this discretion is willfully abused, it is criminal, and under the control of the Court of king's bench.

And in the case Ex parte Pierson, 1 Hill's N. Y. R. 665, the question as to the power of the superior courts to interfere by man-

damus, was distinctly presented on an application for a mandamus to the commissioners of excise to compel them to grant to Pierson a license to keep a tavern. The court refused the mandamus, stating that the law conferred upon the justices a large discretion, the exercise of which, either in granting or refusing a license, could not be coerced in any way.

The case of The Attorney General v. The Justices of Guilford County, 5 Ired. R. 315, is one having a still closer resemblance to the one before us. There the policy of such laws, the power and duties of the justices in administering them, and the extent to which their action is subject to the control of the superior courts, is discussed by Chief Justice Ruffin with great fullness, learning and ability; and the conclusion to which he came, and in which he was sustained by all the judges, were, that whilst the justices might be proceeded against by way of information or indictment for a corrupt exercise of their powers, they could in no case be coerced by mandamus to grant a license. In that case the question was fully presented, and seems to have been conducted with the view of fairly testing whether in any case the mandamus could go. The justices, in their return to the writ, admitted that the applicant had proved himself to be possessed of all the qualifications which the law required, and stated that at a court previous to the one at which the application was made, the justices, a majority being present, had resolved that thereafter no license should be granted to any person, as they entertained the
668 opinion that the retailing of *spirituous liquors was against the public policy and a hurt to the morals of the people, &c, And though the relator had shown himself to be a man of good moral character, yet they thought the business of retailing would of itself be, in that place (the town of Greensborough), productive of evil consequences; and they insisted that, by the law, the granting of orders for such licenses or refusing them, was a matter entirely in the discretion and free choice of the justices; and submitted whether they could be compelled by mandamus to grant the license, &c.

It is true that the application in that case was for a license to retail liquors; but it will be seen that, in the opinion of the chief justice, he places such an application under the laws of North Carolina, on the same footing with one for license to keep a tavern. And it will also be seen from his statement of the provisions of the statute in respect to such last mentioned licenses, that it is very similar to our own. The decision is, therefore, directly in point; and the opinion by which it is sustained is, I think, entitled to great respect as well on account of its intrinsic force as of the well known worth and ability of the learned judge who pronounced it.

The same doctrine is maintained by the Supreme court of Georgia, in the case of Manor v. McCall, 5 Georgia R. 524. The court say that the doctrine as to discretion is well defined, and seems to be this: A superior court will not undertake to regulate and control a discretion in the inferior judiciary, which is not and cannot be governed by any fixed principle or rule; and after citing other instances, the court proceeded: "So in the granting of licenses, roads, &c."—"In this class of cases the inferior courts will be required to act; but they will not be coerced as to the mode or manner of their action."

The counsel for the petitioner re-
669 ferred us to a recent *decision of the Supreme court of Kentucky, which he supposed to be the other way. I understood him to say that he had not seen the report of the case, but that it would be found in 14 B. Monroe, and that he had been informed by members of the bar who had seen it, that it sustained the right of the superior courts to control the action of the justices in the matter of granting licenses to keep ordinaries, &c. The case to which I suppose the counsel intended to refer us, is that of Dougherty v. Commonwealth, 14 B. Monr. R. 237, as it is the only case on matters of this kind which I can find in the report mentioned. It is true that in that case the Supreme court of Kentucky did reverse a decision of a Superior court, declining to review and control the action of the County court in refusing to grant a license. But the application in that case was not for a license to keep a house of public entertainment, but was an application by a merchant for a license to retail liquor. And the case was brought to the superior court not by mandamus, but by writ of error.

Looking to the grounds on which the Supreme court rests its reversal of the judgment of the superior court, I think that the case, so far from deciding anything in opposition to the views I have endeavored to maintain, is a strong one in support of them. This will be shown more readily and clearly by a few extracts from the opinion of the court (delivered by Judge Simpson), than by any other means I can adopt. After stating the case and making some remarks with respect to the jurisdiction of the courts, the opinion proceeds: "That part of the revised statutes which was adopted by the legislature during the session of 1850–51, contains the following section, under the head of Revenue and Taxation, ch. 83, art. 2, § 4: On a license to a merchant to sell spirituous liquors, five dollars.
670 *Licenses to merchants shall be granted by the County courts, only upon satisfactory evidence that the applicant is in good faith a merchant, and his business is that of retailing merchandise; and he has not assumed the name and business of a merchant with the view and object of obtaining a license to sell spirituous liquors."

At the subsequent session of 1851–52, an act was passed by the legislature, by which it was enacted, that no license to a merchant to sell spirituous liquors, shall be granted by the clerk of any county, but only by

the County courts, who may, in their discretion, grant such licenses, provided the applicant is in good faith a merchant. This act was approved the 13th of December 1851. Subsequently, on the 7th of January 1852, during the same session, the remaining chapters of the revised statutes were adopted. One of the chapters on the subject of taverns, tippling-houses, &c. (ch. 99, art. 2), contains the following section: "A merchant may sell at his store-house, to be taken off and drunk elsewhere than on his premises, or adjacent thereto, any wine, spirituous liquors, or the mixture thereof, in any quantity not less than a quart. But before he shall so sell, he shall obtain from the County court a license therefor."

The opinion then proceeds to state that the revised statutes did not take effect till the first day of July 1852; the operation of those adopted at the first session of the legislature, as well as those adopted at the subsequent session, being postponed until that time; and that the application for a license in that case was made after the revised statutes had taken effect.

The concession is then made, that "the correctness of the order of the County and Circuit courts depended upon the ques-
671 tion whether the act of the 13th *December 1851, so far as its provisions are applicable to this subject, was still in force, or had been virtually repealed by the revised statutes."

The inconsistency between the act of December 1851 with the provisions of the revised statutes in relation to the rights conferred by it on merchants to vend spirituous liquors, is thus discussed and shown: "This right in its qualified form, that is that not less than a quart shall be sold to be taken off and drunk elsewhere than on the premises, is by the revised statutes conferred absolutely upon merchants, subject only to the condition that they shall, previous to its exercise, obtain from the County court a license for the purpose. The County court has no discretion upon the subject. It must ascertain judicially the qualifications of the applicant; and if they be such as the law requires, he is entitled to a license as a matter of right. At the time of the adoption of the first part of the revised statutes, and prior thereto, a license to a merchant was granted by the clerks of the County courts. The law required it to be taken out merely for the purpose of increasing the revenue. The only change in the law contemplated by this part of the revised statutes, was a transfer of the power to grant licenses, from the clerks of these courts to the courts themselves. The only object of the change was, that the qualifications of the applicant might be judicially enquired into, and an existing evil be thereby guarded against. It sometimes happened that persons who were not such actually, assumed the name and business of a merchant, with the view of obtaining a license; and under that assumed character procured one from the clerk when it should not have been granted. To remedy this evil, the change in the law was made, and the power to grant licenses to merchants conferred on the County courts. The statute imposed a duty on the court. It not
672 only conferred *jurisdiction to grant a license, but enjoined its exercise." —"Now if the act of the 13th of December 1851 be in force, it produces a material change in the law upon this subject. The merchant has not even a certain qualified right to obtain a license; he has no right whatever; the County court may grant or refuse a license at its discretion. This act, therefore, is in this respect absolutely and entirely inconsistent with the provisions of the revised statutes."

The inconsistency between the act of 1850-51 and the provisions of the revised statutes being thus shown, the court then express the opinion that the former was repealed by the latter; and on this ground reverse the action of the Superior court declining to interfere with the refusal of the County court to grant the license. The case, therefore, so far as it can be cited as an example of judicial opinion worthy of respect in the consideration of the questions in hand, bears with all its weight in favor of the judgment under review.

The case of The Com'rs of the Poor v. Lynah, 2 McCord's R. 170, it is suggested, is a decision in favor of the proposition that when an inferior tribunal clearly abuses a discretion with which it is vested, it may be controlled by mandamus. Mr. Justice Colcock, in delivering the opinion of the court in that case, it is true, did say, "That whenever a discretion is given, the court will not interfere, unless it be clearly shown that this discretion has been abused." If from this expression we are to imply the opinion that the court ought to interfere where there is such abuse, it is manifest, from a report of the case, that such opinion was uncalled for and extrajudicial; for in that case the court refused to interfere. And the case, therefore, I think, opposes no force to the strong current of authority to which reference has been had, all tending to the result that for such abuse of
673 discretion by an *inferior court, the remedy is to be found not in the civil but in the criminal process of the superior courts.

The same remark applies to some dicta of Judge Tucker in the case of Brander v. The Chesterfield Justices, 5 Call 548. In that case, a rule was made, in the District court, against the justices, to show cause why a mandamus should not be awarded, commanding them to cause the necessary repairs to be made to a bridge; in answer to which, the justices showed for cause: 1. That if the plaintiff had a right to redress, he had a different specific legal remedy by appeal or supersedeas. 2. That the order of the County court refusing to let the repairs of the bridge, was made in the exercise of their judicial authority: And for this latter reason, the District court decided that it had no power to award the mandamus. This court affirmed the judgment of the

District court, on the ground that the matters of fact set out in the bill of exceptions were not sufficient to justify a mandamus; but at the same time expressed the opinion that the reason assigned by the District court for its judgment, was not a good one. And Judge Tucker, in delivering his opinion, said, that he did not regard the order of the County court as one made in the exercise of their judicial authority; but in another character, to wit, as commissioners of police for the county; and he proceeded farther to express the opinion that, in permitting the erection of mills, in granting licenses to tavern keepers, and in making orders for building court-houses, &c., the justices performed the functions of commissioners of police, and not of judges. He does not, however, say how far he would interfere with the action of the justices in the performance of these functions. The case did not make it necessary that he should do so; and indeed, so much of the opinion of the court as negatived the validity
674 of the claim of the *justices to have acted in a judicial capacity in refusing to make the order for repairing the bridge, was uncalled for, in as much as the decision of the District court was affirmed on the merits. There is clearly nothing in the case which can be referred to as authority trammeling the action of the court in considering the question now before us.

Left thus free to consider the case as one of the first impression in this court, I have, after the most careful deliberation which I have had in my power to give to it, come to the conclusion, that by the act of 1849 the legislature intended to clothe the County courts with a discretion in the matter of granting licenses for houses of entertainment, in the exercise of which the justices are not liable to be overlooked or controlled by way of mandamus. And as the petitioner, with the view of testing the question whether the Superior court could, or ought to, review the action of the County court in any mode, presented, at the same time with his petition for the writ in this case, two other petitions: one for a writ of error to a refusal of the Superior court to grant him a writ of error; and the other for a like writ to the refusal of the said Superior court to grant him a certiorari, to the order of the County court, I think it proper to add, for reasons which may be collected from views of the law already expressed, that I think there is no mode by which the action of the justices can be appealed from. That the petitioner, by the proof which he furnished in reference to his character, and the probability of his keeping such a house as is contemplated by the law, and by producing to the court the sheriff's receipt for the tax imposed by law on ordinaries, showed that he was a person to whom the County court, if they thought fit, might have granted and may still grant a license; but that he did not thereby acquire any such right to said license, as
675 *places it in the power of the Circuit court, at his instance, to say to the County court, through the medium of any legal proceeding, that they shall grant it.

Whether or no the justices can in any case under our law, be proceeded against by way of information or indictment, for any alleged willful abuse of their discretion in refusing to grant such licenses, is a question not before us, and about which I deem it unnecessary and improper to express any opinion.

I think the judgment ought to be affirmed.

ALLEN, MONCURE and LEE, Js., concurred in the opinion of Daniel, J.

SAMUELS, J., dissented.

Judgment affirmed.

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676 *Kidwell v. The Baltimore & Ohio Railroad Co.

July Term, 1854, Lewisburg.

(Absent DANIEL, J.)

1. **Contracts with Railroad—Construction by Parties—Acquiescence in.***—A contractor for the construction of a bridge on a railroad having received the monthly estimates based upon a particular construction of his contract without objection, will be held to have acquiesced in that construction, and to be bound by it.
2. **Same—Engineer's Final Estimate—Conclusiveness of.**†—The contract providing that the final estimate of the engineer shall be conclusive upon the parties to the contract, that is a valid contract, and the estimate of the engineer, in the absence of fraud or mistake, is conclusive.
3. **Same—Same—Same.**—If the contractor might have refused to abide by the final estimate of the engineer, yet having submitted his charges for the work done to the engineer, and not having objected to his proceeding to make up the final

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***Contracts—Construction by Parties.**—In Knopf v. R. F. & P. R. Co., 85 Va. 778, 8 S. E. Rep. 787, the principal case is cited to the point that the practical construction which the parties put upon the terms of their own contract is not only to be regarded, but that it must prevail over the literal meaning of the contract. See also, Bank v. McVeigh, 32 Gratt. 530, and *foot-note*; District of Columbia v. Gallaher, 124 U. S. 505, 8 Sup. Ct. Rep. 585; Topliff v. Topliff, 122 U. S. 121, 7 Sup. Ct. Rep. 1057, 1062.

†**Contracts of Railroads—Engineer's Estimates—Conclusiveness of.**—In support of the proposition laid down in the second headnote, see the principal case cited in B. & O. R. Co. v. Polly, etc., R. Co., 14 Gratt. 469; Iaege v. Bossieux, 15 Gratt. 101; N. & W. R. Co. v. Mills, 91 Va. 643, 22 S. E. Rep. 556 (dissenting the opinion of BUCHANAN, J.); *foot-note* to Condon v. South Side R. Co., 14 Gratt. 302; Wood v. Chicago, etc., R. Co., 39 Fed. Rep. 53.

In James River, etc., Co. v. Adams, reported as a note at the end of James River, etc., Co. v. Adams, 17 Gratt. 427, 441, it was argued that there is a difference between *monthly* and *final* estimates in regard to their effect as evidence; and that while the latter are conclusive according to the decision of the principal case, the former are not. But MONCURE, J., delivering the opinion of the court, held that, whether either are conclusive or not, depends upon the contract, which may make either or both conclusive, according to the intention of the parties.

estimate, the contractor is concluded by the action of the engineer.

4. **Same—Monthly Payments in Depreciated Orders—Case at Bar.**—The engineer having the right under the contract to stop the work, if the means for carrying it on should fail, and having informed the contractor that the work must be stopped unless he would receive his monthly payments in orders which were at a discount; and the contractor having consented to receive them, he is not entitled to recover for the amount of the depreciation of said orders.

The following statement of the case has been prepared by Judge Moncure:

On the 5th of August 1839 the appellant Zedekiah Kidwell contracted with the appellees, the Baltimore and Ohio railroad company, to build and complete, in a workmanlike manner, on or before the first day of September 1840, a bridge, with stone abutments and wooden superstructure, across Little Cacapon creek; all the work and materials of which were to be approved by the engineer or agent of the said company having the superintendence of the work, to entitle the said Kidwell to the compensation stipulated to be paid for the same; it being agreed that the said
677 agent *should have full power, in case he should believe the said work or any part thereof to be weakly, or otherwise defectively executed, during its progress, or upon its completion, whether said weakness or defect proceeded from the quality, size, or form of the materials used, or the manner of their use, to order the said weakness or defect to be remedied in any manner that he might point out, and for that purpose to order the said work or any part thereof to be taken down and rebuilt; when it should be the duty of said Kidwell to take down and rebuild the same. It was further agreed that said Kidwell should commence working upon the bridge at such time as might be designated by said agent, and at all times when required apply his force to such parts of said bridge as the said agent might indicate; and should commence and carry on the stone work so as to prevent any delay in the progress of the graduation connected with the bridge: The said Kidwell agreed to comply with other terms which it is needless to enumerate. For so doing and performing the work aforesaid, the company agreed to pay at the following rates or prices, viz: For every perch of twenty-five cubic feet in the stone work of said bridge, four dollars, and for every lineal foot in the length of the superstructure, twenty-three dollars. The payments were agreed to be made in the following manner, viz: During the progress of the work and until its completion, a monthly estimate was to be made by said agent of the quantity, character and value of the work done during the month, or since the last monthly estimate, four-fifths of which value were to be paid to the said Kidwell, at such place as the said agent might appoint; and when the work was completed and accepted by the agent, there was to be a final estimate made of the quantity, character and value of the work, agreeably to the terms of the agreement, when the balance appearing to be due
678 to *said Kidwell was to be paid to him upon his releasing the company from all claims or demands growing out of the agreement. And it was agreed that the said monthly and final estimates should be conclusive between the parties to the contract; unless the engineer of location and construction might deem it proper at any time to review and alter the monthly or final estimates of said agent; in which event, the estimate of the said engineer was to be substituted in place of the estimate of the agent: it was, however, to be wholly optional with the engineer to exercise such power of revision or not.

It was further agreed, that should the company be delayed by legal process, (or from want of funds caused by an inability to procure payment of the subscriptions made by the state of Maryland and the city of Baltimore to the capital stock of said company, &c.) from prosecuting the work, &c., operating to delay or hinder the completion of the work of said Kidwell, such delay or hindrance should not give him any claim to damages against the company, but should entitle him to such an extension of the time allowed for the completion of the work as should in the opinion of the engineer of location and construction, compensate for such delay or hindrance. And should such delay or hindrance amount to such an interference with the work that the company should see fit to annul the agreement, the said Kidwell should be entitled to be paid the full amount of the work actually done by him under the agreement according to its tenor, and no more.

And it was further agreed, that in case the said Kidwell should not perform all the terms stipulated to be performed by him, in manner and form, and within the time mentioned in the contract; or in case it should appear to said agent that the work did not progress with sufficient speed; or in case of interference with
679 *said work by legal proceedings; the said agent should have power to annul the contract, &c.; when the agreement on the part of the company should become null, and the unpaid part of the value of the work done, (unless the contract should be annulled in consequence of legal proceedings,) should be forfeited by the said Kidwell, and become the property of the company; and the said company should be at liberty to employ any person in the place and stead of said Kidwell.

Annexed to the said contract, as part thereof, is a paper entitled "Manner and condition, according to which the work must be bid for and executed." In this paper, it is among other things stipulated as follows: "The bridge is to be built of large sized, hard and durable stone, with good natural beds, undressed, except the corner and coping stones, which shall be rough hammered."—"The foundation to be

placed upon solid rock, timber, or other material, as may be directed by the engineer; and all the work both under and above water, except in the cases mentioned below, to be laid without mortar, and with large stone well bedded and bonded. The piers" "shall be laid in good mortar made with common lime, above the low water line."—"The preceding general description" "will be subject to modification, &c."—"The bids per perch of twenty-five cubic feet, for bridge and culvert work and dry walling, will include cost of digging and draining foundations, scaffolding, centreing, and all other expenses necessary to the completion of the masonry according to the plans."—"The wooden superstructures to be built of white or yellow pine timber, as the one or the other may be most cheaply obtained, of the best quality, with a few sticks of white oak in each truss frame, according to the plan exhibited in the drawings and models in the company's office in Baltimore. The cast and
680 wrought *iron of the skew-backs, bolts, &c., to be of good quality, free from all flaws and other defects, and submitted to such tests as the engineer may require. The bid for the superstructures to be by the running foot, and to include scaffolding, materials and workmanship of every kind, excepting painting the bridge and laying the track on the floor."—"The quantities of masonry and bridging, as here stated, may be changed, at the pleasure of the engineer, by alterations in the grades, curves or plans of any part of the work, and the calculations of quantities will be made anew for final settlement with the contractors; it being understood that if by such changes the average haul of materials is lengthened, or the difficulties of the work are considerably increased, the contractor shall be equitably allowed therefor by the engineer."—"The whole work shall be done under the superintendence of the engineer, in accordance with the plans which will be furnished."

On the 10th of December 1849 the appellant made a contract with the appellees for the construction of a bridge across the north branch of the Potomac river; which contract was similar to the one before mentioned, except that the work was to be completed on or before the first day of January 1841, and the price to be paid for it was four dollars and ninety-four cents (instead of four dollars) per perch for the stone work, and twenty-five dollars (instead of twenty-three dollars) per lineal foot for the superstructure. The estimated quantity of materials required for each bridge was stated in the contracts respectively, and of course very much varied; the bridge across the north branch being much longer than that across the little Cacapon.

The bridges seem to have been commenced shortly after the contracts were entered into respectively; but not to have been completed until June 1842. During the progress of the work, monthly esti-
681 mates and payments *were made, and when the work was completed and accepted, final estimates were made, according to the terms of the contracts; from which final estimates it appeared that the value of the work done:

On the North Branch bridge was	$49,388 41
On the Little Cacapon bridge was	8,649 70
Making together, - - -	$58,038 11

After the final estimates were made, the company appear to have been always ready and willing to pay the balance due thereon to Kidwell, who, however, received only a portion of the said balance.

On the 25th of June 1842 Kidwell exhibited his bill in chancery against the company in the Circuit court of Hampshire, complaining that the agents of the company, to whom such power was reserved, frequently and materially varied the manner, quantity, quality and finish of the work which he had contracted to do; sometimes requiring him to pull down parts of the work after the same was built according to the instructions of the resident engineer, or engineer of the division, sometimes requiring additional work not contemplated by the terms of the contracts, requiring mortared masonry instead of dry masonry; and especially and most essentially in requiring him to make ranged and dressed work masonry instead of plain natural bedding, and to furnish and use, in the rock masonry on both bridges, cement lime instead of common lime, and in many other respects exacting of him labor and expense not contemplated by the contracts; all of which would be seen by reference to exhibits No. 3 and No. 4, filed with the bill: Also complaining that in the progress of the work the company refused to pay him the monthly estimates, made by their engineer and agent, in par funds, but required him to receive, and his necessities often compelled him to accept, what is com-
monly called railroad orders, as so
682 *much money; and that the company, by its officers and agents, charged with the duty of making the monthly estimates, did not make them according to the value of the work done and materials furnished, but according to the contract, or what should have been the contract prices, if no alterations had been made in the manner in which the work was to have been done: And claiming that the company were indebted to him in a very large amount, for extra work done as aforesaid, deficiency in the monthly estimates, and loss upon railroad orders, with interest thereon: And praying for suitable specific and general relief.

In September 1842 the defendants filed their answer; in which they say that upon the completion of the work the final estimates were made up by the engineer or agent designated for that purpose in the contracts; that at the time they were made up, the complainant expressed himself fully satisfied with the same and the different items thereof; and that by the terms

of the contracts the said estimates are conclusive between the parties. The defendants then respond to the different items of the complainant's claim, as set forth in his said exhibits Nos. 3 and 4. In regard to the principal item of the claim, to wit, for the masonry, charged in the said exhibits at nine dollars per perch, instead of the contract prices of four dollars and four dollars and ninety-four cents per perch, making a difference in this single item of thirty-one thousand three hundred and thirteen dollars and twelve cents, the defendants say that in whatsoever respect this masonry varies from the specifications in the contract, it was not varied by directions of the engineer of the defendants, but of choice by the complainant himself, in order to avoid complying with the specifications. The contractor was bound by the contract to furnish stone with good natural beds, and that was all the defendants wanted. When he did not get
683 *stone with good natural beds he was offered the alternative to dress them; which he accepted and assented to without complaining to any of the engineers of the defendants; and the variations from the specifications were thus permitted for the accommodation of the complainant himself. In regard to the next largest item of the claim, about which there is any controversy, to wit, for laying three thousand seven hundred and eighty-seven perch of stone in cement mortar at one dollar per perch, the defendants say that the cement mortar was used by the complainant to avoid the expense of obtaining stone with good natural beds, or dressing the beds of the stone to bring them within his specifications. The cost of dressing the beds, if the stone be rough, is greatly lessened by the use of the cement mortar; and in this instance the expense to the contractor was greatly lessened. The saving in the dressing of the beds much more than countervails the expense of mixing and using the mortar.

In regard to the last item of the claim, to wit, for loss on city stock, two hundred and thirty-one dollars: The defendants say that they had power to annul the agreement, provided the want of funds prevented them from prosecuting the work; that they would have been unable to prosecute the work unless the contractors would agree to receive the stock orders of the city of Baltimore in payment of their estimates; and that this fact was communicated to the contractors, including the complainant, who agreed to receive and did receive, the said orders in payment of his demands against the defendants. They aver that the final estimates were made up with the complainant's assent and co-operation; that he brought his bills and papers to the railroad office in Cumberland, to enable the engineers to make such equitable allowances as they were empowered under the contracts
684 to make, in *order to attain even-handed justice between the parties in matters which could not be foreseen; and that the engineers made the allowances; many of them at the suggestion of the complainant, who signified his acquiescence in them, and said he had no objection to anything the engineers had done, but on the contrary assured them of his full satisfaction with all their conduct. But had the complainant not thus assented to the allowances made to him, the defendants insist that, by the express provisions of the contracts, the allowances thus made are final and conclusive between the parties, unless the complainant can show mistake or fraud on the part of the engineers; which the defendants presume will not be attempted.

Finally, they insist that the complainant is entitled to nothing more than is allowed in the final estimates; and for that amount, they say they are, and always have been, willing to settle.

In June 1843 the complainant filed an amended bill, in which, among other things, he stated that before and at the time the bids were made, upon which the contracts were based, the said company, by their agents and officers, declared that suitable materials for the erection of the bridges which would be required to be built, were to be had convenient to the line of the road and the sites of said bridges; that such declarations were made to the public and to the bidders to induce them to offer for the work at low rates; yet when the stone for the masonry was being procured, that said agents condemned it as unsuitable for the masonry of the bridges contracted for by the complainant, unless first hammered and dressed and prepared at great labor and expense to him; and when so prepared, said company have failed and refused to make him any allowance for the labor and expense thus exacted of him: which course of proceeding, he charged, was calculated to deceive and mislead, and did in fact
685 *deceive and mislead him, and was a gross fraud upon him, if, as said defendants contend, under the stipulations of said contract, the complainant is not entitled to receive additional compensation for having, under the orders of the officers and agents of said company, put up "ranged work," instead of "rubble work," for which he bid and contracted. The complainant further charged, that at the time of the making of the contracts, and during the progress of the work, Atkinson the agent, and Latrobe the engineer of location and construction, were stockholders of said company, and consequently not impartial or disinterested; that complainant was not aware of that fact, nor that during the progress of the work said Latrobe would be such engineer, or said Atkinson would be the agent having charge of the work; that the defendants did not give him this information, as they ought to have done; and that he was advised, that for this reason alone, if no others existed, the said estimates cannot be binding and conclusive upon him.

In September 1843 the defendants filed

their answer, in which, among other things, they admit that said Latrobe, at the time of entering into the contract by the complainant, was a stockholder in the said company; but deny that he was so at the time the final estimates were made up for the building of the said bridges; and also deny that the said Atkinson, the engineer, having charge of the work during the whole time it was in progress, and whose duty it was to make the monthly and final estimates, ever was a stockholder in said company. They aver that the complainant, at the time he entered into the contracts, knew that said Atkinson was the engineer who would have charge of the work, and that said Latrobe was and would be the engineer of location and construction. They deny that they did by their agents and officers state that suitable materials for the
686 erection of *the bridges were to be had convenient to the line of the road and the sites of the bridges. And they positively deny that any misrepresentation, deceit, or fraud, in reference to the stone for said bridges, or to any other matter connected with the said contracts, was practiced upon the complainant by the defendants, or any of their agents or engineers.

A great many depositions were taken in the case, but they are sufficiently noticed in the opinion which follows.

An interlocutory decree was pronounced in the case on the 11th of September 1844, and another on the 12th of April 1845; and a final decree on the 30th of December 1845. By these decrees, the court, being of opinion that the final estimates or certificates of completion of the two bridges in controversy, as made out by the engineer of the said company and filed in the cause, are under the terms of the contracts, final and conclusive between the parties as to the work done and materials furnished under the provisions of said contracts;" and being also of opinion that the complainant was entitled to no relief as to the charge in the bill that a portion of the amount paid to him upon these contracts, was paid in depreciated stock orders of the city of Baltimore, it appearing to the court that such payments were made with his consent, and that there was no sufficient proof in the cause that the said company, as to this transaction, acted mala fide, decreed that the complainant recover against the defendants eight thousand five hundred and eighty-seven dollars and fifty-eight cents (being the balance ascertained to be due on account of the said final estimates), with legal interest on eight thousand five hundred and fifty-nine dollars and five cents, part thereof, from the 10th of April 1845 till paid, and that each party pay his own costs. From these decrees the complainant obtained an appeal.

687 *Grattan and Fry, for the appellant.
Andrew Hunter, for the appellee.

MONCURE, J., after stating the case, proceeded:

The principal subject of controversy in this case is, the amount of compensation to which the appellant is entitled for the masonry of the two bridges made by him for the appellees. He charges nine dollars per perch for dressing, ranging and laying the stone, besides making other charges connected with the masonry; whereas the price stipulated in the contracts and allowed in the final estimates, for the entire masonry, is four dollars per perch for that of one of the bridges, and four dollars and ninety-four cents for that of the other. The difference between the amount charged by him, and the amount allowed in the final estimates, for the masonry, is upwards of thirty-five thousand dollars.

The appellant contends that the masonry required by the contracts was "rubble work," whereas he was required by the appellees to do and accordingly did do "ranged rock work;" that though the contracts required that the stone should have "good natural beds," and be "well bedded and bonded," yet those terms should be construed in reference to all the surrounding circumstances, and especially in reference to the quarries in the neighborhood of the bridges, and the nature and quality of the stone they afforded; that the stone of which the bridges were constructed had "good natural beds," and might have been "well bedded and bonded," within the meaning of the contracts, by the use of the hammer merely. That if the work required by the contracts to be done was worth four dollars and four dollars and ninety-four cents per perch, the work required by the appellees to be done, and actually done, was, in the same proportion, worth nine dollars per perch; and that therefore
688 *he is entitled to the latter price. On the other hand, the appellees contend that the stone of which the bridges were constructed had not "good natural beds," and could not have been "well bedded and bonded," within the meaning of the contract, by the use of the hammer merely; that they had a right to require, and only required, the work to be done according to the contracts, but as it could not be done with the stone which was used, they were willing that it might be done in the manner in which it was done; that the change in the manner of doing the work was no benefit to them, but an accommodation to the appellant, who was thereby enabled to do it on better terms than he could have done it according to the contracts; that he assented to the change, and did not complain of it to any of the engineers; that the work actually done was but "rubble work," though of a superior quality, and was not worth more than the contract prices; and that therefore he is entitled only to the contract prices.

The evidence is very conflicting as to the meaning of the technical terms used in the contracts, the character of the work thereby required, and the character and value of the work actually done. It would be difficult for the court to decide upon this evi-

dence without the aid of a commissioner or a jury: But it is unnecessary in this case to do so. The appellees presented to the appellant the alternative of doing the work according to their construction of the contracts, or of doing it as it actually was done; and he elected the latter. He knew that they considered him to be doing the work at the contract prices; and yet during the whole progress of the work, which continued for about two and a half years, he never gave them notice that he would claim a higher compensation. On the contrary, he received from time to time, without objection, the amounts awarded him

689 *in the monthly estimates, though in all of them the work done was charged at the contract prices. Edgerton, a resident engineer, proves that he had a conversation on the subject with the appellant soon after the work was commenced. The appellant "frequently alluded to the character of the work as being superior to what he was required to do by the contract. He was repeatedly told, if he thought so, to discontinue the work until the question could be settled; to do no more until that matter should be finally settled." Atkinson, the division engineer, proves that the appellant never complained to him that he was required to do the work in a different style from that required by the contracts; on the contrary, deponent being told that appellant was complaining to others, asked him if he had any complaint, and he answered very positively that he would never have any controversy with deponent. Latrobe, the engineer of location and construction, proves that if he had been apprised of any intention on the part of the appellant to demand extra compensation for his work, he would immediately have had a communication with him on the subject, and have taken measures to put an end to any such expectations. Deponent is satisfied that at the time the appellant got fairly under way with his job, which was in the summer of 1840, he the deponent could have procured the work to be done precisely in the style in which the appellant then proposed to do it, and has since done it, at a price not exceeding that of his contract.

Under all these circumstances, I am of opinion that whatever may be the true construction of the contracts, the appellant acquiesced in the construction placed upon them by the appellees, and is concluded by such acquiescence from claiming a higher compensation for the masonry than the prices stipulated for in the contracts, and allowed in the final estimates.

690 *I am also of opinion that the final estimates are conclusive not only in regard to the masonry, but also in regard to all other items of the appellant's claim, except two items of small amount, which will be hereafter noticed. The contracts expressly provided that when the work was completed and accepted, final estimates should be made by the agent of the company, of the quantity, character and value of the work agreeably to the terms of the contracts, which final estimates should be conclusive between the parties, unless reviewed and altered by the engineer of location and construction; and that the balance appearing to be due to the contractor should be paid to him upon his giving a release to the company of all claims or demands whatsoever, growing in any manner out of the agreement. The final estimates were made according to the contracts, and have not been reviewed and altered by the engineer of location and construction: Why then are they not conclusive? The counsel for the appellant contended that such provisions are against the policy of the common law, and have a tendency to exclude the jurisdiction of the courts, which are provided by the government with ample means to entertain and decide all legal controversies. Story on Partn. § 215, and cases cited in the notes. The doctrine relied on refers to agreements to refer disputes to arbitration; such as a stipulation, usually inserted in articles of partnership, that disputes and controversies between the partners shall be referred to arbitrators named in the articles, or to be named by the respective partners. It may well be questioned whether the provisions of the contracts in this case for the final estimates come within the influence of the doctrine relied on. They seem to stand on higher ground than mere agreements for future reference; and to be substantial and irrevocable parts of the contracts in which they are embodied.

But waiving the decision of that

691 *question, and conceding for the purposes of this case, that these provisions are in effect agreements for future reference, and are governed by the doctrine referred to, I am still of opinion that the final estimates are conclusive. "The maxim often quoted, says Russell on Arbitration 103, 104, 63 Law Libr. that an agreement to refer is not binding, and cannot deprive the court of its jurisdiction, seems sometimes to have been misunderstood."—"In one sense, it is true, such an agreement may be said not to be binding, for it cannot be pleaded in bar to an action in respect of the matters intended to be referred, and so does not oust the court of its jurisdiction;" and it is very clear that equity will not specifically enforce it. "But in another sense, it is binding, for there is nothing illegal in such a contract; and when it is acted on, and an award has been made, the jurisdiction of the courts over the matter decided by the arbitrator is gone, and all that the court have to say is, whether the award is good or not." Wellington v. Mackintosh, 2 Atk. R. 569; Hill v. Hollister, 1 Wils. R. 129; Halfhide v. Fenning, 2 Br. C. C. 336; Mitchell v. Harris, 2 Ves. jr. R. 129; Thompson v. Charnock, 8 T. R. 139; Street v. Rigby, 6 Ves. R. 815; Waters v. Taylor, 15 Id. 10; Cleworth v. Pickford, 7 Mees. and Welsb. 313, Lord Abinger, C. B. See the American cases cited in 2 Bro. C. C. 270, note (a) Perkins' edition.

According to the doctrine as thus laid down, even if the final estimates had been

made without any co-operation on the part of the appellant, or further assent from him than was given by his becoming a party to the contracts, they would have had the effect of final awards, and been conclusive as such. In this case the appellant not only made no objection to the action of the agent in making the final estimates, nor any attempt to revoke his powers to make them, but actually appeared and ex-
692 hibited his claims against the *company before the engineer, who allowed some and rejected others, in whole or in part; and the appellant seemed at first to acquiesce in the final estimates which were made. These estimates were made by the resident engineers, with the concurrence of the division engineer. Edgerton, the resident engineer at the North Branch bridge, says that the appellant never expressed any dissatisfaction with the monthly estimates, and when deponent gave him a copy of the final estimate, he appeared to be fully satisfied with it, as far as deponent was concerned, and expressed his assent to all the particulars therein. Chiffelle, the resident engineer at the Little Cacapon bridge, says that in making out the final estimate the most liberal allowance which truth and equity could have dictated, was made to the appellant. Atkinson, the division engineer, says that he never heard the appellant make any specific objection to any of the monthly or final estimates. Appellant sometimes asked if the company could not allow more. With regard to the final estimates, deponent took particular care to learn his views, made all the allowances that were required, and supposed he had removed all grounds of complaint, and had made the estimates satisfactory. In order to make up the final estimates and remove all sources of complaint, deponent requested the appellant to remain and come to deponent's office in Cumberland, and give deponent notice of all extra work that he supposed he had done on the bridges, or under any other head for the company, for which he had not been already paid. In consequence of this request, the appellant did remain in Cumberland, calling at deponent's office frequently while the latter was engaged in making up the items, answering such questions as were asked him, and by his conduct satisfying deponent that he considered every ground of complaint was removed. Deponent's reason for re-
693 questing the appellant to be *present was, that under such extensive contracts extra charges which were equitable might possibly escape the notice of the engineers, and that deponent wished the appellant to suggest such, if any there were. Told him this was deponent's design, and had the benefit of his suggestions accordingly. Has no recollection that he objected to any of the items. When deponent handed him the final estimate of the North Branch bridge, i. e. the amount made up in dollars, the appellant said, good naturedly, as deponent supposed, "Is that all?" The impression made on deponent's mind was that he was going to the office to receive the balance due him according to the estimate.

Some of the testimony of the appellant is to some extent in conflict with the foregoing testimony of the appellees, but does not materially alter the case. Better's testimony tends to prove that the resident engineer, Edgerton, obtained from the appellant bills only for such extra work as was occasioned by the mistakes of the engineer, and not for all the extra work. But A. G. Kidwell says that he took a great many of the bills for extra work to the engineers. They received a part, rejected a part, and curtailed the amount of a good many of the bills. Edgerton made out the final estimate, and showed it to the appellant in deponent's presence. The appellant complained of a good many of the amounts not being large enough, and asked if they were not going to allow for laying the masonry in cement mortar, and cutting and dressing the stone. Mr. Atkinson said he could not allow it, because Mr. Latrobe told him he would not allow it. Davis says, Mr. Atkinson showed the final estimate to the appellant in the presence of deponent, in the railroad office in Baltimore. Thinks it was upwards of eleven thousand dollars. Appellant asked Atkinson if that was all he was going to do for him. Atkinson said, "Yes, and you may be thankful to get that;" and appellant said he would not take it.

694 *From all the testimony on both sides, it is manifest that the appellant submitted all his claims arising out of the contracts, or on account of the work done by him for the company, to the consideration and decision of the engineer: And upon every principle of law or equity which is applicable to the case, I think the final estimates of the engineer are conclusive; unless they can be avoided on the ground of fraud or mistake. Has fraud or mistake been shown? is therefore the question next to be considered.

In neither of the bills, original or amended, is any fraud imputed to the engineers in making the final estimates. The original bill contains no allegation of any fraud whatever. The amended bill seems to have been filed mainly with the view of supplying this defect; and charges, in effect, that before and at the time the bids were made upon which the contracts were based, the said company, by their agents and officers, falsely and fraudulently represented to the public, and to the bidders, to induce them to offer for work at low rates, that suitable materials for the erection of the bridges were to be had convenient to the line of the road and the sites of the bridges. This charge is positively denied in the answer to the amended bill, and is unsustained by any evidence whatever.

The amended bill also charges that when the contracts were made and during the progress of the work, Latrobe and Atkinson were stockholders of the company, and therefore not impartial or disinterested; that the appellees did not inform the ap-

pellant of this fact as they ought to have done; and that he was not aware of it. The appellees in their answer admit that Latrobe was a stockholder when the contracts were made; but deny that he was one when the final estimates were made, or that Atkinson ever was one. The answer on this subject is sustained by the evidence; except that Atkinson says he has had
695 a few shares of *stock at different times, but had none he believes while the North Branch bridge was in progress. The only stock held by him since 1838 was three shares held in trust for another for not more than a year, and then sold in November 1842.

The final estimates, as before stated, were made by the resident engineers, and concurred in by Atkinson the division engineer. I do not think their validity is affected by the fact that when they were made Latrobe had been a stockholder, and Atkinson was a stockholder in the character of trustee for another, without having, himself, any interest in the subject. Whether, if they had been made by an engineer who, at the time of making them, was a stockholder in his own right, they would have been invalid merely on that ground and in the absence of fraud, is a question which does not arise, and is therefore not intended to be decided.

The answer to the amended bill positively denies fraud of any kind on the part of the company, their agents and officers, and the evidence affords no proof of any such fraud in the transaction.

As to the ground of mistake: If either of the bills contains any charge, certainly the evidence affords no proof of any such mistake on the part of the engineers as can invalidate their final estimates. There is no mistake of law or fact apparent upon the face of the estimates; and the engineers who made them, testify that all the claims of the appellant against the company, on account of the bridges, which were just and right, were allowed therein.

On this subject, see 2 Story's Eq. Jur. § 1453, 4, 5 and 6, and Russell on Arbitration 242, et seq. 63 Law Libr.

The final estimates were intended by the parties to be, and are, conclusive in regard to all work done and materials furnished by the appellant in the construction of the bridges, including all extra work. In
696 this *respect, the case differs from that of Dubois v. The Delaware & Hudson Canal Company, 12 Wend. R. 334, relied on by the appellant's counsel. All the items of the appellant's claim in this suit appear to be for work done by him in the construction of the bridges, except two items of small amount, before referred to. One of these is for building two cattle stops; and is proved to have been paid. The other is for loss on city stock; for which I think the appellees are not responsible; the appellant having agreed to receive the stock at par.

I think there is no error in the decrees for which they ought to be reversed, and am for affirming them.

The other judges concurred in the opinion of Moncure, J.

Decree affirmed.

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697 *Farish & Co. v. Reigle.

July Term, 1854, Lewisburg.

1. **Carriers of Passengers—Stages—Degree of Care.***—Carriers of passengers by stages are liable for injuries resulting from the slightest negligence on the part of the driver or proprietor of the stage; and they are bound to use the utmost care and diligence of cautious persons to prevent injury to the passengers.
2. **Same—Same—Upsetting Coach—Presumption.**—Where a passenger is injured by the upsetting of the coach, the presumption is, that it occurred by the negligence of the driver; and the burden of proof is on the proprietors of the coach, to show that there was no negligence whatsoever.
3. **Same—Same—Same—Liability of Carrier.**—Though the proprietors of the coach may show that it was reasonably strong, with suitable harness, trappings and equipments of sufficient strength, and properly made, and that the driver was careful, of reasonable skill and good habits, with steady horses not like to endanger the safety of passengers; yet, if the upsetting of the coach is caused by the running off of the horses, and such running off of the horses might have been arrested if the utmost care and diligence of very cautious persons had been exercised, the proprietors of the coach are liable for the injuries sustained by a passenger.
4. **Same—Same—Same—Same.**—If the coach is upset by the running off of the horses, and if they ran off not because they were accidentally frightened, but because the blocks were out of the brake, causing the stage to run upon them; and if the running off of the horses might have been prevented if the horses had been properly harnessed, or if the utmost care and diligence of a cautious person had been used to secure the blocks in the brake, the proprietors are liable.
5. **Same—Same—Duty to Provide Safe Appliances.**—Carriers of passengers by stages are bound to provide not only good coaches, harness, &c., of the kind used on their line, but they are bound to provide such as will best secure the safety of the passengers.
6. **Same—Same—Upsetting of Coach—Liability of Carrier.**—If the coach is upset in consequence of having too much baggage on the top, the proprietors are liable for any injury sustained by a passenger by such upsetting of the coach.
7. **Same—Damages—When Verdict Set Aside†.**—In actions by passengers against carriers, for injuries

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***Carriers of Passengers—Stages—Degree of Care.**—Upon the question of the degree of care required of a carrier of passengers, see *foot-note* to Va. Cent. R. R. Co. v. Sanger, 15 Gratt. 230, where there is a collection of the authorities and among others, the cases which cite the principal case upon that point. See also, Jammison v. C. & O. Ry. Co., 92 Va. 330, 23 S. E. Rep. 758, citing the principal case.

†**Same—Damages—When Verdict Set Aside.**—In the last headnote of the principal case it is held, that,

sustained, the judgment of the jury as to the amount of the damages, must govern, unless the damages allowed are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case.

698 *This was an action on the case in the Circuit court of Shenandoah county by John Reigle against William Farish & Co. stage owners, to recover damages for an injury sustained by the plaintiff by the upsetting of the defendants' stage. The plaintiff who lived in Pennsylvania, took a passage in the defendants' stage to go from Staunton to Winchester; and he proved that after leaving Woodstock, a short distance below that town, the stage was turned over and he was very much injured; his head was severely cut, and one of his legs was broken immediately above the ankle, the small bone having passed through the muscles of the leg and also through his boot and clothes. He was confined at a house near the place of the accident for six months, during which time he suffered very severely, and for a part of the time was occasionally delirious. At the time of the trial, which was a year after the occurrence, his leg was not entirely healed, and was shortened, the ankle joint was swollen and stiff, and he was obliged to use crutches; and the physician who attended him expressed the opinion that the joint would continue to be stiff, and he would be a cripple for life. He was also subjected to considerable expense; having paid his physician's bill of two hundred and eighty dollars, and to the man at whose house he was confined, one hundred and fifty-four dollars and twelve cents.

The defendants proved that the stage used on the occasion was a good one, and the gearing was good of its kind. The horses were also proved to be steady, and the driver a very good, prudent and careful driver, and a perfectly sober man: He was examined as a witness. He stated that he took charge of the stage at Red Banks, nine miles above Woodstock. That he then looked at the blocks in the brake, and was satisfied they were in their proper position; and they held well and worked well
699 from thence to Woodstock. *The passengers dined at Woodstock; and he there looked at the blocks again to see if they were in proper condition, but he did not at either place strike them with his hatchet, which it is the general habit to carry along with them for the purpose of fixing the blocks when they require it; nor did he take hold of them. A short distance from Woodstock the road descends for some distance. When he went to use the brake at the hill, he found that the blocks were out. It appears from the evidence that the running of the stage on the horses frightened them, and they commenced to run; and for some part of the way over which they ran, and at the place where the stage was upset, there was a precipice on the right side of the road, and a hill on the left. The driver described his efforts to stop the horses, in which he failed. He said that he then tried to keep the middle of the road, hoping to be able to pull up on reaching a hill before him; but that the hind wheels of the coach began to slip, and were nearly over the precipice; and whilst he was endeavoring to avoid it, the coach was upset. He stated further that the stage, in going down the hill and around the turns, rocked very much from side to side, and just before turning over on the left, had been strongly tilted to the right, and falling back, tilted the other way, and seemed to him to have been for some distance on the left wheels before it went entirely over. He stated further that he had no occasion to use the brake after he left Woodstock until he commenced descending the hill, and made no experiments to ascertain if the blocks were still in. The first time he attempted to use the blocks, he found they were both out. This was about half a mile or a little more from the tavern in Woodstock.

The witness had no recollection as to the amount of the baggage on the top of the stage, or the number or size of the trunks. He found it all on and under the
700 *canvas when he took charge of the coach, and had no occasion to examine or handle it. It appeared that there were nine passengers inside the coach; the plaintiff was sitting with the driver, and there was a negro man on top. At the place where the coach was upset the road was smooth, though it was descending.

The plaintiff proved that there was no breeching on the horses; and one witness introduced by him, who was from Maryland or Pennsylvania, stated that he had been from a boy engaged in staging, and had quit the business about ten years before the trial; that he considered it unsafe to rely upon the brake alone without breeching on

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in actions by passengers against carriers, for injuries sustained, the judgment of the jury as to the amount of the damages, must govern, unless the damages allowed are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case.

For the above proposition the principal case is cited and approved in the following cases: Norfolk, etc., Ry. Co. v. Shott, 92 Va. 48, 22 S. E. Rep. 811; Richmond Ry., etc., Co. v. Garthright, 92 Va. 635, 24 S. E. Rep. 267; Norfolk v. Johnakin, 94 Va. 287, 26 S. E. Rep. 830; Va. Mid. R. R. Co. v. White, 84 Va. 508, 5 S. E. Rep. 573; Norfolk & W. Ry. Co. v. Anderson, 90 Va. 9, 17 S. E. Rep. 757; Norfolk & W. R. Co. v. Ampey, 93 Va. 137, 25 S. E. Rep. 226; Trice v. C. & O. Ry. Co., 40 W. Va. 277, 21 S. E. Rep. 1025; Boster v. C. & O. Ry. Co., 36 W. Va. 324, 15 S. E. Rep. 160.

Instructions—Evidence Tending to Prove Case.—Upon this point, see *foot-note* to Early v. Garland, 13 Gratt. 1, where the principal case is cited and all the cases which cite the principal case as authority upon this subject. See also, Anable v. Com., 24 Gratt. 569; Wooddell v. W. Va. Imp. Co., 38 W. Va. 51, 17 S. E. Rep. 396; Smith v. Snyder, 77 Va. 441, citing the principal case. See also, extensive *foot-note* to the principal case in 62 Am. Dec. 666.

the horses: That breeching was used on the National road. Several witnesses were introduced by the defendants, who stated that they had been engaged in the business of staging for from eighteen to thirty years, some of them in Virginia and two in Virginia, North and South Carolina and Georgia; that breeching was of no advantage where the brake was used, and that since the introduction of brakes breeching had been abandoned. One of them stated that economy was not the object in dispensing with breeching; that they had sometimes received harness from the manufacturer at the north with breeching, and had taken it off and hung it up as surplus harness. This witness further stated that the blocks would bounce out in very dry weather.

After the evidence had been introduced, the plaintiff moved the court to instruct the jury:

1. That passenger carriers are liable for injuries resulting even from the slightest negligence on the part of the coachman or proprietor of the stage, and that they are bound to use the utmost care and diligence of cautious persons to prevent injury to passengers.

2. That if the jury believe from the evidence that the plaintiff was injured by the overturning of the coach, the prima facie presumption is, that it occurred
701 *by the negligence of the coachman, and the burden of proof is on the proprietors of the coach to establish that there was no negligence whatsoever; and that although this prima facie presumption may be repelled by defendants proving that the coach was reasonably strong, with suitable harness, trappings and equipments of sufficient strength, and properly made, and that the driver was careful, of reasonable skill and good habits, with steady horses, not likely to endanger the safety of passengers; yet, if the jury believe from all the evidence that the running off of the horses caused the overturning of the coach, and that such running off of the horses might have been arrested if the utmost care and diligence of very cautious persons had been exercised, that then the defendants are liable in damages to the plaintiff.

3. If the jury believe that the plaintiff was injured by the upsetting of the stage, and that the upsetting was caused by the horses running off; that the horses ran off, not because they were accidentally frightened, but because the blocks were out of the brake, causing the stage to run upon them: And if the jury further believe that such running off of the horses might have been prevented if the horses had been properly harnessed, or if the utmost care and diligence of a cautious person had been used to secure the blocks in the brake, that then the defendants are liable in damages.

4. If the jury believe that the coach was upset in consequence of having too much baggage on the top of the coach, that the defendants are liable for the injury sustained by the plaintiff because of such upsetting.

The court gave the 1st, 2nd and 4th instructions without alteration, and also gave the 3rd instruction, accompanied by the remark to the jury that in speaking of the horses being "properly harnessed,"
702 the *court must not be understood to express any opinion whether the horses should have breeching or not, for that upon that subject he would express no opinion, leaving it entirely to the jury as a question proper for their decision.

The court also gave to the jury the following instructions, asked for by the defendants:

1. In the absence of any express or special contract, the proprietors of stage coaches for the transportation of passengers are not bound to guarantee as to their coaches, harness and fixtures, more than that they shall be sound and complete of the kind used upon their line, and offered to the patronage of travelers. And they cannot be charged with damages resulting, without negligence, from the nonadoption of another kind or style of conveyance, harness or fixtures.

2. In ascertaining whether the injury in this case resulted from negligence or want of due precaution upon the part of the driver, the jury are bound to consider his conduct according to the rules which prevail in like cases among the most prudent, discrete and skillful drivers; and if they are satisfied that he used every precaution which experience has established as sufficient under the circumstances, they will attach no responsibility to the defendants because of an unforeseen and improbable accident.

To the giving of all and each of the said instructions asked for by the plaintiff, and to the instruction contained in the remark of the court above stated, the defendants, by counsel, excepted.

There was a verdict and judgment for the plaintiff for nine thousand dollars; and a motion for a new trial by the defendants on the grounds that the verdict was contrary to the evidence, and that the damages were excessive; which was overruled by the court; and the defendants again ex-
703 cepted: but the exception, instead *of stating the facts proved, gave the evidence of the different witnesses. Upon application to this court by the defendants a supersedeas to the judgment was awarded.

Michie and Baldwin, for the appellant, insisted:

1. That the ground on which a carrier of passengers was held responsible for injuries sustained by them, is negligence. And they referred to Aston v. Heaven, 2 Esp. R. 533; Christie v. Griggs, 2 Camp. R. 79; Jones v. Boyce, 2 Eng. C. L. R. 482; Johnson v. Tollett, 3 Eng. C. L. R. 233; Crofts v. Waterhouse, 11 Eng. C. L. R. 119; Bremner v. Williams, Id. 437; Harris v. Costar, Id. 505; Curtis v. Drinkwater, 22 Id. 51; Sharp v. Gray, 23 Id. 331; Ware v. Gay, 11 Pick. 106; Camden & Amboy R. R. Co.

v. Burke, 13 Wend. R. 611; Boyce v. Anderson, 2 Peters' R. 150.

2. That the principle applicable to carriers of passengers is that applicable to bailees for hire; and therefore they are responsible for only ordinary neglect. And they referred to the cases before cited, especially Boyce v. Anderson, 2 Peters' R. 150. This was a case of a carrier of slaves, and they said the Supreme court held that the responsibility of the carrier should be measured by the law which is applicable to passengers rather than that which is applicable to the carriage of common goods; that the carrier was answerable for injury sustained in consequence of his negligence or want of skill, but no further. And that the court recognized the rule laid down in Jones on Bailments as applicable to bailees for hire: That they are responsible for no more than ordinary neglect.

3. That ordinary neglect is the want of that diligence which the generality of mankind use in their own concerns. Angell on Carr. p. 47, § 45, note 3; p. 49, § 47. That this being the criterion by which the conduct of the carriers and their
704 agents was to be *measured, it was clear the first and second instructions given upon the motion of the plaintiff were erroneous. And they insisted that the fourth instruction had no reference to any evidence in the cause, and was therefore erroneous.

4. That the third instruction given on the motion of the plaintiff was directly in conflict with the first instruction given on the motion of the defendant. They insisted that the latter was correct; that all that could be required of the carrier, even upon the harshest principles that had been applied to them, is that their coaches, harness and fixtures shall be sound and complete of the kind used upon their line, and offered to the patronage of travelers.

The counsel took up the question upon principle, and insisted that as it was an open question in this state, sound principle and sound policy forbade the adoption of the very harsh rule which had been acted on in some of the cases elsewhere; a rule which seemed to look upon carriers of passengers as criminals to be punished, not as useful citizens to be encouraged and protected.

G. N. Johnson, for the appellee:

1. Proprietors of stage coaches are liable for the misconduct or neglect of their drivers, and for defects of their coaches, harness and other equipments. Angell on Carr. § 534, 540; Story on Bailments, § 592, 593, 596; and almost all the cases cited under the other heads.

2. Carriers of passengers for hire are liable for the smallest negligence, and bound for the utmost diligence in regard to everything connected with the safety of the passengers. Angell on Carr. § 540; Story on Bailments, § 598, 601, 602; Aston v. Heaven, 2 Esp. N. P. R. 533; Christie v. Griggs, 2 Camp. R. 79; Jackson v. Tollett, 3 Eng. C. L. R. 233; Crofts v. Water-
705 house, 11 *Eng. C. L. R. 119; Sharp v. Grey, 23 Eng. C. L. R. 331; Stokes v. Saltonstall, 13 Peters' R. 181; Hall v. Connecticut River Steamboat Co., 13 Conn. R. 319; Derwort v. Loomer, 21 Conn. R. 245; Ingalls v. Bills, 9 Metc. R. 1; Peck & wife v. Neil, 3 McLean's R. 22; a case in Queen's Bench, Montreal, stated in note to Angell on Carr. p. 520, § 541.

And in connection with the above cited cases of Christie v. Griggs and Sharp v. Grey, which relate chiefly to the landworthiness of the coach and its equipments, see Israel v. Clark, 4 Esp. R. 259, and Bremner v. Williams, 11 Eng. C. L. R. 437.

3. It is the duty of such carriers and their agents, especially the driver, to make frequent, careful and thorough inspections to ascertain that all is right. Bremner v. Williams, 11 Eng. C. L. R. 437; Angell on Carr. § 535; Christie v. Griggs, 2 Camp. R. 79; Sharp v. Grey, 23 Eng. C. L. R. 331; Ware v. Gay, 11 Pick. R. 106; Ingalls v. Bills, 9 Metc. R. 1.

4. It is the duty of drivers to warn passengers when there is danger. Story on Bail. 377, § 598; Dudley v. Smith, 1 Camp. R. 167; Stokes v. Saltonstall, 13 Peters' R. 181; Derwort v. Loomer, 21 Conn. R. 245.

5. If the coach is overloaded with passengers or baggage, &c., and that may have caused the injury to the plaintiff, the defendant is liable. Angell on Carr. § 537; Story on Bail. § 594; Aston v. Heaven, 2 Esp. R. 533; Israel v. Clark, 4 Esp. R. 259; Curtis v. Drinkwater, 22 Eng. C. L. R. 51.

6. The breaking down or overturning of the coach is prima facie evidence of negligence. Christie v. Griggs, 2 Camp. R. 79; Ware v. Gay, 11 Pick. R. 106; Stokes v. Saltonstall, 13 Peters' R. 181; Carpue v. London & Brighton Railway Co., 48 Eng. C. L. R. 747.

7. If any neglect of duty on the part of the driver caused the accident, it is
706 no defense that the plaintiff *had not done all he might have done to protect himself from danger. And whether the plaintiff's neglect or the neglect of the driver caused the accident, is a question of fact for the jury. Jones v. Boyce, 2 Eng. C. L. R. 482; Curtis v. Drinkwater, 22 Eng. C. L. R. 51; Stokes v. Saltonstall, 13 Peters' R. 181; Ingalls v. Bills, 1 Met. R. 1; Beers v. Housatonuc R. R. Co., 19 Conn. R. 566.

8. Whether the injury is to be attributed to the negligence of the carrier or not, is always a question of fact for the jury; which is left to their judgment, subject to such instructions as the court may give upon the law. See all the cases cited for the other propositions; to which may be added Harris v. Costar, 11 Eng. C. L. R. 505.

9. The court of appeals will not judge, upon a question of new trial, either of the credibility or weight of the evidence. Bills of exception, in such cases, must state the facts proved, not the evidence. If, however, it does state the evidence, the court of

appeals will disregard all the evidence which makes for the exceptant; and if, by so doing, the court can ascertain the facts proved by the other evidence, and can find no evidence to justify the verdict, then, and then only, will it be set aside. Grayson's Case, 6 Gratt. 712; Hill's Case, 2 Ib. 594; Bennett v. Hardaway, 6 Munf. 125; Ewing v. Ewing, 2 Leigh 337; Green v. Ashby, 6 Leigh 135; Pasley v. English, 5 Gratt. 141.

10. Where there is no certain criterion of damages, the amount to be given rests exclusively with the jury. And this is especially true in actions for personal injuries. In such cases the court will never grant a new trial on the ground that the damages are excessive, unless the court can manifestly see that the jury have been outrageous in giving such damages as greatly exceed the injury; such as to convince the court that the jury must have been
707 influenced by *passion, partiality, prejudice or corruption, or have been mistaken in the law of the case. Wilford v. Berkeley, 1 Burr. R. 609; Coffin v. Coffin, 4 Mass. R. 29; Worster v. Proprietors of Canal Bridge, 16 Pick. R. 541; Payne v. Brittenham, 1 A. K. Marsh. R. 440, 591; Harvey v. Huggins, 2 Bailey's So. Ca. R. 252, 268; Park v. Hopkins, Ibid. 408; Sedgwick on Damages, chap. 13, 1st edi. p. 369; 2d edi. p. 355. But the court uses its power to set aside verdicts in such cases sparingly and with reluctance; and never except in a very clear case. Gilbert v. Burtenshaw, 1 Cowp. R. 230; Sedgwick on Damages, 2d edi. 599 to 603, and cases cited there.

DANIEL, J. In the ninth article of Judge Story's work on Bailment, is to be found the most concise and lucid exposition of the rights, duties and obligations of carriers of passengers, that I have met with. It is there stated, that carriers of passengers merely for hire, are subject to the same responsibility as carriers of goods for hire, at the common law, so far as respects the baggage of the passengers: But as to the persons of the passengers, a different rule prevails. Attempts have been made to extend their responsibility as to the persons of passengers, to all losses and injuries, except those arising from the act of God or from the public enemies. But the support of this doctrine has been uniformly resisted by the courts, although a strict responsibility as to the carriage of the persons of passengers is imposed upon such carriers. Section 590. In section 592, the author proceeds to state as the result of the decided cases, that carriers of persons by stage coaches are bound to provide coaches reasonably strong and sufficient for the journey, with suitable harness, trappings and equipments; and to make a proper examination thereof previous to each journey. In other terms, that they
708 *are bound to provide road-worthy vehicles suitable for the safe transportation of passengers: And if they fail in any of these particulars, and any damage or injury occur to the passengers, they will be responsible to the full extent thereof. Hence (he says) it has been held that if there is any defect in the original construction of the stage coach, as for example in an axletree, although the defect be out of sight, and not discoverable upon a mere ordinary examination, yet, if the defect might be discovered by a more minute examination, and any damage is occasioned to a passenger thereby, the coach proprietors are answerable therefor.

In the next place, they are bound to provide careful drivers, of reasonable skill and good habits, for the journey; and to employ horses which are steady and not vicious, or likely to endanger the safety of their passengers. Section 593.

In the next place, they are bound not to overload the coach either with passengers or with luggage; and they are to take care that the weight is suitably adjusted, so that the coach is not top-heavy and made liable to overset. Section 594.

They are bound to make use of all the ordinary precautions for the safety of passengers on the road. The coachman must, in all cases, exercise a sound and reasonable discretion, in traveling on the road, to avoid dangers and difficulties. If he is guilty of rashness, negligence or misconduct, or if he shows any want of skill, the proprietors will be responsible for any injury resulting from his acts. Section 598.

The liabilities of such carriers naturally flow from their duties. As they are not, like common carriers of goods, insurers against all injuries, except by the act of God, or by public enemies, the enquiry is naturally presented, What is the nature and extent of their responsibility? It is certain that their undertaking is
709 *not an undertaking absolutely to convey safely. But although they do not warrant the safety of the passengers, at all events; yet their undertakng and liability go to the extent, that they and their agents possess competent skill, and that they will use all due care and diligence in the performance of their duty. But in what manner (the author asks) are we to measure this due care and diligence? Is it ordinary care and diligence, which will make them liable only for ordinary neglect? Or is it extraordinary care and diligence, which will render them liable for slight neglect? As they undertake for the carriage of human beings, whose lives and limbs and health are of great importance as well to the public as to themselves, the ordinary principle in criminal cases, where persons are made liable for personal wrongs and injuries arising from slight neglect, would seem (he says) to furnish the true analogy and rule. It has been accordingly held that passenger carriers bind themselves to carry safely those whom they take into their coaches, as far as human care and foresight will go, that is, for the utmost care and diligence of very cautious persons, and of course they are responsible for any even the slightest neglect. Section 601.

In section 601 a, the further proposition

is stated, that when injury or damage happens to the passengers by the breaking down or overturning of the coach, or by any other accident occurring on the ground, the presumption prima facie is, that it occurred by the negligence of the coachman; and the onus probandi is on the proprietors of the coach to establish that there has been no negligence whatsoever; and that the damage or injury has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent. For the law will, in tenderness to human life and limbs, hold the proprietors liable for the slightest negligence, and will compel them to repel, by satisfactory proofs, every imputation thereof.

710 *This summary of the law seems to me to comprehend and to affirm all the propositions involved in the instructions given at the instance of the defendant in error.

The plaintiff in error, in his petition, denies the propriety of each of these instructions, but neither in the notes of his counsel accompanying the petition, nor in the argument here, has any serious effort been made to show by argument or authority, that the instructions have failed to propound the law correctly, except in two particulars. In order to determine whether the instructions have erred in either of these particulars, a more special notice of the law, in relation to them, would seem to be rendered proper.

In the first place it is urged, that carriers of persons are responsible for no more than ordinary neglect; and that as the instructions lay down a rule which imputes liability for a less degree of negligence than that which constitutes ordinary neglect, they have in such particular stated the law too strongly against the plaintiff in error. In support of this objection the authority mainly relied upon is the case of Boyce v. Anderson, 2 Peters' R. 150. That case does, I think, decide the law as the counsel for the plaintiff states it; but in the case of Stokes v. Saltonstall, 13 Peters' R. 181, it has been substantially, if not in terms, overruled.

Justice Barbour, in Stokes v. Saltonstall, in reviewing the decision in Boyce v. Anderson, says, "that was an action brought by the owner of slaves against the proprietors of a steamboat on the Mississippi, to recover damages for the loss of the slaves, alleged to have been caused by the negligence or mismanagement of the captain and commandant of the boat. The court distinguished slaves, being human beings, from goods; and held that the doctrine as to the liability of common carriers for mere goods, did not apply to them; but that in respect to them, the carrier was responsible only for ordinary neglect. The court seem to

711 have *considered that case as being a sort of intermediate one between goods and passengers. We think, therefore, that anything said in that case in the reasoning of the court, must be confined in its application to that case; and does not affect the principle which we have before laid down." And in a preceding portion of the opinion, the general principle is asserted, that though a carrier of passengers "does not warrant the safety of the passengers, at all events, yet his undertaking and liability as to them goes to this extent: that he, or his agent, if, as in this case, he acts by agent, shall possess competent skill; and that as far as human care and foresight can go he will transport them safely;" and the case of Aston v. Heaven, 2 Esp. R. 533, is cited with approbation, in which it is held that whilst the action stands on the ground of negligence, yet the responsibility attaches to the smallest negligence.

And in Jackson v. Tollett, 3 Eng. C. L. R. 233, Lord Ellenborough states the law to be, that "every person who contracts for the conveyance of others, is bound to use the utmost care and skill; and if through any erroneous judgment on his part any mischief is occasioned, he must answer for the consequences."

The case of Crofts v. Waterhouse, 11 Eng. C. L. R. 119, is substantially to the same effect. So in Hall v. Conn. River Steamboat Co., 13 Conn. R. 319, the court held that whilst the rule applicable to carriers of goods had not been applied in its fullest extent to carriers of persons, because they have not the same absolute control over passengers that they have over goods entrusted to their care; yet that both policy and the authority of adjudged cases require great care and skillful management in the transportation of passengers by common carriers. They said it was but right it should be so; that those, upon whose skill and careful management, not unfrequently, depend the lives and safety of others, should feel themselves re-

712 sponsible for any *want of care or faithfulness, and that they therefore fully approved the instruction given in the court below, that the defendants were bound to employ the highest degree of care that a reasonable man would use.

In Stockton v. Frey, 4 Gill. 406, and in Maury v. Talmadge, 2 McLean's R. 157, and in Dewort v. Loomer, 21 Conn. R. 245, the same doctrine is maintained. And in the case of the Philadelphia and Reading R. R. Co. v. Derby, 14 How. S. C. R. 486, Justice Grier in delivering the opinion of the Supreme court uses the following strong and emphatic language: "When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. Any negligence in such case may well deserve the epithet of "gross." And in Angell on the Law of Carriers, it is stated as the result of the decided cases, that "the degree of responsibility to which carriers of persons are subject, is not ordinary care, which will make them liable only for ordi-

nary neglect, but extraordinary care, which renders them liable for slight neglect. It is the danger to the public which may proceed even from slight faults, unskillfulness or negligence of passenger carriers or their servants, and the helpless state in which passengers, by their conveyances, are, which have induced the courts, both in England and in America, to bind the rule of the contract locatio operis, much tighter than could be insisted for on the ordinary principle of that contract. The most inconsiderable departure, therefore, from the important duties imposed upon passenger carriers, will render them liable for the consequences." Indeed, I have seen no case except that of Boyce v. Anderson,
713 which sanctions *the idea that the carrier is not responsible for slight neglect; and I feel no hesitation in approving the instructions of the judge in the particular under consideraton.

The second error supposed to be committed by the judge below, in expounding the law to the jury, is to be found in the explanation accompanying the third instruction asked by the defendant in error. In the third instruction, it will have been seen, the judge instructed the jury that if they believed that the plaintiff was injured by the upsetting of the stage, and that the upsetting was caused by the horses running off; that the horses ran off, not because they were accidentally frightened, but because the blocks were out of the brake, causing the stage to run upon them; and if the jury further believed that such running off of the horses might have been prevented, if the horses had been properly harnessed, or if the utmost care and diligence of a cautious person had been used, to secure the blocks in the brake; that the defendants were liable in damages. And the court accompanied this instruction by the remark to the jury, that in speaking of the horses being "properly harnessed," the court was not to be understood as expressing any opinion whether the horses should have had breeching or not; for upon that subject he would express no opinion, leaving it entirely to the jury, as a question proper for their decision.

And the court afterwards, at the instance of the plaintiff in error, instructed the jury, that in the absence of any express or special contract, the proprietors of stage coaches for the transportation of passengers, are not bound to guarantee as to their coaches, harness and fixtures, more than that they shall be sound and complete of the kind used upon their line, and offered to the patronage of travelers. And that they cannot be charged with damages resulting,
714 without *negligence, from the non-adoption of another kind or style of conveyance, harness or fixtures. The defendant in error having offered the testimony of witnesses to show, that, since the introduction of the brake, it was not safe to trust to that as a means of checking the velocity of stages in descending hills, with harness that had no breeching; and the plaintiff having offered evidence to show that when the brake was used the breeching to the harness was of no value as a means of safety; and that on his line, and on many other lines, the breeching had been abandoned as useless since the improvement of the brake had been introduced, it was, I think, evidently the purpose of the court, in the explanation given of the third instruction, to guard the jury against the impression, that in saying if the jury believed that the running off of the horses might have been prevented if the horses had been properly harnessed, &c., the plaintiffs in error were liable, the court intended to express the opinion that the failure to use breeching to the harness did of itself constitute neglect: whilst on the other hand the plaintiff in error was desirous of getting rid of the testimony offered by his adversary on that head by the instruction which he asked; the effect of which was to negative the conclusion in law, of any neglect in failing to use the breeching, though the jury should be of opinion, from the evidence that harness with breeching would be safer than harness without, provided they should also believe that the harness used was sound and complete, of the kind used, upon the line of the plaintiffs in error.

It is insisted by the counsel of the plaintiff in error, that there is an obvious conflict between the third instruction of the defendant in error as explained by the court, and the first instruction given at the instance of the plaintiff in error; that the latter properly confined the jury to the enquiry whether the harness was
715 sound *and complete of the kind used on the line, whilst the former left the jury at liberty to impute neglect to the plaintiff in error in failing to use harness of a different kind.

The discrepancy between the two instructions complained of does, I think, exist; and it becomes necessary to enquire which of the two instructions is right. The question as to the liability of the carrier is presented in a peculiar and novel aspect; but it will on examination, I think, be found to fall within the influence of well settled and familiar principles.

I have already cited the authority of Judge Story to show that the carrier is bound to provide coaches reasonably strong and sufficient for the journey, with suitable harness, trappings and equipments. And there are numerous cases stating the law the same way; and among others, Christie v. Griggs, 2 Camp. R. 79; Bremner v. Williams, 11 Eng. C. L. R. 437; Crofts v. Waterhouse, Ib. 119; Sharp v. Grey, 23 Eng. C. L. R. 331; Stockton v. Frey, 4 Gill's R. 406.

In the case of Ingalls v. Bills, 9 Metc. R. 1, the correctness of some of these decisions, so far as they go to declare the stage owner to be a warrantor of the soundness and sufficiency of the coach in all respects, is denied. And it was there held that when the accident arises from a hidden and internal defect which a careful and thorough examination would not disclose, and which

could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury; but the misfortune must be borne by the sufferer. Yet the court at the same time said, that the carriers of passengers are bound to use the utmost care and diligence in the providing of safe, sufficient and suitable coaches, harness, horses and coachmen, in order to prevent those injuries which human care and foresight can guard against; and
716 that if an accident happens *from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason of such accident.

If this case is to be regarded as establishing that a latent defect in the coach, which a careful examination would not disclose, forms an exception to the general undertaking of the carrier to furnish a sufficient coach (about which I do not deem it necessary to express an opinion), it is clear, I think, that this exception has no bearing on the case, and that in expounding the law, there was nothing making it incumbent on the judge to state it. And the true point of enquiry out of which the conflict of instructions arose, was whether an alleged defect in the harness used by the plaintiff in error (which if it existed, was a patent defect consisting in the absence of a certain portion of the harness, with or without which it could be used), was a proper matter of enquiry for the jury; and if so, whether on their being of opinion that there was such defect, they could make it the ground for finding the plaintiff in error guilty of neglect.

If the proposition contended for by the plaintiff in error is to be received as the law, viz: that he undertakes only that his coaches, harness and fixtures shall be sound and complete of the kind used on his line, it follows that he may be excused from liability in the face of the amplest proof to show that owing to their style or kind, they were positively dangerous. In no case that I have seen can any warrant be found for such a rule. Could it be said, in the language of the case of Ingalls v. Bill, that a carrier uses the utmost care and diligence in the providing of safe, sufficient and suitable coaches, harness, &c., if it was shown that from want of care, skill or judg-
717 ment, he *had selected for use on his line, a style of harness shown to be less safe than another which had long been in use, and which was known by him to be in use? Such a rule seems to me to alter the relative rights and duties of the carrier and passenger. The passenger, instead of relying on the carrier to use the proper care and judgment in the selection of the coach, harness, &c., with a view to its safety, would have to use the utmost diligence, whenever about to take passage, in enquiring into the style and fashion of the coach used on the line, and then to determine for himself whether or not a stage constructed after such style or fashion, would or would not, probably, be safe. The law, I think, imposes no such duty on the passenger. He has, I think, a right to expect that the carrier who has undertaken to use the greatest care and skill in providing for his safe passage, will exercise the proper caution and care in seeing that his coach is not only sound and complete of its kind, but is also of a safe kind. The traveling public have a right to expect that he who undertakes to fill such a responsible post, will bring to the discharge of its duties all the knowledge that appertains to the calling; that he will observe and compare the different kinds of coaches is use, and direct his attention to the principles on which they are constructed, in order to use a well informed experience and an enlightened judgment in the selection of such as will be most likely to insure the safety of those who are to be carried in them. The carrier cannot be said to have fulfilled the requirements of the law so long as there exists any known want of safety in his coaches, harness, &c., whether arising from defectiveness of material or workmanship, or faultiness of the principle on which they are constructed, for which there is a known remedy, used wisely as a means of safety, by others, of skill and sound judgment, engaged in the same
718 *business. A danger arising from any such defect cannot be properly regarded as one of those risks or dangers necessarily incident to the mode of travel, which it is presumed every passenger has made up his mind to encounter.

In the case before us there was not only testimony tending to show that there would be a greater degree of safety in using harness with breeching than without, but that the horses could be readily trained to the use of such harness in holding back. In this state of things, seeing that the slight change in the harness, by the addition of breeching, would be attended by little or no expense and with slight trouble or inconvenience in training the horses to the use of it, it seems to me that it was a fair subject for the jury to consider (in case they believed what the evidence of the defendant in error tended to prove), whether the failure of the plaintiff in error to make the change, as a measure of safety, was not evidence of a want of proper care and vigilance on his part, in providing for the safety of those traveling in his coaches.

The seeming conflict in the instructions was brought about by the plaintiff in error, in asking and obtaining from the court an instruction to which, in the view I have taken, he was not entitled; and there is nothing, therefore, in that particular, of which he has any right to complain.

Upon a view of all the instructions given by the court, as a whole, I have been unable to discover that they assert any principle which bears too harshly on the plaintiff in error, or which was calculated to mislead the jury, to his prejudice. And at a period

when the facilities for travel are so rapidly multiplying, and the amount of travel is so constantly on the increase, I feel no disposition to relax any of the rules which hold the carrier to a strict accountability. When so many causes are conspiring to en-
719 gender and foster a *love for the excitement of rapid traveling, which is daily betraying the managers and conductors of every species of conveyance into a fatal disregard of all the precautions essential to the preservation of the limbs and lives of those committed to their charge, I do not think that the law should slacken the reins by which to some extent at least, it holds them in check. On the contrary, policy, humanity and reason all seem to require from the courts a stern adherence to the principles which tend to insure the greatest care on the part of the carrier, and the least danger to the passenger.

The fourth instruction given at the instance of the defendant in error is objected to, not because it states the law incorrectly, but because, as is said, there was no evidence tending to prove that the coach was upset in consequence of having too much baggage on the top. If there was no evidence on that head, the plaintiff in error could not have been injured by a correct statement of the law, that the carrier would be liable for an injury arising from an overturning of the coach occasioned by its being too heavily loaded on the top. On the other hand, if there was any competent and relevant testimony, however slight, tending to show that the upsetting was due to that cause, the defendant in error was entitled to have the law in that particular hypothetically expounded to the jury. There was, I think, evidence tending to the proof of such fact. Discarding the statement of the witness Cralle, that the driver Carper said to him that he thought there was too much baggage on the top, and that he thought the upsetting was in part occasioned thereby, as illegal, except for the purpose of impeaching Carper, I think there was circumstantial evidence, though slight, tending to the conclusion that the coach was top-heavy, and that the upsetting may have been partly due to that cause.
720 It is in proof that *there were eleven passengers, nine inside and two on the outside. How and where their baggage was disposed, does not appear, with the exception that one of the passengers proved that his trunk was in the boot behind.

Carper says that he has no recollection as to the amount of baggage on the top of the stage, or the number or size of the trunks; that "he found it all on, and under the canvas when he took charge; and had no occasion to handle or examine it." And he further states "that in coming down the hill and around the turns, the stage rocked very much from side to side, and just before turning over on the left hand, had strongly tilted to the right, and in falling back, tilted the other way, and seemed to him to be some distance on the left wheels before it went clear over."

And it is further shown that at the point where the coach overturned, the road was level across, though slightly descending. The rocking of the coach from side to side, and the manner of its turning over, were circumstances tending to the inference that it was top-heavy. I think the plaintiff in error had a right to the instructions.

The last cause of error assigned is the refusal of the court to set aside the verdict and grant a new trial. We have no certificate of the facts; but only a certificate of the evidence. When such is the case, this court has uniformly refused to take cognizance of the exception, except when it appears that after rejecting all the parol evidence in favor of the party excepting, and giving full force and credit to that of the adverse party, the decision of the court below still appears to be wrong. Pasley v. English, 5 Gratt. 141; Rohr v. Davis, 9 Leigh 30. Applying this rule there is nothing to rebut or weaken the prima facie case made by proof of the upsetting of
721 the stage, and the consequent *injury to the defendant in error. So far from it, the evidence in favor of the verdict shows most clearly a case of culpable negligence on the part of the driver. Without adverting to the other evidence in support of such a conclusion, the driver's own account of his conduct proves it. He showed a want of ordinary care in failing to make a more minute examination of the blocks at Red Banks where he first took charge of the coach. There was the same want of care in their examination at Woodstock, when the most ample time and opportunity were afforded for a thorough examination. Having failed to make such examination at Woodstock, he was guilty of the grossest negligence in failing to assure himself that the blocks were in before he commenced descending the hill where the disaster occurred. In the absence of breeching or any other substitute by which the horses could hold back and prevent the stage from running on them, he knew that his main if not sole reliance for a safe descent of the hill was in the brake, which, he also knew, would be of no avail if the blocks were not in place; yet he most negligently and recklessly commenced the descent of the hill without having tested the presence or absence of the blocks, which might have been done by simply applying his foot to the brake. Whilst descending the hill he for the first time discovered that the blocks were out. The brake of course was useless. As might have been expected, the stage soon began to run on the horses, and they, in the absence of any other cause of fright, ran off and upset the stage. The disaster is thus most clearly traced, by the driver's own account of his conduct, to his unpardonable failure to provide the means, with his power, by which to prevent it.

It is, however, in the last place insisted that the damages are excessive, and
722 that this appears from the *evidence of the defendant in error, and that the

court ought to have granted a new trial for that cause.

There is no rule of law fixing the measure of damages in such a case; and it cannot be reached by any process of computation. In cases of the kind, the judgment of the jury must govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case. 16 Pick. R. 547.

On the one hand, the damages seem to be heavy. On the other, the injuries, losses and sufferings which they are designed to compensate, are proved to be great.

The head of the defendant in error was severely cut, and one of his legs badly broken, the smaller bone protruding through his clothing and boot. One of his physicians thought, at first, that amputation would have to be resorted to. His agonies, physical and mental, must have been intense. For some time his mind was seriously affected. At the time of the trial, rather more than a year after the happening of the disaster, his leg had not entirely healed; the limb was shortened and the joint stiff. The use of crutches was still necessary, and the physicians expressed the opinion that he would be a cripple for life. He was necessarily confined for some six months in a house near the place of the disaster, detained from his business, and from his home, which was in another state. The presence of members of his family, some during the whole time, and others for a portion of it, was necessary, in order that his wants and comforts might be properly attended to; and the expenses which he encountered in the discharge of the bills of boarding and the attendance of his physicians, and other incidental charges, were necessarily large.

723 *In view of such a state of facts, I cannot undertake to say that the damages are so plainly beyond a reasonable compensation, so manifestly exorbitant, as to require us to disturb the estimate and verdict of the jury.

I think the judgment ought to be affirmed.

The other judges concurred in the opinion of Daniel, J.

Judgment affirmed.

COMMON CARRIERS.

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2. Evidence.
VII. Criminal Liability.

Cross References to Monographic Notes.

Agencies, appended to Silliman v. Fred., etc., R. Co., 27 Gratt. 119.
Assignability of Choses in Action.
Assumpsit.
Damages, appended to N. & P. R. Co. v. Ormsby, 27 Gratt. 455.
Death by Wrongful Act.
Instructions, appended to Womack v. Circle, 29 Gratt. 192.
Insurance, Fire and Marine, appended to Mut. Assur. Soc. v. Holt, 29 Gratt. 612.
Negligence.

I. IN GENERAL.

A. DEFINITION. "The term 'common carrier' shall be construed to include any railroad, express or canal company, chartered by this or any other state and doing business in this state, whether incorporated or not, and whether operated or controlled by an individual or partnership." Virginia Acts of Leg. 1891-92, p. 965; Pol. Supl. Code (1900), § 1297 a, ch. 18.

B. TELEGRAPH COMPANIES AS PUBLIC CARRIERS.—Telegraph companies are not public carriers in the strict sense of the term, yet on account of the public nature of their employment, they have in many cases been held to a very similar responsibility. West. Union Tel. Co. v. Reynolds, 77 Va. 173.

C. PREFERENCE TO SOLICITORS OF BAGGAGE.—Where the legislature adopts an English statute prohibiting carriers from giving undue preferences to particular persons, it will be presumed that the settled construction given to such statute by the English courts is intended to be incorporated in the act, and such construction will govern in the interpretation thereof. N. & W. Ry. Co. v. Old Dominion Baggage Co. (Va. 1900), 37 S. E. Rep. 784.

Thus, under Acts 1891-92, p. 965, providing that common carriers shall not give preference to particular persons in any respect, or subject any particular person to prejudice, a baggage transfer company cannot restrain a railway company from allowing a rival baggage company the exclusive privilege of entering its grounds to solicit baggage. N. & W. Ry. Co. v. Old Dom. Bag. Co. (Va. 1900), 37 S. E. Rep. 784.

D. RESPONSIBILITY OF RECEIVERS.—A receiver appointed to assume charge of the affairs of a railroad company may be held responsible for the damage actually sustained through the negligence of the receiver's agents and employees, in any case in which the company could be so held. But where the receiver is appointed by a court of equity he cannot be sued at law without permission of the appointing court. Melendy v. Barbour, 78 Va. 544.

II. CONTROL AND REGULATION OF CARRIERS.

State Government—Fixing Charges of Transportation of Freight and Passengers.—The right to regulate and fix at their pleasure the charges of railroad companies for transportation of freight and passengers is one of the powers of sovereignty inherent in every state, to be exercised by the legislature from time to time at its pleasure. A legislature cannot, however, by a charter granted to one company, make stipulations as to charges which will be binding on future legislatures. Laurel Fork, etc., R. Co. v. Transportation Co., 25 W. Va. 324; W. Va. Transportation Co. v. Sweetzer, 25 W. Va. 434; Richd. & A. R. R. Co. v. Patterson, etc., Co., 92 Va. 670, 24 S. E. Rep. 261, 1 Va. Law Reg. 917.

Thus, the W. Va. Act 1873, ch. 227, establishing a reasonable maximum rate of charges for the transportation of passengers and freight, and providing relative to unjust discrimination and extortion in the rates to be charged by different railroads in the state, is applicable to all railroads in the state, whether the charters were granted before or after the act. Furthermore the act is constitutional. Laurel Fork, etc., R. Co. v. Transportation Co., 25 W. Va. 324; W. Va. Transportation Co. v. Sweetzer, 25 W. Va. 434.

Connecting Carriers.

Facilities for Interchange of Traffic and Passengers.—Act March 3, 1892, § 4, requires common carriers to afford all reasonable, proper, and equal facilities for traffic between their respective lines, and for receiving, forwarding, and delivering passengers and property to and from their several lines and connecting lines. Under this act it is held that a railroad, so changing its time card that a connection with a connecting road, which is of general convenience, is discontinued, in order to furnish better facilities to several towns, is in violation of the statute. So. Ry. Co. v. Com., 98 Va. 758, 37 S. E. Rep. 294. See Pol. Supl. Code (1900), § 1297 a.

For statutes affecting carriers, see Va. Code 1887, § 1217, providing that "Railroad companies are not liable for acts of express companies"; § 1295, relating to "Liability of carrier for transportation beyond the terminus of his line"; § 1296, "When agreements exempting carrier from liability not valid"; § 1297 (W. Va. Code 1900, p. 775), "How carrier may be sued, when not incorporated, and when suit not to abate"; § 3228, (W. Va. Code 1900, p. 847); "Process"; § 1297 a, Pol. Supl. containing provisions relative to "Long and Short Haul," "Rates," "Preferences," "Discrimination," "Rebates," "Drawbacks," "Public Schedules," "Interchange of Traffic," "Opening

Ticket Office," etc., etc., being a general provision; W. Va. Code 1900, p. 955, "Embezzlement by Carrier"; W. Va. Code 1900, p. 949, "Penalty on conductor or captain of boat or public conveyance, for negligently injuring anyone." See 24 Stat. (U. S.) 379, and 25 Stat. (U. S.) 855; also, Interstate Com. Acts, July 22d 1897, Nov. 16th 1897. These statutes are more fully treated hereafter, under heads appropriate to the subject-matter involved. Reference is therefore made to them.

Federal Government.

Power to Control and Regulate.—Congress has power under the constitution of the United States, to regulate commerce among the states, and this power embraces the power to regulate all the various agencies by which that commerce is conducted. State laws which undertake, in any form, to enforce a tax on such commerce, or to impose a burden or hindrance thereon, or to embarrass commercial intercourse and transactions, or to give citizens of one state any advantage over citizens of another state engaged in interstate commerce, are regulations of commerce among the states, and therefore void. This power, when exercised by congress, is exclusive in its character, and the omission to exercise it is equivalent to a declaration of the will of congress that it shall remain free and uncontrolled in those respects in which the subject is capable of being dealt with by general regulations. R. & A. R. Co. v. R. A. Patterson Tobacco Co., 92 Va. 670, 24 S. E. Rep. 261, 1 Va. Law Reg. 917. See, in general connection, So. Ry. Co. v. Com., 98 Va. 758, 37 S. E. Rep. 294; Va., etc., Co. v. L. & N. R. Co., 98 Va. 776, 37 S. E. Rep. 310; State v. R. Co., 24 W. Va. 783, construing W. Va. Code 1891, §§ 16, 17, ch. 149, relating to Sunday laws, these sections being held not to be in conflict with the Constitution of the U. S., art. 1, § 8, ch. 3; N. & W. R. R. Co. v. Com., 88 Va. 95, 13 S. E. Rep. 340, construing Va. Code 1887, § 3801, relating to Sunday laws, in which case this statute was held void and inoperative being in conflict with the Constitution of the U. S., art. 1, § 8, providing that congress shall have power to regulate commerce among the several states.

Same—Interstate Commerce Acts.

Filing Joint Rates—Connecting Carriers.—Under the Interstate Commerce Act (24 Stat. 379), as amended by Act, March 2, 1889, ch. 382 (25 Stat. 855), requiring the filing with the commission of established joint rates by connecting carriers, and making it unlawful for any such carrier to receive a greater or less compensation for the transportation of freight, a contract for the shipment of freight beyond the line of a receiving carrier, at a rate which it has furnished the commission, and which is less than the aggregate of the rates charged by the connecting carriers, is not invalid, where the receiving carrier, without intending to violate the act, fixed such rate on quotations made to it by the connecting line, and by mistake fixed the rate for such connecting line at less than it charged. And failure of the other connecting carriers to give publicity to the rate does not invalidate a contract for the shipment of freight over such connecting lines, as violative of the interstate commerce law, which is otherwise valid. Va., etc., Co. v. Louisville & N. R. Co., 98 Va. 776, 37 S. E. Rep. 310.

And lowering a freight rate in the manner required by the Interstate Commerce Act (July 22d 1897, Nov. 16th 1897), after a contract has been made in violation of that act, does not render the contract valid and binding on the carrier, and, if under no legal obligation to lower the rate, the carrier may restore the rate so lowered. Southern Railway Co. v. Wilcox (Va. 1900), 7 Va. Law Reg. 381.

III. CARRIERS OF GOODS.

A. DELIVERY BY CARRIERS.

Duty Imposed by Statute to Notify Consignee When Freight Is Ready for Delivery—Removal.—It is provided by statute, Acts 1891-92, p. 965, Pol. Supl. § 1297 a, that it shall be the duty of every company upon the arrival of freight shipped to any of its depots or stations to notify the consignee, by mail or otherwise, when such freight is ready for delivery, and give a reasonable time for the removal of the same, making due allowance for its class and for bad weather and holidays.

By undertaking to transport goods, a common carrier necessarily includes the duty of delivering them in safety, and within a reasonable time, and the carrier is liable for all loss or damage except that which is caused by the act of God, the act of the common or public enemy, or the act of the owner of the goods. B. & O. R. Co. v. Morehead, 5 W. Va. 293; Murphy v. Staton, 3 Munf. 239. Or as held by some authorities, a carrier is not liable when the loss occurs by reason of acts of public authority, as for instance, destruction under the police power. Mugler v. Kansas, 123 U. S. 623; Railroad Co. v. Husen, 95 U. S. 465. Nor losses caused by the inherent nature of the goods. The doctrine as to the latter has been so declared in Mississippi, Illinois, Massachusetts, New York, and in England. As to the exception in case of loss in shipping live animals, see *post*, "Carriers of Live Stock." In the exceptional cases declared in Virginia and West Virginia, the carrier will, nevertheless, still be responsible if the inevitable accident is the remote, and not the immediate, cause of the loss, and the loss could have been avoided by prudence and proper care. B. & O. R. Co. v. Morehead, 5 W. Va. 293; Murphy v. Staton, 3 Munf. 239. The question of liability for loss or damage is treated more fully, *post*, "Liability," to which reference is made.

Effect of Acceptance by Consignee after Carrier's Breach of Contract.—And again, acceptance of goods which a carrier has contracted to deliver at a certain time and which it has failed to deliver until a later date is no waiver of the consignee's right of action for the delay. N. & W. R. Co. v. Ship. Comp. Co., 83 Va. 272, 2 S. E. Rep. 139.

Disposition to Be Made of Goods—When Delivery Is Prevented by a State of War.—Furthermore, if access to the assignee, and delivery of the goods at the end of the route, is prevented by a state of war, it is the carrier's duty to take care of the goods for the consignor, and notify him within a reasonable time of his inability to make the delivery, after which his liability is only that of the bailee. B. & O. R. Co. v. Morehead, 5 W. Va. 293.

Same—Duty to Deliver.—An express company is a common carrier and its responsibility for the safe delivery of the property expressed to it is the same as that of the carrier. So. Exp. Co. v. McVeigh, 20 Gratt. 264.

B. BILLS OF LADING.

Nature.—Bills of lading are held, in Pollard v. Vinton, 105 U. S. 1, to be both a receipt and a contract. So far as they acknowledge the delivery and acceptance of the goods, they are mere receipts. As to the rest, they are contracts.

Property in Goods Acquired by Bill of Lading.—And a party discounting a draft, and receiving therewith, deliverable to his order, a bill of lading of the goods against which the draft was drawn, acquires a special property in them, and has a complete right to hold them as security for the acceptance and payment of the draft. Neill v. Rogers, etc., Co., 41 W. Va. 37, 23 S. E. Rep. 702.

Effect of Notice of Claim, When Bill Omits Name of Claim Agent's Office.—And it should be noted, that where a bill of lading does not state the location of a claim agent's office, a stipulation that notice of a claim must be given within five days is unreasonable and void. Norfolk & W. Ry. Co. v. Reeves, 97 Va. 284, 33 S. E. Rep. 606.

Issuing Duplicate Bills—Statutory Requirement.—As to the issuance of duplicate bills to shippers, Va. Acts 1891-92, p. 965, Pol. Supl. § 1297 a, ch. 7, has the following provision: "All common carriers doing business in this state shall on demand issue duplicate freight receipts to shippers, in which shall be stated the class or classes of freight shipped and the freight charges over the road giving the receipt."

Construction of Words "At the Owner's Risk," Appearing in the Bill of Lading.—The term, "at the owner's risk," in a bill of lading, which is declared to be a special contract, taken in connection with other stipulations therein, limits the carrier to such loss or damage only as might result from ordinary neglect, which is defined to mean that want of care and diligence which prudent men usually bestow on their own concerns. B. & O. R. Co. v. Rathbone, 1 W. Va. 87.

Liability under Bill of Lading.—In Lewis v. C. & O. Ry. Co. (W. Va. 1900), 35 S. E. Rep. 908, a carrier received lumber for shipment to Europe. Subsequently, it was held liable under its bill of lading for the lumber, which was lost after placing it on the pier of the railway company under its exclusive control.

C. CONTRACT OF TRANSPORTATION AND DELIVERY.

What Contract Implied by Law.—When a common carrier undertakes to convey goods, the law implies a contract, that they shall be carried and delivered at the place of destination safely and within a reasonable time. And what is "reasonable time" within which goods are to be delivered, cannot be defined by any general rule, but must depend upon the circumstances of each particular case. Thus, the mode of conveyance, the distance, the nature of the goods, the season of the year, the character of the weather, and the ordinary facilities of transporation are matters properly entering into the consideration of what is "reasonable time." McGraw v. B. & O. R. Co., 18 W. Va. 361.

Consideration to Support the Contract.—And the mutual obligation of a shipper to ship, and of a carrier to carry, furnish sufficient consideration for a contract to carry at a specified rate; but if the shipper fails to accept the carrier's offer, and is not bound to furnish the goods for carriage, the carrier's offer or promise to carry for a particular rate becomes a mere *nudum pactum*, the breach of which will not support an action. Southern Railway Co. v. Wilcox, 7 Va. Law Reg. 381.

Estoppel to Recover Higher Value Than Agreement Specifies.—As a common carrier is entitled to be fairly informed as to the value of the property confided to his care, where a shipper enters into an agreement with a carrier as to the value of the property shipped, and receives the benefit of low rates by reason of placing a low valuation upon the property, he is estopped from claiming or recovering another and higher valuation after the loss occurs, although said loss may be the result of negligence on the part of the carrier, provided the same is not gross, wanton, or wilful. Zouch v. C. & O. Ry. Co., 36 W. Va. 524, 15 S. E. Rep. 185.

Construction of Contract for Transportation.—In White v. Toncray, 9 Leigh 347, there was a covenant between a carrier and a manufacturer of salt, whereby the carrier agreed to transport from 1200 to 5000 barrels of salt, annually for three years, from the manufacturer's salt works, for certain specified prices, for a stipulated reward per barrel transported. It was held that the manufacturer, and not the carrier, had the right to elect what quantity of salt, not less than 1200 nor more 5000 barrels, should be transported by the carrier annually.

Performance.

When Liable for Delay.—In McGraw v. B. & O. R. Co., 18 W. Va. 361, potatoes were delivered at the defendant's depot on the 13th day of February 1866, to be shipped on the 14th. There was a daily train between the two points of shipment; the weather was mild and so continued on the 14th; but the potatoes did not reach Grafton, their destination, until the 16th, and arrived so frozen as to be worthless, the weather on the 15th and 16th having become cold. Under the circumstances the company was held liable in damages for the delay.

When Right of Action for Delay Not Waived.—Where there has been a delay in the transportation of goods causing a breach of the carrier's contract to deliver at a specified time, by reason of which loss ensues to the consignee, such consignee's right of action for the delay is not waived by a mere acceptance of the goods upon arrival at a later date than that specified in the contract. N. & W. Ry. Co. v. Ship. Comp. Co., 83 Va. 272, 2 S. E. Rep. 139. See *post*, "Liability."

D. LIABILITY.

1. IN GENERAL.

a. Responsibility for Goods Received, Degree of Care Required, and Exceptions by Law to Liability.—The law imposes upon the common carrier of goods an unusual and extraordinary liability. The foundation for this requirement rests upon considerations of public policy and convenience. The carrier is regarded as a practical insurer of the goods entrusted to him, and is liable for all losses, except such as arise by the act of God, the public enemy, or the conduct of the owner, unless the loss or damage arises from the nature and inherent character of the property carried, such as the natural decay of perishable articles, or the fermentation or evaporation of articles liable to these effects, or the natural and necessary wear of certain articles, or from defects in the packages in which they are shipped, or in the case of live stock where the loss arises from their own vitality, or where vicious and unruly animals injure and destroy themselves by refusing food, or die of fright or heat, provided the carrier has used foresight, diligence and care to avoid such loss and damage. McGraw v. B. & O. R. Co., 18 W. Va. 361; B. & O. Ry. Co. v. Morehead, 5 W. Va. 293; Murphy v. Staton, 3 Munf. 239. And the onus is upon the carrier to show that the loss was such as he could not have prevented. B. & O. Ry. Co. v. Morehead, 5 W. Va. 293. See *post*, "Carriers of Live Stock," for exceptions in transporting live animals.

It is held by some authorities upon the common law, that the rule rendering common carriers liable for every loss, except that which is caused by the act of God or the public enemy, was not a part of the ancient common law. It is a comparatively modern innovation, introduced in consequence of the growing commercial relations of the country, an imperfect police, imperfect protection from the government, and frequent losses by robbery. "The first case in which the principle was recognized and settled is that of Woodliefe and Curtis in the thirty-eighth year of the reign of Elizabeth. And the reason of the rule is not, as stated by Sir Edward Coke, solely or principally because the carrier hath his hire; for other bailees for hire and private carriers for hire are not liable in the same manner and to the same extent." Per BOCKEE, SEN., in Van Santvoord v. St. John, 6 Hill 157.

If this be the true doctrine other innovations upon the liability of the carrier have been added in more recent times. Thus by some authorities a carrier is not liable when the loss occurs by reason of acts of public authority, as for instance, destruction under the police power. Mugler v. Kansas, 123 U. S. 623; Railroad Co. v. Husen, 95 U. S. 465. Or loss arising from the nature and inherent character of the property in custody. McGraw v. B. & O. R. Co., 18 W. Va. 361. The doctrine as to the latter has been also declared in Mississippi, Illinois, Massachusetts, New York, England, and doubtless other states. Another exception is when the loss occurs by reason of the act of the owner of the goods. B. & O. Ry. Co. v. Morehead, 5 W. Va. 293; Murphy v. Staton, 3 Munf. 239; McGraw v. B. & O. R. Co., 18 W. Va. 361.

b. Act of God.

Meaning and Application.—There is much conflict in the authorities as to the meaning of the term, "the act of God." Some restrict its meaning to accidents in which it was impossible that there could have been any intervention of human agency. Again a distinction is drawn between active and passive acts of nature or the elements. As said by a learned author, "perhaps no subject could open a wider field for theological and speculative discussion than the question what are the acts of God. In one sense it may be said that all events may be attributed to His agency; but, this is by no means the sense in which the phrase is to be legally understood; and it can never become necessary, so far as the question of the liability is concerned, to discuss so abstract a proposition, because the exception to his liability intended by these words has, by a long course of almost concurrent adjudication, received a tolerably fixed and definite but limited meaning."

As a general rule, it is held, that the act of God, which excuses the common carrier, must be a direct and violent act of nature. Thus "such an accident as could not happen by the intervention of man, as storms, lightning and tempests"; "those losses that are occasioned by the violence of nature by that kind of force of the elements, which human ability could not have foreseen or prevented, such as lightning, tornadoes, sudden squalls of wind"; "an extraordinary convulsion of nature"; "a direct visitation of the elements, against which the aids of science and skill are of no avail"; "physical causes which are irresistible, which human foresight and prudence cannot anticipate, nor human skill and diligence prevent, such as loss by lightning, storms, inundations and earthquakes, and the unknown dangers to navigation, which are suddenly produced by their violence." See Friend v. Woods, 6 Gratt. 195; Maslin v. B. & O. R. Co., 14 W. Va. 189; McGraw v. B. & O. R. Co., 18 W. Va. 361.

Freezing Weather.—In this latter case potatoes were shipped by the plaintiff, and upon arrival at their destination, it was discovered that they were frozen to such an extent as to be worthless. The carrier failed to ship on the day agreed, delaying the shipment to a subsequent day at which time the weather was cold, a sudden change having taken place in the conditions of the atmosphere. The defence set up by the carrier was, that the freezing weather caused the loss, and this brought the loss within the exception "act of God."

The court in answering this defence, in the course of its argument, said: "If the question in this case depended solely on the question, whether the plaintiff in error (carrier) was liable for the loss of the property from freezing, because that was an act of God, I should have no hesitation in saying that the liability exists. But on the other hand, if the question of liability rests simply upon the question, whether they were liable for the freezing of the property, having been guilty of no negligence or misconduct, by which that injury resulted, I would have as little hesitation in saying, that they were not liable; not because the freezing was an act of God, or an inevitable accident, but because of the exception to that principle, on account of the nature and inherent character of the property and its liability to freeze."

Bar in River.—And in Friend v. Woods, 6 Gratt. 189, a common carrier on the Kanawha river stranded his boat upon a bar which had been formed in the river a few days before the boat had proceeded on its voyage, the bar resulting from a rise of the Elk river, a tributary of the Kanawha, causing the ice to gorge at its mouth, and a bar of sand and gravel to form in the channel along which the boat had to pass. The officers and crew of the boat were ignorant of the bar, when the boat stranded upon it. The defence interposed was that the accident which caused the loss was due to the act of God. The court *in arguendo* said: "Among the strongest authorities stated in behalf of the plaintiffs in error are the cases of Smyrl v. Niolon, 4 Bailey 421, 23 Am. Dec. 146; Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235. In the former it was held that a loss occasioned by boats running on an unknown 'snag' in the usual channel of the river, is referable to the act of God, and that the carrier will be excused; and in the latter it was said that striking upon a rock in the sea not generally known to navigators, and not known to the master of the ship, is the act of God. And other authorities go so far as to assert that if an obstruction be secretly sunk in the stream, and, not being known to the carrier, his boat founder, he will be excused. The last proposition stands condemned by the leading cases both in England and America. In the case of Forward v. Pittard, 1 T. R. 27, LORD MANSFIELD says, that 'to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows that it was done by the king's enemies, or by such an accident as could not happen by the intervention of man, as storms, lightning and tempest.' The same doctrine is strongly stated in McArthur v. Sears, 21 Wend. 196, where it is said that 'no matter what degree of prudence may be exercised by the carrier and his servants; although the delusion by which it is baffled, or the force by

which it is overcome, be inevitable; yet if it be the result of human means, the carrier is responsible.' These cases clearly restrict excuses of the carrier for losses occasioned by obstructions in the stream to such obstructions as are wholly the result of natural causes. * * The rule, it is insisted, is a harsh one upon the carrier, and it is argued that the court should be slow to extend it further than it is fully sustained by the cases. However harsh the rule may at first appear to be, it has been long established, and is well founded on maxims of policy and convenience, and viewing the carrier in the light of an insurer, it is of the utmost importance to him, as well as to the public who deal with him, that the acts for which he is to be excused should have a plain and well-defined meaning. When it is understood that no act is within the exception, except such a violent act of nature as implies the entire exclusion of all human agencies, the liabilities of the carrier are plainly marked out, and a standard is fixed by which the extent of the compensation to indemnify him for his risks can be readily measured and ascertained." In view of these principles the carrier was held liable for the damage done to the freight on board his boat. For instances where these principles have been applied in connection with losses or injuries suffered by passengers, see *post*, "Carriers of Passengers."

Effect When Negligence Is the Proximate Cause.—But whenever the common carrier is exempted from liability, either because of the act of God or because of the nature and inherent character of the property and its liability to loss and damage, he must be free from any previous neglect or misconduct, by which that loss or damage may have been occasioned. For though the immediate and proximate cause of the loss in any given instance may have been what is termed the act of God, or from the nature and inherent character of the property, yet if the carrier unnecessarily exposed the property to such accident by any culpable act or omission of his own, he is not excused. And the previous neglect or misconduct, which makes the carrier liable for loss to property, must be immediately or proximately connected with the accident or loss. If it is remotely the occasion of the loss or damage the carrier is not liable. He is answerable for the ordinary and proximate consequence of his negligence, and not for those that are remote and extraordinary, and this liability includes all those consequences, which may have arisen from the neglect to make provision for those dangers which ordinary skill and foresight is bound to anticipate. Thus, a shipper delivered potatoes to a carrier on the 13th day of the month to be shipped to a point between which and the shipping station there were daily trains. The 13th was fair and the weather moderate, and upon this day the carrier agreed to ship. As a matter of fact they did not reach their destination until the 16th, and upon their arrival they were found to be frozen and worthless, a decided change having taken place in the condition of the weather after the 13th, the day upon which they should have been shipped. The carrier defended on the ground that the loss was caused by the freezing, which was due to an act of God. The court held that freezing weather, causing a loss to goods, could not be deemed an act of God, and did not come within the definition of that term. It further held, however, that if the question of liability rested solely upon the question, whether they were liable for the freezing of the property, having been guilty of no negligence or misconduct, by which that injury resulted, they would not be liable, not because the freezing was an act of God or an inevitable accident, but because of the exception to that principle on account of the nature and inherent character of the property and its liability to freeze. But it was shown by the evidence that the carrier was negligent in having failed to ship on the 13th day of the month as agreed, by doing which the cold weather would have been avoided, consequently no loss would have resulted from the goods being frozen; therefore, the carrier was liable for the damage accruing by reason of its default which was the proximate cause of the loss, even though in the absence of misconduct on its part, it would have been relieved from the liability under the exception "loss due to the nature and inherent character of the goods." McGraw v. B. & O. R. Co., 18 W. Va. 361; Maslin v. B. & O. R. Co., 14 W. Va. 189.

See *post*, "Negligence," discussed under "Carriers of Passengers"; also, monographic *note* on "Negligence."

2. BEGINNING AND ENDING OF LIABILITY AS A COMMON CARRIER.—As a general rule a carrier's liability as a common carrier, for the safety of the goods tendered to it for transportation, commences at the time of the delivery of such goods to it for immediate transportation. Acceptance may be either actual or constructive. And in order to charge a railroad company or other carrier with liability for the loss of, or injury to, goods which had been tendered for carriage and delivery by the shipper or his agent, an actual or implied acceptance by the carrier must be shown. Southern Exp. Co. v. McVeigh, 20 Gratt. 264.

The delivery must be such as to place the goods in the custody and under the control of the carrier, and not merely in his vehicle, or other conveyance; so that if they are really in charge of the *owner's* servants, although they may be in the carrier's wagon or vessel, the carrier is not answerable. Southern Exp. Co. v. McVeigh, 20 Gratt. 264.

And as the liability of a common carrier thus begins with the delivery of the goods to it, so it continues until a proper delivery of the goods by it; for it is bound, not only to carry them to their destined place, but also to deliver them there to the bailee or as he may direct, else he must deposit them in a reasonably safe warehouse after the consignee has had a reasonable time in which to call for them and take them away. B. & O. R. Co. v. Morehead, 5 W. Va. 293. And as to the duty of notifying the consignee upon the arrival of the goods at the end of their destination, it is held in B. & O. R. Co. v. Morehead, 5 W. Va. 293 (1872), that it is the duty of the carrier to tender delivery, or at least to *notify* the consignee of his readiness to deliver; and if the place of destination cannot be reached so as to make the delivery, the carrier should not only take care of the goods, but also notify the *consignor* or *owner* within a reasonable time, of his inability to make the delivery, and thereafter it will be liable only as a bailee. Yet in Berry v. W. Va. & P. R. Co., 44 W. Va. 538, 30 S. E. Rep. 143 (1898), it is held, that the railroad company is not required to give notice to the consignee of the arrival of the goods, but he must look out for their arrival.

The duty of the carrier to notify the consignee upon the arrival of the goods which was decided in the affirmative in B. & O. R. Co. v. Morehead, 5 W. Va. 293, was urged in the case of Berry v. W. Va.

& P. R. Co., 44 W. Va. 538, 30 S. E. Rep. 143, and B. & O. R. Co. v. Morehead was cited as authority for the status of the law in West Virginia.

The court in the Berry Case, reviewing the former decision, said: "Railroad Co. v. Morehead, 5 W. Va. 293, seems to hold that notice is necessary, but it seems against the better authorities, and based on exceptional circumstances on account of inability to deliver at the point of destination." In Virginia, however, this question is set at rest by statute. It is provided by the Virginia Code, Acts 1891-'92, p. 965, Pol. Supl., § 1297 a, that it shall be the duty of every company upon the arrival of freight shipped to any of its depots or stations to notify the consignee by mail or otherwise when such freight is ready for delivery and give a reasonable time for the removal of the same, and make due allowance for its class and for bad weather and holidays. In West Virginia, it is held that the removal by the consignee must be made without regard to the distance to the depot, or the means of removal or convenience of the consignee. If not made promptly, the carrier will cease to be liable as such. And what is a reasonable time for the removal of the goods by the consignee from the railroad warehouse is a question of fact, under all the circumstances for the jury; but, where the facts are clear and undisputed, it is a question of law for the court. Berry v. W. Va., etc., Co., 44 W. Va. 538, 30 S. E. Rep. 143. However, a railroad company is still under liability for a reasonable time as a common carrier while the goods are in the warehouse, but after a reasonable time elapses it is only under liability as a warehouseman. Berry v. W. Va., etc., Co., 44 W. Va. 538, 30 S. E. Rep. 143.

And a carrier receiving lumber for shipment to Europe was held liable on its bill of lading for lumber lost after placing it on the pier of the railway company and under its exclusive control. Lewis v. C. & O. Ry. Co. (W. Va. 1900), 35 S. E. Rep. 908.

In respect to mere delay of delivery, however, the carrier stands on the same footing as other bailees of its class, that is for the mutual benefit of both parties; and is answerable in respect to default only for ordinary neglect and may, therefore, excuse itself for such delay on the score of accident or misfortune, without its default, as by adverse winds, freezing of water, founderous roads and the like. See, in this connection, 3 Min. Inst. (2d Ed.) 276, etc. See also, *ante*, "Acceptance and Delivery of Goods"; "Delay in Transportation."

It should be observed, however, that a drayman authorized to haul a merchant's goods from the depot is not, from that consideration merely, an agent whose knowledge of arrival of goods will be notice to the merchant. Berry v. W. Va. & P. R. Co., 44 W. Va. 538, 30 S. E. Rep. 143.

When an Express Company Accepts in Capacity of Carrier.—Moreover, when goods are delivered to parties to be forwarded and transported, and these parties are expressmen, and receive compensation for forwarding and transporting, the goods are in their custody as carriers. Thus, the owner of certain goods about to arrive at the depot of a railroad station in Charlotte, North Carolina, wished them to be carried from thence to Richmond, Virginia, and an express company, by their agent at Charlotte, undertook to remove and deposit the goods in their warehouse as soon as possible on the arrival of the goods at the depot in Charlotte, and to carry them from Charlotte to Richmond within a reasonable time for the reward paid. The goods arrived at the depot, and the express company had notice of their arrival. It was held that it was a delivery to the express company as a common carrier. So. Exp. Co. v. McVeigh, 20 Gratt. 264.

3. LOSS OR DAMAGE ON LINE OF CONNECTING CARRIER—WHEN RESTRICTED TO RECEIVING CARRIER'S ROUTE.—The rule established by the federal and many of the state courts regarding the common-law liability of the carrier for goods which are delivered and transported over and beyond its own lines is, that the liability of the common carrier is restricted to its own route, unless it contracts to carry the goods to the ultimate point of destination, which is beyond its own line; and such contract is not established by proof that the carrier accepted the goods with the knowledge of their destination and named the rate for the same; and in the absence of special contract to deliver the goods at a point beyond its line, the receiving carrier is not liable for loss or damage occurring to the goods after their delivery to the connecting carrier. Hadd v. U. S. & C. Exp. Co., 36 Am. Rep. 757; R. R. Co. v. Pratt, 22 Wall. 123; McConnell v. N. & W. R. R. Co., 86 Va. 248, 9 S. E. Rep. 1006. However, at the revision of the Code in 1887, the revisors proposed to the legislature the following provision which was adopted and incorporated into the Code of 1887, § 1295; "When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent; and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge." Under this section of the Code when a carrier accepts anything for transportation beyond the terminus of its own line, it assumes an obligation for its safe carriage to such destination, unless it is released from such liability by written contract signed by the owner; and it is liable to such owner for an excess of freight charged over the rate agreed to by the receiving carrier, and paid to the connecting carrier at destination, though the bill of lading issued by the receiving carrier stipulated that it should not be accountable for any damage after the freight receipted for by the connecting carrier. Va. Coal, etc., Co. v. L. & N. R. R. Co., 98 Va. 776, 37 S. E. Rep. 310 (1900). And this is true though the shipment be an interstate shipment and the carrier issues to the shipper a printed bill of lading, signed by the carrier only, in which it is stated that "it is mutually agreed that the liability of each carrier as to goods destined beyond its own route shall be terminated by proper delivery of them to the next succeeding carrier." R. & A. R. Co. v. Patterson Tob. Co., 92 Va. 670, 24 S. E. Rep. 261. The constitutionality of § 1295, Va. Code 1887, was raised in R. & A. R. Co. v. Patterson Tob. Co., 92 Va. 670, 24 S. E. Rep. 261. The provision is that the company shall be liable for injuries happening on their lines to goods which the receiving carrier has accepted for transportation beyond its own line unless there be a written contract, signed by the shipper, exempting the carrier from such liability. The point made by

the defence was that it was a regulation of commerce among the states, and being a provision made by a state government, was therefore in conflict with the Constitution of the United States, art. 1, sec. 8, ch. 3, which provides that, "the congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes." After a full discussion the court of appeals of Virginia held that the provision was constitutional. And on an appeal to the supreme court of the United States the decision was affirmed. MR. JUSTICE WHITE delivering the opinion of the court.

See 1 Va. Law Reg. 924; 3 Va. Law Reg. 907, for editorial comments upon the common law regulating this subject; the present Virginia doctrine under § 1295, and remarks upon the case above referred to in which this statute was construed by the Virginia court of appeals, and the opinion therein delivered, which was affirmed and the view adopted by the supreme court of the United States. See Va. Coal, etc., Co. v. Louisville, etc., R. Co., 98 Va. 776, 37 S. E. Rep. 310 (1900). See also, in this connection, Va. & Tenn. R. Co. v. Sayers, 26 Gratt. 328; So. Exp. Co. v. McVeigh, 20 Gratt. 264; Wilson v. C. & O. Ry. Co., 21 Gratt. 654.

4. AS WAREHOUSEMAN.

When Liable as Such, and Extent of Liability.—If a carrier be a warehouseman, or have a place of deposit for goods which he has transported, and he place them therein without instruction from the owner, either express, or implied from established usage or otherwise, he is still liable as carrier; but where they are so deposited in pursuance of express instructions, or in accordance with known and established usage, or where, notice having been given of their arrival, they are not removed within a reasonable time, the party's duty and obligation as carrier is at an end, and he becomes subject to the far less rigorous responsibility of a warehouseman, that is, he is answerable for ordinary or for gross neglect, according as he is or is not paid for such storage.

And if access to the assignee, and delivery of the goods at the end of the route, is prevented by a state of war, it is the carrier's duty to take care of the goods for the consignor, and notify him within a reasonable time of his inability to make the delivery, after which his liability is only that of a bailee. B. & O. R. Co. v. Morehead, 5 W. Va. 293.

But if goods are under the control of parties as forwarders and not as common carriers, and are consumed by accidental fire in a warehouse without any fault or negligence on their part, they are not liable; unless they had agreed for compensation paid, to insure them, and had failed to do so. So. Exp. Co. v. McVeigh, 20 Gratt. 264.

However, where goods stored in a railroad warehouse are called for by the consignee, and he is informed by an agent that they have not arrived, which prevents their removal, and they are destroyed by the burning of the warehouse, the company is liable. Berry v. W. Va. & P. R. Co., 44 W. Va. 538, 30 S. E. Rep. 143.

5. AS FORWARDER.—If goods are under the control of parties as forwarders and not as common carriers, and are consumed by accidental fire in a warehouse without any fault or negligence on their part, they are not liable; unless they had agreed for compensation paid, to insure them, and had failed to do so. So. Exp. Co. v. McVeigh, 20 Gratt. 264.

6. WHEN PRIVILEGE IS EXTENDED TO OTHER COMPANIES OR CORPORATIONS TO CARRY ARTICLES ON TRAIN.—Whenever any such corporation, company, association, or person, as is mentioned in Va. Code 1887, ch. 51, shall obtain from a railroad company the right or privilege of carrying articles upon the trains of such railroad company, and shall comply with the provisions of § 1216 relative to terms upon which foreign express companies may do business in this state, such railroad company shall not in any manner be liable, as a common carrier, for any articles thereafter delivered to such corporation, company, association, or person, for carriage as aforesaid. Va. Code 1887, sec. 1217. See, in this connection, So. Exp. Co. v. McVeigh, 20 Gratt. 264.

7. HIRED CARS.—Moreover, it is settled that a railroad company cannot escape responsibility for damages resulting from its failure to provide cars reasonably fit for conveyance of the particular class of goods it undertakes to carry, by alleging that the cars used for the purpose of its own transit are the property of another, who undertook to provide the necessary material to insure the fitness of the cars for such transportation. The owners of the cars will be deemed to be the agents and servants of the railroad company, and it will be held to the same liability as if it owned the cars. Thus, a railroad company which uses the cars of a refrigerator company for the transportation of fruit is under the same obligation to care for the fruit that it would have been, had the cars belonged to it. N. Y., P. & N. R. Co. v. Cromwell, 98 Va. 227, 35 S. E. Rep. 444.

8. CARRIER AS AGENT FOR CONNECTING CARRIERS.—And where a carrier undertakes to carry for the whole distance, on and beyond its line, and then has a contract with a connecting carrier by which it is to accept and transport from the end of the initial carrier's line to point of final destination, the initial carrier will be liable as principal for loss of goods on the line of the connecting carrier, and the latter will be regarded as agent of the receiving carrier. So laid down in Wilson v. C. & O. R. Co., 21 Gratt. 654 (1872).

Furthermore, by the terms of the Va. Code 1887, § 1295, connecting carriers become the agents of the initial carrier, and the latter is liable for their default in failing to transport the goods safely, or for charging a greater rate of freight than that agreed on. In Va. Coal & Iron Co. v. Louisville & Nashville R. Co., 98 Va. 776, 37 S. E. Rep. 310, there was no such release, and the initial carrier was bound to make good the rate of freight it had guaranteed.

Moreover, where a contract for transportation of goods over connecting lines of railway is made with one railway company as agent of the other, and the *latter* transports the goods and at the end of the trip presents a bill for the charges, it cannot, when sued for injury to the goods by its servants, deny the agency. N. & W. R. R. Co. v. Read, 87 Va. 185, 12 S. E. Rep. 395.

E. CONTRACTS OF EXEMPTION AND LIMITATION.

Validity—Negligence—Operation and Effect.—The general principles which regulate and govern the common-law liability of the common carrier have been more broadly and extensively treated *ante*, "In General." In brief the common law holds the carrier of goods liable for any loss or damage to the goods occurring while in his care or under his control as carrier, except, as at first held, for such

losses as occur by reason of the act of God, the public enemy, some default or misconduct on the part of the owner, or unless the loss be due to the nature and inherent character of the goods. In other words the common law regards the common carrier as a practical insurer of the goods, saving only a limited number of exceptions.

However, it is held that the carrier may, by a valid contract, make a caution for itself, and, to a degree limit the strictness and rigor of the terms imposed by the common law.

Thus, in Richd. & Dan. R. Co. v. Payne, 86 Va. 481, 10 S. E. Rep. 749, it is held that a valid contract to limit the liability of the carrier to a certain agreed valuation of the property even though less than actual value, may be made by the carrier, where it is just and reasonable in its terms, and a reduced rate of freight is made a consideration for it. B. & O. R. Co. v. Skeels, 3 W. Va. 556; B. & O. R. Co. v. Rathbone, 1 W. Va. 87; Zouch v. C. & O. Ry. Co., 36 W. Va. 524, 15 S. E. Rep. 185; Maslin v. B. & O. R. Co., 14 W. Va. 180; Wilson v. C. & O. R. Co., 21 Gratt. 654.

And as further held, it seems to be a well settled principle that a railroad company may, by express contract or notice brought home to the employer, relieve itself from its liability as an insurer of freight or for money or valuable articles liable to be stolen or damaged, unless apprized of their character and value, or for articles liable to rapid decay, or for live animals liable to get unruly from fright and to injure themselves in that state, when such articles or animals become injured without the fault or negligence of the company or its agents. However, it cannot, by express contract, though upon the consideration of a reduced charge upon the freight, relieve itself from its liability, as carrier of the freight, for injury to or loss of the freight resulting in any degree from the want of care or faithfulness of themselves or their agents. Va. & Tenn. R. Co. v. Sayers, 26 Gratt. 328; Brown v. Adams Express Co., 15 W. Va. 812; Berry v. W. Va. & P. R. Co., 44 W. Va. 538, 30 S. E. Rep. 143. The latter part of the proposition is confirmed in Virginia by statute, Va. Code 1887, § 1296, providing that "no agreement made by a common carrier for exemption from liability for injury or loss occasioned by his own neglect or misconduct, shall be valid."

Still, it is of importance, that upon the terms and conditions set forth in § 1295 of the Code, a common carrier *may limit* its liability for freight to such damages as result from its negligence prior to delivery to its connecting carrier. When such contract has been made, it is for the jury to determine from the evidence, under proper instructions from the court, whether or not the damage or injury complained of occurred while the freight was in its possession or upon its line of road. Norfolk, etc., R. Co. v. Reeves, 97 Va. 285, 33 S. E. Rep. 606.

In West Virginia, however, the authorities conflict regarding the proposition that a common carrier can by special contract exempt itself from loss caused by its negligence. Thus in the first case involving the point, B. & O. R. Co. v. Rathbone, 1 W. Va. 87, it was held, that a common carrier could diminish and restrict its common-law liability by special contract; and could absolve itself in this manner from all liability resulting from *every degree* of *negligence however gross*, if it falls short of misfeasance or fraud, provided the terms and language of the contract are so clear and definite as to leave no doubt as to the intention of the parties.

But in the subsequent case of Maslin v. B. & O. R. Co., 14 W. Va. 180, the Rathbone Case was directly overruled, the court holding that a common carrier cannot exempt itself from loss and damage, which has *in any degree* been caused by the negligence or misfeasance of itself or its servants. Commenting upon the Rathbone Case, GREEN, J., said: "I have reviewed the authorities at some length, because there is a decision of the supreme court of appeals of the state of West Virginia, which is in conflict with the views I have expressed and with the great weight of authority. In the case of the Baltimore & Ohio Railroad Co. v. Rathbone, 1 W. Va. 87, the court decides: 'That it is competent for a common carrier to diminish and restrict his common-law liabilities by special contract; and that he may, by express stipulations, absolve himself from all liability resulting from any and every degree of negligence however gross, if it fall short of misfeasance or fraud, provided that the terms and language of the contract are so clear and definite as to leave no doubt, that such was the understanding and intent of the parties.'

"This case was decided during the war. It was argued at some length, and no doubt all the authorities then accessible were examined by the counsel and court; yet few authorities were then accessible. The authorities referred to on this point by counsel were only the English and New York cases and the decisions of the supreme court of the United States up to that time. The court in its opinion cites but a single case. We have seen, that the recent New York and English cases are in conflict with the great weight of authority. A decision of such importance rendered by a court under such disadvantageous circumstances, and in conflict with both reason and the great weight of authority, though it be our own court, we cannot follow." Berry v. W. Va. & P. R. Co., 44 W. Va. 538, 30 S. E. Rep. 143; Zouch v. C. & O. Ry. Co., 36 W. Va. 524, 15 S. E. Rep. 185.

Moreover, where a shipper enters into an agreement with a carrier as to the value of the property shipped, and receives the benefit of low rates by reason of placing a low valuation upon the property, he is estopped from claiming or recovering any other and higher valuation after the loss occurs, although the loss may be a result of negligence on the part of the carrier, *provided* the same is not gross, wanton or wilful. But such a contract will not be upheld as exempting the carrier from all liability but as limiting the liability in case of loss to the amount fixed by agreement. Zouch v. C. & O. Ry. Co., 36 W. Va. 524, 15 S. E. Rep. 185.

As to the construction of the contract, the term, "at the owner's risk," in a bill of lading which is declared to be a special contract, taken in connection with other stipulations therein, limits the carrier to such loss or damage only as might result from ordinary neglect; which is defined to mean that want of care and diligence which prudent men usually bestow on their own concerns. B. & O. R. R. Co. v. Rathbone, 1 W. Va. 87.

Further, in this connection, it should be observed, that a common carrier cannot limit his common-law responsibility by any general notice, though knowledge of such general notice may be brought home to the consignor before or at the time he applied to have his goods transported. Brown v. Adams Express Co., 15 W. Va. 813.

Moreover, where a common carrier relies on a contract of exemption, he must not only bring himself within the exemption but show that no negli-

gence of his contributed to the result. Brown v. Adams Express Co., 15 W. Va. 813.

And, again, a common carrier does not by limiting his common-law liabilities by special contract thereby become a private carrier; and if loss is sustained, the burden of proof is on him to show, not only that such loss arose from a cause from which he was exempted from responsibility by the terms of his special contract, but also that it arose from no negligence or misfeasance of himself or his servants. Brown v. Adams Express Co., 15 W. Va. 812; Maslin v. B. & O. R. Co., 14 W. Va. 180.

F. FREIGHT, DEMURRAGE AND OTHER CHARGES.

1. STATUTORY REGULATIONS.

Long and Short Haul.—It is unlawful for any common carrier doing business in this state to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. But this is not to be construed as authorizing any common carrier to charge and receive as great compensation for a short as for a long distance: provided, however, that upon application to the railroad commissioner such common carrier may in special cases, after investigation by the railroad commissioner, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property, and the commissioner may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this act. Va. Code 1887, § 1297; Pol. Supl. (1900), § 1297 a.

Special Rates—Rebates—Drawbacks—Discrimination.—If any common carrier subject to the provisions of the Act of the Legislature, ch. 55, Va. Code 1887, Pol. Supl. (1900), § 1297 a, shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any other person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of this act than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

Validity of Charges for Detention after a Reasonable Time.—Va. Code 1887, §§ 1202, 1203, allows railroad companies to make a certain charge for the shipment of produce and other articles; and for the weighing, storage, and delivery of articles at any depot or warehouse of the company; a charge may also be made, not exceeding the ordinary warehouse rates charged in the city or town in which, or nearest to which, the depot or warehouse is situated; but they forbid a railroad company to charge or receive any fee or commission other than the regular transportation fees, storage, and other charges authorized by law for manifesting, receiving, or shipping any goods or other articles for transportation on such railroad. Construing these sections, it was held in N. & W. R. R. Co. v. Adams, 90 Va. 393, 18 S. E. Rep. 673, that the statutes do not forbid a charge of $1.00 per day for the detention of a car more than 72 hours after notice to the consignee of its arrival. LACY and HINTON, JJ., dissenting.

2. PREFERENCES.—And it shall be unlawful for any common carrier, subject to the provisions of the act regulating common carriers to make or to give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Va. Code 1887, ch. 55, Pol. Supl., ch. 55. See these references for general provisions relating to common carriers.

3. WHEN ENTITLED TO FREIGHT AND DEMURRAGE.

Contract for Freight and Demurrage Distinct and Independent.—By charter party of affreightment, a plaintiff engaged their vessel to take a cargo for defendants to a designated port, at a specified freight; and it was agreed that twenty running days should be allowed for unloading and discharging the vessel after her arrival at the port of destination, and that for every additional day's detention, defendants should pay $50 demurrage. It was held that the stipulation for payment of demurrage did not affect the contract for freight, and if the consignee failed to unload and discharge the vessel within the lay days allowed, there being no impossibility of his doing so, and afterwards, while the vessel was detained on demurrage, the vessel and cargo be lost without the default of the master or mariners, the plaintiffs were entitled to recover the freight, as well as the demurrage. Brown v. Ralston, 9 Leigh 532.

Avoiding Capture—Vessel Stranded.—And if in order to avoid capture by the enemy, the master before he reaches the port of destination, strands the vessel; which is thereby lost, but the cargo saved, the cargo shall not contribute to repair the loss of the ship, but the owner of the ship is entitled to freight and salvage. Eppes v. Tucker, 4 Call 346.

Vessel Condemned by Foreign Tribunal—Fraud of Owner.—But freight (though by the terms of the charter party, payable monthly, if required) is not to be recovered, where the voyage is never completed, but the vessel is condemned, by a foreign tribunal, in consequence of a fraud attempted by one of the owners intrusted by the rest with the care of the vessel, though no proof appear of their assenting to such fraudulent act. Hadfield v. Jameson, 2 Munf. 53.

Vessel Goes to Sea without Taking a Cargo Agreed upon.—And a shipper of corn having agreed to deliver it on board with no unreasonable delay, the captain of the vessel applied for it on Sunday, and, no person being ready to deliver it, would not wait until Monday, but went to sea without it. The ship owner was not entitled to dead freight on the quantity not shipped; but, on the contrary, was bound to make compensation to the other party, for the loss sustained, in consequence of the captain's not taking the full quantity on board. Dunbar v. Buck, 6 Munf. 34.

Merchantman Having Letter of Marque—To What Extent the Enemy May Be Chased—Freight Allowed.—But a merchantman having a letter of marque, and having taken goods on freight, may chase an enemy in sight, but cannot justify going out of her course to cruise. If, in the former case, she engage the enemy, and be so injured as to compel her to put

into a port, other than that of her destination, she is entitled to freight. But if the goods be not afterwards sent by the ship owner to the port of delivery, she is entitled only to freight *pro rata itineris*, unless prevented from doing so by the freighter. Hooe v. Mason, 1 Wash. 264. See, in this general connection, Galt v. Archer, 7 Gratt. 307.

4. WHEN FREIGHT IS DUE.—It is a general principle that freight is not due until it is earned by a delivery of the cargo unless the delivery is prevented by default of the shipper or his agents. And if it becomes impossible to deliver the cargo, from causes not arising from the default of either party, the shipper will be excused from paying the freight. Brown v. Ralston, 4 Rand. 504.

5. SET-OFF.—And a consignee cannot set off against a carrier's charges the amount of damages sustained by the goods from an act of God. Galt v. Archer, 7 Gratt. 307.

6. RECOVERY.—An action at law may be maintained by a carrier to recover his charges for transportation. The usual form of action at common law is assumpsit. Thus, in Galt v. Archer, 7 Gratt. 307, a common carrier contracted to deliver a crop of wheat at an agreed price per bushel. A large portion of the crop was delivered in good order; but from the unavoidable effects of a storm, a small part was delivered in a damaged condition, and another small portion was lost. It was held, in an action by the carrier for the freight, that he was entitled to recover under the common *indebitatus* count, the agreed price for the whole quantity so delivered or lost. See *post*, "Actions."

7. EXCESSIVE CHARGES.

Recovery from Carrier.—Under Va. Code, § 1295, providing that, when a common carrier accepts anything for transportation beyond the terminus of its own line, it shall assume an obligation for its safe carriage to such destination, unless it is released from such liability by a written contract signed by the owner, a carrier accepting freight for transportation beyond its lines, and who has obtained no such written release signed by the owner, is liable to such owner for an excess of freight charged over the rate agreed to by the receiving carrier, and paid to the connecting carrier at destination, though the bill of lading issued by the receiving carrier stipulated that it was not to be accountable for any damage after the freight was receipted for by a connecting carrier. Va. Coal, etc., Co. v. Louisville & N. R. Co., 98 Va. 776, 37 S. E. Rep. 310 (1900).

And in W. Va. Transp. Co. v. Sweetzer, 25 W. Va. 434, the court said that, where, generally speaking, the only outlets for the transportation of oil is over a certain railroad, and an excess of legal freight appears to have been paid in order to secure transportation over it, though paid after each shipment, it is compulsory, and can be recovered.

And a repayment of freight charges in excess of those lawfully chargeable by a railway company need not be demanded before bringing suit to recover back the excess. W. Va. Transp. Co. v. Sweetzer, 25 W. Va. 434.

And in an action against a carrier for charging an illegal freight rate, if the declaration states the weight of the freight, the time and place where delivered to defendant for transportation, and places to which it was to be transported, distance, the amount which was demanded and received by defendant and that it was more than was lawful, contrary to the statute in such case made and provided, it is a sufficient notice of the cause of action to the defendant to enable it to make all just and proper defences. Hart v. B. & O. R. Co., 6 W. Va. 336. See *post*, "Actions."

IV. CARRIERS OF LIVE STOCK.

A. STATEMENT OF DUTY.

1. DEGREE OF CARE AND LIABILITY IN GENERAL.—An exception is made to the strict liability to which a common carrier is held by the common law for the transportation of goods intrusted to it in the case of a shipment of live stock. It would be an unjust and unreasonable imposition to hold a carrier responsible to the same degree for the safety of animate as is done in the case of inanimate property. Carriers of live stock are liable as common carriers for damages or injuries thereto arising during the transportation, except such as, without the fault or negligence of the carrier, result from the vitality of the freight; that is to say, the nature and propensity of animals to injure themselves or each other, their unruliness, restiveness, fright, viciousness, kicking, or goring, etc. The carrier is relieved from liability for injury from such causes if he has provided suitable means of transportation and exercised that degree of care which the nature of the property required, or has not otherwise contributed to the injury. Maslin v. B. & O. R. R. Co., 14 W. Va. 180; Hutchinson on Carriers, § 217 *et seq.* While common carriers are insurers of inanimate goods against all loss and damage except such as is inevitable or caused by the public enemy, or default of the owner, they are not insurers of animals against injuries arising from their nature and propensities, and which could not be prevented by foresight, vigilance and care. See *ante*, "Carriers of Goods."

2. CONFINEMENT AND TREATMENT IN TRANSITU.

What Classes of Animals Included.—Section 4386 of the Revised Statutes of the United States forbidding any railroad company which carries "cattle, sheep, swine, or other animals" from keeping the same confined in its cars for a longer period than twenty-eight consecutive hours without unloading the same, watering, and feeding, for the period of at least five consecutive hours, applies to a shipment of horses, mules, and all animals which may suffer for want of food, water or rest during such transportation. And that the two cars, in which 43 horses were shipped, were two feet longer than ordinary cars with racks, and troughs in which to feed and water, is insufficient to show that the cars were such that the cattle could have "proper food, water, space, and opportunity for rest," as provided by Rev. St. U. S. § 4388, so as to relieve the carrier from the duty of unloading them at stated intervals to rest, water and feed. C. & O. Ry. Co. v. Amer. Exch. Bank, 92 Va. 495, 23 S. E. Rep. 935.

Negligence in Allowing Stock to Drink Salt Water.—But where a contract by which lambs were shipped provided that the company should not be liable for injury to the stock until they were "loaded into the car, and the car door fastened by the conductor," it was held that this did not exempt the carrier from injury caused by its negligence in allowing the lambs to drink salt water before they got on the car. N. & W. R. Co. v. Harman, 91 Va. 601, 22 S. E. Rep. 490.

B. LOSS CAUSED BY OWNER'S DEFAULT.

Improper Interference.—In view of these exceptions, it was held that a common carrier will not be liable for injury to a horse occasioned by the improper or unwarrantable interference of the owner or his

agent, in the management of the car by the servants or employees of the company. Roderick v. Railroad Co., 7 W. Va. 54.

Contributory Negligence.—If the owner's contributory negligence is the proximate cause of the accident and loss of his live stock, the general principles would apply, and his recovery be barred.

But the fact that a shipper in unloading horses, allowed some of them to go out without leading them, does not show, as a matter of law, that he was guilty of contributory negligence. C. & O. R. Co. v. American Exch. Bank, 92 Va. 495, 23 S. E. Rep. 935.

And in Norfolk & W. R. Co. v. Sutherland, 89 Va. 703, 17 S. E. Rep. 127, the plaintiff shipped cattle over the defendant railroad company's line to a point on another line, the bill of lading providing that he should load, unload, and transfer them at his own cost. At a point on defendant's line the cattle were unloaded and fed and reloaded by defendant, though the plaintiff was present and willing to do so, and, in reloading, some of the plaintiff's cattle were placed in the cars of another shipper. It was held that the mistake was the company's, and that the owner of the stock was not guilty of contributory negligence, though the loss occurred on the line of the connecting carrier, since it was the result of its own negligent act, committed before the cattle were delivered to the connecting carrier. See *post*, under "Carriers of Passengers," the subject "Negligence." See also, Roderick v. Railroad Co., 7 W. Va. 754.

C. CONTRACTS OF EXEMPTION AND LIMITATION.—And it seems a railroad company may, by express contract or notice brought home to the employer, relieve itself from its liability as insurer of live animals liable to get unruly from fright and to injure themselves in that state, when such animals become injured without the fault or negligence of the company or its agents. Va. & Tenn. R. R. Co. v. Sayers, 26 Gratt. 328. See *ante*, "Liability."

Thus, a common carrier may, by special agreement, just and reasonable in itself, and fairly made between itself and the consignor of a horse at the time of shipment, fix the value of such horse, upon consideration that the rate of charges for transportation shall be commensurate with the value thus ascertained, and may also limit its liability in case of loss to the amount thus agreed upon, even though the loss may be the result of negligence on the part of the carrier, provided the negligence be not gross, wanton, or willful; but cannot wholly exempt itself from liability for loss resulting from negligence. Zouch v. C. & O. Ry. Co., 36 W. Va. 524, 15 S. E. Rep. 185.

But by the better rule and weight of authority the carrier cannot make a valid contract to exempt itself from liability for loss or damage arising from its own negligence. Va. & T. R. R. Co. v. Sayers, 26 Gratt. 328; Richd., etc., R. Co. v. Payne, 86 Va. 481, 10 S. E. Rep. 749; Johnson v. Richd., etc., R. Co., 86 Va. 975, 11 S. E. Rep. 829; N. & W. R. Co. v. Harman, 91 Va. 601, 22 S. E. Rep. 490; C. & O. R. R. Co. v. Am. Exch. Bank, 92 Va. 495, 23 S. E. Rep. 935. See also, Zouch v. C. & O. Ry. Co., 36 W. Va. 524, 15 S. E. Rep. 185; Maslin v. B. & O. R. Co., 14 W. Va. 193. For a fuller discussion of this particular point upon which the West Virginia courts disagree, and the general principles governing the subject of common carriers of goods, which in general apply with equal force to the subject in hand, reference is made to "Carriers of Goods," treated *ante*.

V. CARRIERS OF PASSENGERS.

A. IN GENERAL.

Who Is a Common Carrier of Passengers.—A common carrier of passengers is one who undertakes for hire to carry all persons indifferently who may apply for passage, so long as there is room, and there is no legal excuse for refusing. Gillingham v. Ohio River R. Co., 35 W. Va. 588, 14 S. E. Rep. 242. This definition includes electric railway companies. Richd. Ry. & E. Co. v. Bowles, 92 Va. 738, 24 S. E. Rep. 388; Danville Street-Car Co. v. Payne (Va. 1896), 24 S. E. Rep. 904; Fisher v. W. Va. & P. R. Co., 39 W. Va. 366, 19 S. E. Rep. 578, 23 L. R. A. 758. Also, stage coaches. Farish v. Reigle, 11 Gratt. 697. See Maslin v. B. & O. R. Co., 14 W. Va. 180.

See *ante*, I. "In General," for more comprehensive definition, authorities, and comparison of characteristics of carriers of passengers, live stock and goods.

Duty to Have Passenger Cars Open at the Termini.—It shall be the duty of every railroad company in this state to have at the termini of its road passenger cars open for admission of passengers, and baggage cars for the reception of baggage, at least thirty minutes before the advertised hour of departure of every passenger train. Va. Code 1877, § 1297, Pol. Supl., § 1297 a.

Who Conservator of the Peace on a Train.—The conductor of every train of railroad cars shall have all the powers of a conservator of the peace while in charge of the train. W. Va. Code 1900, ch. 145, § 31; Gillingham v. Ohio River R. Co., 35 W. Va. 588, 14 S. E. Rep. 243.

B. RELATION EXISTING BETWEEN PASSENGER AND CARRIER.

1. WHO MAY BECOME A PASSENGER.—It is the lawful right of every citizen *prima facie* to become a passenger of a railway train. N. & W. R. R. Co. v. Galliher, 89 Va. 639, 16 S. E. Rep. 935.

2. WHO IS ENTITLED TO THE PROTECTION OF A PASSENGER.—But neither the purchase of a ticket nor any entry into the car is essential to create the relation of carrier and passenger. Thus, where a person enters a ticket office of a railway company to buy a ticket he is entitled to the protection of a passenger, even though the agent refuses to sell him a ticket. N. & W. R. Co. v. Galliher, 89 Va. 639, 16 S. E. Rep. 935.

And although a railroad company requires fare for all children over five years old, the fact that a father purchases no ticket for his child six years old, will not bar recovery for injury causing his death; and whether or not he knew that a ticket was required is immaterial. N. & W. R. Co. v. Groseclose, 88 Va. 267, 13 S. E. Rep. 454.

So a person having a ticket for passage upon a railroad, who boards a freight train which does not carry passengers believing the ticket good on that train, is to be treated as a passenger, and is not a trespasser. Boggess v. C. & O. Ry. Co., 37 W. Va. 297, 16 S. E. Rep. 525.

And a mail agent traveling on a passenger train in the discharge of his official duties is a passenger. N. & W. R. Co. v. Shott, 92 Va. 34, 22 S. E. Rep. 811.

Moreover, where a common carrier transports cattle for hire, and a free pass is given to the shipper so that he can take care of the cattle, the person traveling on the free pass is a passenger, and the carrier cannot by special contract exempt itself from liability for its own negligence or that of its servants. Maslin v. B. & O. R. Co., 14 W. Va. 180.

3. WHEN PRESUMED TO BE A PASSENGER.—And every one riding in a railroad car is presumed *prima facie* to be there lawfully, as a passenger having paid, or being liable when called on to pay, his fare. Gillingham v. Ohio River R. Co., 35 W. Va. 588, 14 S. E. Rep. 243.

4. TREATMENT AND PROTECTION OF PASSENGER.—It is the duty of a carrier of passengers to treat his passengers properly and respectfully, and to carry them safely; and though not an insurer, yet the law, based upon principles of public policy, is strict and exacting in requiring performance; and public policy is not likely to exact any less stringent rule in this age, when all the world is carried to and fro daily by instrumentalities vast in power and force, owned by mere corporate entities, and which are almost as dangerous as useful, unless there be constant care and vigilance, and greater skill employed in their management and disposition.

But, as stated, the common carrier of passengers is not an insurer of their safety or of their proper treatment, but is liable for their injury or improper treatment, due to the negligence or willful misconduct of itself or of its servants while engaged in executing the contract. Gillingham v. Ohio River R. Co., 35 W. Va. 588, 14 S. E. Rep. 243.

However, in order that a passenger may hold a carrier liable to the full measure of its responsibility for safe carriage, he must conform to all the reasonable rules made by the company looking to the safety of its passengers. Downey v. C. & O. Ry. Co., 28 W. Va. 732. This subject is treated more at length, with fuller array of authorities, *post*, "Injuries to Passengers."

5. RIGHT TO MAKE RULES AND HAVE THEM OBEYED.—A carrier, however, is entitled to make rules for conducting its affairs, if they be reasonable, not conflicting with any legal liability, and not exempting from liability for negligence or improper conduct. If the rules be such as described, they are binding on persons dealing with the carrier when notified thereof. The reasonableness of a rule is a question of law for the courts. N. & W. R. Co. v. Wysor, 82 Va. 250.

It is a reasonable rule that it will only carry as baggage the passenger's wearing apparel, and upon refusal of a passenger to certify that "his trunk contained nothing except wearing apparel," the passenger is not entitled to damages for the company's refusal to carry such trunk. N. & W. R. R. Co. v. Irvine, 84 Va. 553, 5 S. E. Rep. 532. And a passenger in the habit of carrying merchandise in his trunk, against carrier's rules, may be required to prove contents as condition of receiving and checking it. N. & W. R. Co. v. Irvine, 85 Va. 217, 7 S. E. Rep. 233.

C. FARES AND TICKETS.

1. THE TICKET.

As Evidence of a Contract.—Passenger tickets do not generally set out the full contract between the parties, and are for the most part mere memoranda, importing a contract on the part of the carrier to carry the passenger from one given point to another, in the manner in which the holders of such tickets are usually carried. As said in one case, the real contract between the carrier and the passenger is usually made before the ticket is delivered, and where it does not purport to be the complete agreement between the carrier and the passenger, it has been held that suppletory evidence is competent to show what was the real contract indicated by the ticket. In this incomplete form the tickets are no more than the tokens or checks which the bailor may take from the common carrier as evidence of his receipt of goods for the purpose of being carried, and which would not be held to preclude the bailor from showing a special contract with the carrier as to the terms upon which they had been accepted. Notwithstanding this, however, the ticket accepted by the passenger must usually, as will be seen, be treated as conclusive evidence of the passenger's rights, as between the passenger and the conductor, leaving the passenger to his action against the carrier if he has not been given such a ticket as his contract called for. But when the passenger has bought and been given a ticket unlimited upon its face, evidence of rules and regulations of the carrier tending to defeat the apparent right conferred by the ticket is not admissible if the passenger was not informed of them. Neither can he be bound, by accepting it, by limitations or conditions printed upon the back of the ticket, which he did not see or know of, and to which his attention was not called at the time he accepted it. On the other hand, when such tickets profess to set out or contain the terms of a special contract between the carrier and the passenger, as they frequently do, there is no reason why they should not be held as conclusive upon the passenger as a bill of lading or the receipts of the common carrier are upon the bailor of goods. Hutchinson on Carriers, § 580.

Limited to What Passage.—A ticket limited on its face to certain time for passage, is not good after expiration of such time. Grogan v. C. & O. Ry. Co., 39 W. Va. 415, 19 S. E. Rep. 563.

And as between a person who buys a ticket bearing a date prior to the purchase, and the company, he is entitled to a passage on the date of purchase, the ticket being limited to one day from date of sale. Trice v. C. & O. R. Co., 40 W. Va. 271, 21 S. E. Rep. 1022.

Demand for Ticket or Fare.—A railroad conductor may demand a ticket as evidence of a passenger's right of passage, and on failure to produce it may demand payment of fare; and on failure to pay it may lawfully eject the passenger from the train using no more force than necessary. MacKay v. O. R. R. Co., 34 W. Va. 65, 11 S. E. Rep. 737. See *post*, "Ejection"; also, "Actions."

2. SCHEDULES.

Duty of Carrier to Print and Make Public Schedules of Rates and Fares.—Every common carrier subject to the provisions of § 1297, Va. Code 1887, shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its route between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers of freight respectively are received for transportation in such form that they shall be accessible to the public and can be conveniently inspected. Va. Code 1887, § 1297; Pol. Supl. (1900), § 1297.

3. ADVANCEMENTS AND REDUCTIONS.

Public Notice Required.—No advance shall be made in the rates and fares and charges which have been established and published as required by the Code, by any common carrier in compliance with the requirements of § 1297, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the increased rates and fares and charges will go into effect; and the proposed changes shall be shown by printing new schedules in force at the time and kept open for public inspection. Reductions in such published rates, fares, or charges shall only be made after three days' previous public notice, to be given in the same manner that notice of an advance in rates must be given. Va. Code 1887, § 1297, Pol. Supl. (1900), § 1297.

Effect of Demanding or Receiving a Greater or Less Compensation Than Schedule Rate.—And when any common carrier shall have established and published its rates and fares and charges in compliance with the provisions of the Code, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or for any services in connection therewith than is specified in such published schedules of rates and fares and charges as may at the time be in force. Va. Code 1887, § 1297; Pol. Supl. (1900), § 1297.

When a Carrier May Reduce or Waive Charges.—But it is provided that nothing in the general act upon carriers shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States, state, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons and the necessary agents employed in such transportation, or to mileage, excursion, or commutation passenger tickets, or to persons in charge of live stock being shipped from the point of shipment to the point of destination and return; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion or to indigent persons, or to inmates of the Confederate homes or state homes for disabled soldiers, and of disabled soldiers and sailors, including those about to enter and those returning home after discharge, or carrying the same free; nothing in this act shall be construed to prevent common carriers from giving free carriage to their own officers, employees and members of their families, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers, employees and members of their families; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies; provided, that no pending litigation shall in any way be affected by the act. Va. Code 1887, § 1297; Pol. Supl. § 1297 a.

4. OPENING OF TICKET OFFICE.—And it is the duty of every railroad company in this state to have its ticket offices opened and its agents for the sale of tickets in attendance at least thirty minutes before the advertised hour of departure of every passenger train. Va. Code 1887, § 1297; Pol. Supl. (1900), § 1297.

5. RIGHTS IN CONNECTION WITH TICKET.

a. Of Passenger.

Erroneous Statement by Carrier as to Connection.—Where a person purchased a ticket on the statement of the ticket agent that the train she was about to take made close connection at a certain point with another train going to her place of destination, which statement was erroneous, and such person, on arriving at such connecting point, was obliged to wait some time for such connecting train, and thereupon, in the face of a storm, and in her delicate state of health, procured a buggy, and drove over a rough road to her father's house, she could not recover for the injuries resulting from such drive. Fowlkes v. Southern Ry. Co., 96 Va. 742, 32 S. E. Rep. 464.

Passenger Directed into Wrong Car.—But where a passenger who has procured a ticket for himself and family is, by a negligent mistake of one of the employees of the railroad, directed into a car which is cut off and left standing when the train leaves,—one of his children with him being sick at the time, carrying off his baggage, including the child's clothing and medicine, part whereof was lost, the father is entitled to compensatory but not to punitive damages. N. & W. R. Co. Lipscomb, 90 Va. 137, 17 S. E. Rep. 809.

Wrong Date Stamped upon Ticket.—And where a ticket agent selling a mileage ticket good for one year only, stamps upon it as the date of issue a date one year before the date of issue, the passenger can ride upon such book, and if refused, and rejected for nonpayment of fare, he can recover damages. Trice v. C. & O. R. Co., 40 W. Va. 271, 21 S. E. Rep. 1022.

Ticket Sold to Station at Which There Is No Regular Stop.—Moreover, when a railroad company has sold a passenger a ticket to a particular station it has no right to refuse to stop its train there, and is liable for such refusal. And a ticket from one designated station to another is good for any intermediate station at which, by the regulations of the company, the train regularly stops. R., F. & P. R. R. Co. v. Ashby, 79 Va. 130.

Ticket Wrongfully Taken Up.—Furthermore, where a passenger's ticket is wrongfully taken up by one conductor, and another conductor in charge of the train demands his ticket and ejects him, plaintiff can recover whatever damages he shows himself entitled to recover, either on the contract, or *ex delicto*. Lovings v. N. & W. Ry. Co. (W. Va. 1900), 35 S. E. Rep. 962.

Detaching Coupons Wrongfully.—In N. & W. R. Co. v. Wysor, 82 Va. 250, a plaintiff purchased from the defendant a commutation coupon book, which had attached to it a condition that coupons should be detached by the conductor in collecting fares; and should not be accepted if detached from the book. The condition was known to and accepted by the passenger, but he insisted on tearing out the coupon himself, against the remonstrance of the conductor that such coupons would not be accepted. The conductor refused to accept them, and, on the passenger's refusal to allow the conductor to tear out other coupons, the conductor put him off the train. In an action for ejectment the jury awarded plaintiff $550 damages. The court held that the verdict was for punitive damages, and should have been set aside, there being no evidence of any wilful and malicious purpose on the part of the defendant, or any neglect of duty.

Performance of Requirements Concerning Signing and Identification.—But if a railroad ticket provides that when presented to the conductor the passenger shall sign his name thereto and "otherwise identify" himself as original purchaser, the conductor is not entitled, after the passenger has offered to sign the

ticket, to refuse such offer and require the passenger to "identify" himself, and to eject him from the train for refusing to do so, and the carrier, upon ratifying the acts of the conductor is liable to the passenger in exemplary damages. N. & W. R. Co. v. Anderson, 90 Va. 1, 17 S. E. Rep. 757, 44 Am. St. Rep. 884.

b. Of Carrier.—Where a passenger, either wilfully or because he has forgotten having a ticket, does not show it, and refuses to pay fare, he cannot recover if ejected. Price v. C. & O. R. Co., 46 W. Va. 538, 33 S. E. Rep. 255. See N. & W. Ry. Co. v. Wysor, 82 Va. 250; N. & W. R. Co. v. Anderson, 90 Va. 1, 17 S. E. Rep. 757, 44 Am. St. Rep. 884.

And a pass issued on a false representation that the person to whom it was issued was connected with a newspaper can be cancelled. Moore v. O. R. R. Co., 41 W. Va. 160, 23 S. E. Rep. 539.

Moreover, a passenger presenting an invalid ticket after having been notified that it was invalid can be ejected. Moore v. O. R. R. Co., 41 W. Va. 160, 23 S. E. Rep. 539.

6. ANNUAL PASSES.

Application for Renewal Necessary.—In Knopf v. R. F. & P. R. R. Co., 85 Va. 769, 8 S. E. Rep. 787, a railway company by contract issued to plaintiff an annual pass. On its expiration plaintiff applied for and secured a renewal. On its expiration he did not apply for another. It was held to be a question for the jury whether it was the duty of the company to issue a renewal without application.

7. COMMUTATION BOOKS.—The rule that coupons of commutation tickets, if detached, will not be accepted for a passage, is reasonable. Thus where a commutation coupon book provides that the coupons must be detached by the conductor, and will not be accepted if otherwise detached, a passenger who, with knowledge of such condition detaches the coupons is not entitled to ride thereon. N. & W. R. Co. v. Wysor, 82 Va. 250.

8. OVERCHARGES.—A railroad company is not liable for the penalties of overcharging, under W. Va. Code 1891, ch. 54, cl. 5, where the charge was made by a conductor, unless it authorized or ratified the conductor's act. Hall v. N. & W. Ry. Co., 44 W. Va. 36, 28 S. E. Rep. 754.

9. CONTRACT TO FURNISH TICKET.—In Knopf v. Rich., F. & P. R. Co., 85 Va. 769, 8 S. E. Rep. 787, a railway company contracted with a firm, "in consideration for a ticket entitling either member of the firm, but only one on any train, to a seat on its passenger trains." The firm was entitled to only one ticket, to be presented when any one member took passage.

D. INJURIES TO PASSENGERS.

1. IN GENERAL.

a. Statement of Duty as to Care and Safety.—In Searle v. K. & O. Ry. Co., 32 W. Va. 370, 9 S. E. Rep. 251, the court gave among others the following instructions which were held entirely proper: "The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such cases makes such carriers liable in damages under the statute. Said railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair, and care of the track and bridges, and all other arrangements necessary to the safety of passengers." B. & O. Ry. Co. v. Wightman, 29 Gratt. 431. Or as stated in Va. Cent. R. Co. v. Sanger, 15 Gratt. 230, the carrier is bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and in all subsidiary arrangements necessary to the safety of the passenger. Connell v. C. & O. Ry. Co., 93 Va. 44, 24 S. E. Rep. 467. This duty to protect and carry safely is variously expressed as "utmost care," "utmost care and diligence," "utmost care and human foresight," or "greatest possible care and diligence." Fisher v. W. Va., etc., R. Co., 39 W. Va. 366, 19 S. E. Rep. 578; B. & O. R. Co. v. Noell, 32 Gratt. 394; Richd. City Ry. Co. v. Scott, 86 Va. 902, 11 S. E. Rep. 404. All the authorities seem to have in view one purpose, to throw around the passenger every guard which reason and prudence would suggest as likely to shield him from accident or loss; and in exacting such protection for the person standing in the relation of passenger, the carrier is held liable for the slightest degree of negligence on its own part, or its servants or employees. However, the duty does not extend so far as to make the carrier a practical insurer of a passenger, as it is of goods or property. N. & W. R. Co. v. Williams, 89 Va. 165, 15 S. E. Rep. 522.

Its duty is to carry them safely, using the utmost care as far as human skill, diligence and foresight can reasonably be required to go. Fisher v. W. Va. & P. R. Co., 39 W. Va. 366, 19 S. E. Rep 578; Connell v. C. & O. Ry. Co., 93 Va. 44, 24 S. E. Rep. 467.

b. Source of Liability for Injuries Occurring to Passengers.—The liability of common carriers of passengers does not flow directly from the injuries sustained, but from their duty to convey their passengers in comfort and safety. They are responsible for injuries if it appear that they knew, or ought to have known that danger existed, or was reasonably to be apprehended, and did not use proper means to avert it. But a sleeping-car company is not liable for the death of one of its passengers, at the hands of an assassin, in the nighttime, who enters its car by stealth, while traveling through a peaceable, law-abiding country. This is not a natural or probable danger, nor one to be anticipated, against which the company is expected to guard and protect its passengers. Connell v. C., etc., R. Co., 93 Va. 44, 24 S. E. Rep. 467.

c. Duty to Passenger and Employee Distinguished.—The difference between the degree of care which railroad companies owe to a passenger and to an employee is vast. As to the former, they are held liable for the slightest negligence; as to the latter, they are bound to use only ordinary care. N. & W. R. Co. v. Williams, 89 Va. 165, 15 S. E. Rep. 522.

d. Illustrative Cases Involving the Nonperformance of Duty to Protect from Injury.

(*a*) **Taking on Passengers.**—In N. & W. R. Co. v. Groseclose, 88 Va. 267, 13 S. E. Rep. 454, a freight train, with caboose for passengers, stopped at a certain station, and the conductor, though he saw several approaching with baggage, ordered the engineer to back the train. Without warning the train violently backed while the passengers were boarding it, fatally injuring a boy between five and six years old, standing on the end of the ties, and about to get on. It was held that the railroad company was liable.

(*b*) **In Transitu.**

In Connection with the Conveyance—Class of Conveyance to Be Provided.—Carriers of passengers are bound to provide such conveyances as will best secure the safety of passengers. Farish v. Reigle, 11 Gratt. 697; B. & O. R. Co. v. Wightman, 29 Gratt. 431, 26 Am. Rep. 384; B. & O. R. Co. v. Noell, 32 Gratt. 394.

What Constitutes Negligence in Running.—The mere speed of motion of the train, or the fact that the train is "behind time," is not, *per se*, evidence of negligence. N. & W. R. Co. v. Ferguson, 79 Va. 241.

And in an action for injuries to a passenger thrown from the train by a lurch caused by striking a curve, an instruction that defendant is liable if the train was run over the curve "at an unusually rapid rate of speed" is erroneous, since "unusually rapid" is not equivalent to "dangerous." C. & O. Ry. Co. v. Clowes, 93 Va. 189, 24 S. E. Rep. 833.

Conveyance Upsetting.—If a coach is upset in consequence of having too much baggage on the top, the proprietors are liable for any injury sustained by a passenger by such upsetting of the coach. And the *prima facie* presumption is, that it occurred by the negligence of the driver; and the burden of proof is on the proprietors of the coach, to show that there was no negligence whatsoever. Farish v. Reigle, 11 Gratt. 697, 62 Am. Dec. 666.

Condition of Premises.

Track—Obstructions.—The duty of a railroad company to employ the utmost care and diligence in guarding obstructions on the track is clearly embraced within its warranty to carry their passengers safely, so far as human care and foresight can go. Because railroad companies conveying passengers, combining in themselves ownership as well of the road as of the cars and locomotives, are bound to the utmost care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangement necessary to the safety of the passengers. Va. Cent. R. R. Co. v. Sanger, 15 Gratt. 230; Carrico v. W. Va. Cent., etc., Ry. Co., 39 W. Va. 86, 19 S. E. Rep. 570.

Moreover, if a railroad company, whilst using its track for the carriage of passengers, engages in a work to be done on its road and in the immediate proximity of its track, negligence in the performance of which would, in the estimation and opinion of cautious persons, involve the hazard of obstruction to the passage of its cars, and accident to a passenger is caused by an obstruction arising from negligence in the performance of the work, it is no defence to show merely that they had placed the work in the hands of an independent contractor, and that the obstruction was caused by the carelessness of one of his employees.

Thus, contractors employed by a railroad company to deliver stone on the road and prepare it for ballasting the track (the ballasting not being necessary to the security, but being intended for the preservation of the track), place the stone in ridges so near the rail that it is struck by the step of the baggage car, or the ridge is disturbed and a stone rolled down by the hub of one of the cars, or is rolled down by the jarring of the train as it passes near the ridge, or it is loosened from its place and rolled down by the haste of one of the hands employed by the contractors in getting off the ridge to avoid the train, and the cars run against it, and are thrown off the track, whereby a passenger is injured; it is for the jury to enquire whether there was not danger in the work, arising from the mode and manner in which it was done; whether the company did not know, or by the exercise of the proper diligence might not have ascertained, the existence of such danger; and whether they had used due care and foresight in guarding against it; and if they have failed in this, the company is responsible to the passenger for the injury he has sustained. Va. Cent. R. R. Co. v. Sanger, 15 Gratt. 230. Compare N. & W. R. Co. v. Stevens, 97 Va. 631, 34 S. E. Rep. 525.

Lights at Stopping Place.—And where there is evidence before the jury that there were no lights at a stopping place, it is proper for the court to charge that if the accident was caused by the defendant company's failure to light the place, it is liable for damages. Alexandria & F. R. R. Co. v. Herndon, 87 Va. 193, 12 S. E. Rep. 289. As to placing "safe guards," see Richd. City Ry. Co. v. Scott, 86 Va. 902, 11 S. E. Rep. 404.

(*c*) **Setting Down Passenger.**—In Alexandria & F. R. Co. v. Herndon, 87 Va. 193, 12 S. E. Rep. 289, an accident occurred at night during a snow storm while it was intensely dark, and the platforms of the cars were covered with snow. The plaintiff, a woman, was unattended, and was incumbered by heavy clothing and parcels. There was no platform at the station, and defendant's servants, though present, rendered plaintiff no assistance. It was not error under these circumstances for the court to charge that, if there was no platform or other proper landing place at the stopping place, and defendant's servants rendered plaintiff no assistance in alighting, and, for want of such landing place and assistance, plaintiff was injured without fault on her part, she could recover.

And when a street-railway company stops its car in front of an excavation made by the city, to allow passengers to alight, and neither warns them of the danger nor assists them to alight, it is liable for injuries sustained by a passenger who steps off the car into the excavation.

Thus, in an action against a street-railway company for personal injuries sustained by plaintiff in stepping off defendant's car, on which he was a passenger, and falling into a ditch made by the city, and along which the car was stopped for plaintiff to alight, a demurrer to the declaration, on the ground that it does not show the condition of the place was such by reason of the absence of proper safeguards, is properly overruled, since the cause of action arises out of the duty of every carrier of passengers not to expose its passengers to any danger in alighting, and not from such failure to provide safeguards. Richmond City Ry. Co. v. Scott, 86 Va. 902, 11 S. E. Rep. 404.

e. To Whom Liable, and When.

Trespasser.—In Va. M. Ry. Co. v. Roach, 83 Va. 375, 5 S. E. Rep. 175, a former fireman of the railroad accepted an invitation of one of its engineers to ride on the engine with him. The conductor saw him on the engine, and spoke to him there. He neither paid any fare nor had any demanded of him. The rules of the company, which every employee was required to learn, prohibited any one but the engineer and certain employees from riding on the engine. Such former fireman was charged with notice of such rules, and could not derive any authority from the engineer or conductor for his act, and was therefore a mere trespasser, and could not recover for injuries sustained.

Carrier as Conservator of the Peace.—Section 31, ch. 145 of the Code, which enacts among other things,

that "the conductor of every train of railroad cars shall have all the powers of a conservator of the peace while in charge of the train," does not relieve the carrier of passengers from such liability. Gillingham v. Ohio River R. Co., 35 W. Va. 588, 14 S. E. Rep. 243.

Liability for False Imprisonment.—A common carrier of passengers is liable for the false imprisonment of a passenger, made or caused to be made by its conductor in charge of the train, during his execution of the carrier's contract to treat properly and convey safely. Gillingham v. Ohio River R. Co., 35 W. Va. 588, 14 S. E. Rep. 243.

And the mayor of a city is not authorized by law to appoint a special policeman for a railroad company. Thus, a night watchman, in the employ and pay of the company was sworn in by the mayor, at the company's request. He arrested and imprisoned the plaintiff, though possessed of no authority to make arrests as an officer. In so doing, however, he acted within the scope of his employment, and the arrest of the plaintiff was authorized and ratified by the company. The plaintiff in an action against the company for false imprisonment is entitled to recover. N. & W. R. Co. v. Galliher, 89 Va. 639, 16 S. E. Rep. 935.

Assault by Conductor.—And a railroad company is liable to a passenger on one of its trains for willful assault and battery committed on such passenger by the conductor in charge of such train. Such an assault is a breach of the duty of protection which such company owes to its passengers. Smith v. N. & W. Ry. Co. (W. Va. 1900), 35 S. E. Rep. 834. See in connection with this general subject, *ante*, "Liability"; *post*, "Ejectment"; also, "Actions."

E. NEGLIGENCE.

1. IN GENERAL.

Defined.—Negligence is the doing of something, which, under the circumstances, a reasonable person would not do, or the omission to do something in discharge of a legal duty, which, under the circumstances, a reasonable person would do, and which act of commission or omission, as a natural consequence directly following, produces damages to another. Washington v. B. & O. R. R. Co., 17 W. Va. 190.

Embraces a Question of Law and Fact.—The question whether a party has been negligent in a particular case, is one of mingled law and fact. It includes two questions, whether a particular act has been performed or omitted; this is a pure question of fact. Whether the performance or omission of this act was a legal duty; this is a pure question of law. The extent of a person's duties is to be determined by a consideration of the circumstances in which he is placed. The law imposes duties upon men according to the circumstances in which they are called to act. When the facts are disputed, the question of negligence is a mixed question of law and fact. The jury must ascertain the facts, and the judge must instruct them as to the rule of law which they are to apply to the facts as they may find them. When, however, the direct fact in issue is ascertained by undisputed evidence, and such fact is decisive of the case, a question of law is raised, and the court should decide it. The jury has no duty to perform. The issue of negligence comes within this rule. Questions of care and negligence after the facts are proved must be decided by the court. A judge is not bound to submit to the jury the question of negligence, although there may be a conflict of evidence in relation to some of the facts relied on as proving it, if, rejecting the conflicting evidence, the negligence charged is conclusively proved by the defendant's own witnesses. Dun v. Seaboard, etc., R. Co., 78 Va. 658.

Onus Probandi.—The *onus probandi* is upon the plaintiff. At least a reasonable presumption of negligence must be raised by the plaintiff. But when a passenger is injured, or damage befalls a passenger, due to the breaking down or overturning of a train, or the falling through of a bridge, the breaking of some part of the vehicle or apparatus, as a wheel or axle, or by any other accident occurring on the road, there is a *prima facie* presumption that it occurred by the negligence of the carrier, and the onus is shifted to the carrier to rebut the presumption thus created. Moreover, it rests upon the defendant to show contributory negligence on the plaintiff's part, where the defendant desires to defend on the ground that the contributory negligence of the plaintiff was the proximate cause of the injury. C. & O. R. Co. v. Lee, 84 Va. 642, 5 S. E. Rep. 579; Madden v. Ry. Co., 28 W. Va. 610; B. & O. R. R. Co. v. Noell, 32 Gratt. 394; Johnson v. R. R. Co., 25 W. Va. 571; Sheff v. City of Huntington, 16 W. Va. 307; B. & O. R. R. Co. v. McKenzie, 81 Va. 71; Farley v. R. R. Co., 81 Va. 783; Barton's Law Prac. p. 204. See *post*, "Actions"; also, *ante*, "Liability."

Negligence Per Se.—In cases where the common experience of mankind, and a common consensus of prudent persons have recognized that to do or not to do certain acts is prolific of danger, the doing or omission of them is "negligence *per se*" or "legal negligence." The omission of the duty enjoined by law for the protection and safety of the public by a common carrier, or the doing of an act by such a carrier, which, by the experience and consensus of prudent persons, would create danger to passengers, is legal negligence. Carrico v. W. Va. Central, etc., Ry. Co., 35 W. Va. 389, 14 S. E. Rep. 12.

Thus, it is legal negligence for a passenger to ride in a fast going passenger coach, with his arm protruding from the window, and beyond the line of the body of the car. Carrico v. W. Va. Cent. & P. Ry. Co., 35 W. Va. 389, 14 S. E. Rep. 12; Dun v. Seaboard, etc., R. Co., 78 Va. 645.

But the train's mere speed of motion is not, *per se*, evidence of negligence, nor is the fact that the train is behind time. N. & W. R. R. v. Ferguson, 79 Va. 241.

Specific Application of Principles.

Washout Due to Waterspout—Vis Major.—In an action against a railroad company for the death of a passenger, it appeared that the accident occurred on a dark and rainy night, the rain falling in torrents, flooding the track, which lay alongside a mountain; that the train was stopped at times at exposed places, but met no obstruction until it reached the place of accident, by which time the rain had ceased. This place was an earth fill, provided with a stone culvert 35 years old, and no accident had ever happened there. In consequence of a waterspout, the culvert did not carry off the water, and a great pond was formed against the earth embankment, causing it to give away, but leaving the rails and ties unbroken; the train went down into this washout, killing plaintiff's intestate. *Held*, that defendant was not liable. Norfolk & W. R. Co. v. Marshall, 90 Va. 836, 20 S. E. Rep. 823. See *ante*, "Act of God." See also, *post*, subject "Duties."

Liability Cannot Be Shifted.—And a carrier of passengers cannot relieve itself from liability in regard to the condition and construction of its road by undertaking to confide its duties, which it owes to

passengers, to other hands, no matter what precaution it may take in selecting such agencies; as where it confides to a contractor the repairs on its road and the contractor places constructions too close to the track. Carrico v. W. Va. Central, etc., Co., 35 W. Va. 389, 14 S. E. Rep. 12.

So, if by reason of work done by a company in the neighborhood of their track, a stone rolls onto the track and obstructs it, that work being such that any negligence in its performance would be likely to cause such an obstruction, they are liable to a passenger for an accident caused by the obstruction, although they employed a skillful contractor to perform the work. Va. Cent. R. Co. v. Sanger, 15 Gratt. 230.

Passenger Injured by a Collision—Instruction.—And in Shen. Val. R. Co. v. Moose, 83 Va. 827, 3 S. E. Rep. 796, a passenger, who was suffering with rheumatism was thrown from his seat by a collision of trains and his thigh bone broken. An instruction to the jury that, though they believed the plaintiff was injured as complained of, yet, if they believed that he was in such an infirm state as would have prevented a prudent man from taking the risk of travel, and but for that state he would not have received the injury, he cannot recover, is properly refused, because inconsistent with both the evidence and the law.

Carrier's Duty to Invite Intoxicated Passenger to Go Inside.—And where a passenger rides on the platform of a car in such a state of intoxication as to be careless and heedless of the danger to which he is exposed, it is the duty of the railroad company, after the conductor has notice of his condition and exposure to danger, to use the ordinary precautions for his safety, such as calling his attention to the danger, and the rules of the company forbidding such exposure, and inviting him to go inside the car. Fisher v. W. Va. & P. R. Co., 39 W. Va. 366, 19 S. E. Rep. 578, 23 L. R. A. 758.

Servant's Skill and Knowledge.—And servants of an electric street-railway company are bound to know the difficulty of controlling a car when there is snow on the rails; and where, at such a time, they approach a heavy down grade at such unusual speed as to cause their car to slide down the track, though the brakes are properly set, the company is liable for injuries to a passenger. Danville St. Car Co. v. Payne (Va. 1896), 24 S. E. Rep. 904.

Coach Upset—Horses Not Controlled—Liability.—Moreover, though the proprietors of the coach may show that it was reasonably strong, with suitable harness, trappings and equipments of sufficient strength, and properly made, and that the driver was careful, of reasonable skill and good habits, with steady horses not likely to endanger the safety of passengers; yet, if the upsetting of the coach is caused by the running off of the horses, and such running off of the horses might have been arrested if the utmost care and diligence of very cautious persons had been exercised, the proprietors of the coach are liable for the injuries sustained by a passenger. Farish v. Reigle, 11 Gratt. 697.

2. CONTRIBUTORY NEGLIGENCE.

a. In General.

What It Consists in and Effect.—It is a general if not universal rule, that, if the plaintiff has been guilty of contributory negligence, he cannot recover. By contributory negligence is meant such negligence on the part of the plaintiff as contributes to the injury, that is, directly in part causes it. Washington v. B. & O. Ry. Co., 17 W. Va. 190; Dun v. Railroad Co., 78 Va. 658; B. & O. R. R. Co. v. McKenzie, 81 Va. 71. See Nash v. Railroad Co., 82 Va. 55.

Or, as stated in Richd. & Danvl. R. Co. v. Pickleseimer, 85 Va. 798, 10 S. E. Rep. 44, it consists in such acts or omissions of plaintiff, as amount to want of ordinary care, as, co-operating with negligent acts of defendant, are the proximate cause of the injury.

But it is not contributory negligence for a plaintiff to be guilty of a negligent act, which might have produced the injury, if, before it actually results, the defendant is guilty of some negligent act, which was the immediate cause of the injury, even though no damage could have resulted to the plaintiff, had he not been originally negligent. Washington v. B. & O. R. Co., 17 W. Va. 190.

Therefore if the direct cause is defendant's omission, after knowing plaintiff's negligence, to use proper care to prevent its consequences, a recovery may be had. Farley v. Railroad Co., 81 Va. 783; Railroad Co. v. Barksdale, 82 Va. 330; Va. Mid. R. Co. v. White, 84 Va. 498, 5 S. E. Rep. 573; Railroad Co. v. Burge, 84 Va. 63, 4 S. E. Rep. 21; Coyle v. B. & O. R. Co., 11 W. Va. 94; Rudd v. R. & D. Ry. Co., 80 Va. 546; Downey v. C. & O. Ry. Co., 28 W. Va. 732; Johnson v. R. R. Co., 25 W. Va. 571.

Theory of Contributory Negligence as a Defence.—The principle of right that limits responsibility for negligence to the reasonable results that follow therefrom underlies the rule that there is no liability when contributory negligence is shown. For if it appears that an injury has been occasioned by the negligence of the person who is charging a breach of the duty to exercise care upon another, then this person is himself answerable for the damage and he cannot recover compensation from any one else. The damage is the reasonable result of the contributory negligence and not of the original wrongdoing. And it is important to observe that in all cases it is necessary that this must be true, and that the contributory negligence must be the proximate cause of the injury, or it will be no defence. The damage must be justly attributable to it to allow the original wrongdoer to escape from the final effect of his act. As is said by an eminent authority, the person who is injured by the negligence of another "is not to lose his remedy merely because he has been negligent at some stage of the business, though without that negligence the subsequent events might not or could not have happened; but only if he has been negligent in the final stage and at the decisive point of the event, so that the mischief, as and when it happens, is proximately due, to his own want of care and not to the defendants." Pollock on Torts, p. 375; Shearman and Redfield on Neg., § 94; Wharton on Neg., § 300; Jones on Neg. of Mun. Corp. § 206.

See, on general subject of contributory negligence, N. & P. R. R. Co. v. Ormsby, 27 Gratt. 455; N. & W. R. R. Co. v. Groseclose, 88 Va. 267, 13 S. E. Rep. 454; Trumbo v. Street-Car Co., 89 Va. 780, 17 S. E. Rep. 124; R. & D. R. R. Co. v. Pickleseimer, 85 Va. 798, 10 S. E. Rep. 44; Richd. & Danvl. R. R. Co. v. Scott, 88 Va. 958, 14 S. E. Rep. 763; N. & W. R. R. Co. v. Ferguson, 79 Va. 241; Reed v. Axtell, 84 Va. 231, 4 S. E. Rep. 587; N. Y., etc., R. Co. v. Cooper, 85 Va. 939, 9 S. E. Rep. 321; Jammison v. C. & O. R. Co., 92 Va. 327, 23 S. E. Rep. 758.

b. Cases Illustrative of Principles.

(*a*) **Entering Conveyance.**—In an action for personal injuries, it appeared that plaintiff was traveling as a stock shipper on defendant's freight train; that at the end of a run, on a rainy night, the train

stopped just before crossing a bridge, where it is customary to detach the caboose in which plaintiff had been riding; that he could walk across or ride on the rear freight car; that the stop was long enough to enable him to make a change; but he remained in the caboose till it was uncoupled, and the train had started, when he went forward, with a large valise in his hand, and in attempting to climb on car while in motion fell through the bridge. *Held*, his own negligence was the cause of his misfortune. R. & D. R. Co. v. Picklesimer, 89 Va. 389, 16 S. E. Rep. 245; R. & D. R. Co. v. Pickleseimer, 85 Va. 798, 10 S. E. Rep. 44.

(*b*) **In Transitu.**

Riding on Platform.—It is the duty of a passenger unnecessarily riding on the platform of a car in motion to go into the car when requested by the conductor or other person having charge of the train, when there is standing room inside, and by reason of such refusal, and by going down on the steps of the car without the knowledge of the conductor or other person having charge of the train, he loses his balance and falls over board, and is injured, he is guilty of contributory negligence such as will preclude his recovery for such injury. Fisher v. W. Va. & P. Ry. Co., 42 W. Va. 183, 24 S. E. Rep. 570.

Passing from One Car to Another.—But it is not negligence *per se* for a passenger on a rapidly moving train to attempt to pass out of one car into another, in search of a seat. C. & O. R. Co. v. Clowes, 93 Va. 189, 24 S. E. Rep. 833.

Riding on Pilot of Engine.—However, where a railroad company is in the habit of carrying its shopmen to and from their work as a matter of accommodation and without any agreement or compensation therefor, if its train is so crowded, that one of said shopmen cannot get a seat in the cars, that fact will not justify him in sitting on the pilot of the engine; and if he does improperly do so, it is his duty to leave the pilot and go into the cars at his first opportunity. Downey v. C. & O. Ry. Co., 28 W. Va. 732.

Riding in Conductor's Chair in Caboose of Freight Train.—In Norfolk & W. R. R. Co. v. Ferguson, 79 Va. 241, a passenger in a freight car who had been drinking, and who, instead of taking a perfectly safe seat designed for passengers, along the sides of the car, sat in the conductor's loose chair tipped up against a box within three inches of the open side door, was thrown out by the jar of the cars running together, because of the train running at 35 miles an hour around sharp curves. It was held that he was guilty of contributory negligence.

Resting Arm on Window Sill—Not Protruding.—Yet to rest the arm upon the window sill of a car, provided it does not protrude, is not negligence *per se*. Carrico v. W. Va. Cent., etc., Co., 35 W. Va. 389, 14 S. E. Rep. 12.

Same—Arm Protruding beyond Line of Body of the Car.—Nevertheless, the slightest voluntary projection of the limbs of the passenger from the window of a moving car constitutes contributory negligence, preventing a recovery on his part in case of injury, without regard to the question of negligence in the carrier in failing to take precautions against such accidents. Richd. & D. R. Co. v. Scott, 88 Va. 958, 14 S. E. Rep. 763, 16 L. R. A. 91; Carrico v. W. Va. Cent., etc., Co., 35 W. Va. 389, 14 S. E. Rep. 12.

Thus, in Dun v. Ry. Co., 78 Va. 645, 49 Am. Rep. 388, it is held that, riding with the arm outside the window of a railway car is fatal contributory negligence, *unless* it appears that the defendant knew the danger and omitted to warn the passenger.

Jumping from Moving Car to Escape Impending Danger.—Yet, where a passenger, acting with reasonable care, jumps from a moving car in order to escape an impending danger, and is injured thereby, he is not guilty of such contributory negligence as will bar a recovery, even though such injury would not have occurred if he had remained upon the car. Dimmey v. W. & E. G. R. R. Co., 27 W. Va. 32.

Going upon Platform When Train Stops.—And where a passenger, who has been informed that the train will stop at the station for 10 or 15 minutes, goes upon the platform of the coach to greet a friend while the train stops, it is not negligence. So. Ry. Co. v. Smith, 95 Va. 187, 28 S. E. Rep. 173.

(*c*) **Leaving Conveyance.**

Stepping Off Station Platform in Dark.—But in Reed v. Axtell & Myers, 84 Va. 231, 4 S. E. Rep. 587, a passenger, while staying over at a station on the company's road at night, went upon the platform, and walked to the end where she fell off and was injured. The night was dark, and the platform lamp had been temporarily moved to be trimmed. The court held that the plaintiff was guilty of recklessness, and could not recover.

Passenger by Mistake Jumps Off End of Caboose.—Similarly, a passenger in a caboose of a freight train, was awakened by the conductor, and informed that he had reached his destination; and after the train had passed it a little, and stopped at the frog, the passenger was again awakened by the conductor, and could then have gotten off safely. The conductor soon returned, and woke him a third time, telling him to get off and then went out at the end of the caboose, and, the night being very dark stood on the station platform with the lantern in his hands within three feet of the car platform. There was no chain across the end of the platform in rear of the caboose, and it was not necessary to have any. The train commenced backing. The passenger walked to the end of the car, jumped off, and was severely injured by the cars passing over him. The court held that, although the company was culpably negligent for having insufficient station lights, and for not warning the passenger to wait until the train was still, yet the passenger's contributory negligence precluded him from recovering for the injury. Richmond & D. R. Co. v. Morris, 31 Gratt. 200.

Thrown from Platform by the Jerking of the Cars.—And in N. & W. R. R. Co. v. Prinnell (Va. 1887), 3 S. E. Rep. 95, when a station had been announced, the train stopped at the accustomed place, and a passenger, who was descending the steps in the act of alighting, was thrown down, either by a sudden jerking of the car or its unexpected motion. The court held that the plaintiff was not guilty of negligence, as he was on the platform in response to the defendant's invitation to alight; and the defendant, having violated its duty by moving the train when the plaintiff had the legal right to assume that it would remain stationary, was guilty of negligence for which an action would lie.

3. IMPUTED NEGLIGENCE.—And where by a railroad company's negligence a child of tender age and *non sui juris* is injured, the contributory negligence of its parents is not to be imputed to the child; and whether the action for damages is brought by the child itself or by its personal representative, the company is liable. N. & W. R. Co. v. Groseclose, 88 Va. 267, 13 S. E. Rep. 454.

4. CONCURRENT NEGLIGENCE.—Moreover, where by the concurrent negligence of a carrier and third person, a passenger is injured, the negligence of the former cannot be attributed to the passenger so as to prevent him from recovering damages of the third person. N. Y., P. & N. R. R. Co. v. Cooper, 85 Va. 939, 9 S. E. Rep. 321. And where the negligence or carelessness of a passenger concurs with that of the carrier, causing injury to the passenger, the carrier is not liable by default. Downey v. C. & O. R. Co., 28 W. Va. 732.

5. PROXIMATE CAUSE.—The cause of an injury in the contemplation of law is that which immediately produces it as its natural consequence; and therefore if a party be guilty of an act of negligence, which would naturally produce an injury to another, but, before such injury actually results, a third person does some act, which is the immediate cause of the injury, such third person is alone responsible therefor, and the original party is in no degree responsible therefor, though the injury could never have occurred but for his negligence. The causal connection between the first act of negligence and the injury is broken by the intervention of the act of a responsible party, which act is in law regarded as the sole cause of the injury according to the maxim "*In jure non remota causa sed proxima spectatur.*" Washington v. B. & O. Ry. Co., 17 W. Va. 190.

And it is important to observe that in all cases it is necessary that the contributory negligence of the plaintiff must be the proximate cause of the injury, or it will be no defence. Pollock on Torts, p. 375; Wharton on Neg. § 300.

Negligence, however, is the proximate cause of an injury when the injury is the natural and probable consequence of the negligence complained of, and the result is such as ought to have been foreseen under the circumstances in the particular case. Connell v. Chesapeake, etc., Ry. Co., 93 Va. 44, 24 S. E. Rep. 467.

Illustrating the application of these principles, it is held that, a person cannot voluntarily incapacitate himself from liability to exercise ordinary care for his own self-protection and then set up such liability as an excuse for his failure to use care, and if the intoxication contributed to the injury, as a proximate cause thereof, it is a complete bar to any action for any damages sustained in consequence of it. Fisher v. W. Va. & P. R. Co., 39 W. Va. 366, 19 S. E. Rep. 578, 23 L. R. A. 758.

But in order to debar a plaintiff from recovery of damages for an injury from negligence it must be shown that his negligence must be the proximate cause of the injury. When both parties are chargeable with negligence, the plaintiff cannot recover if his negligence contributed in any degree to his injury; but, if it did not contribute to it in any degree, he may recover, his negligence not then being contributory, because not the proximate cause of the injury, but only remote from it, or collateral to it; and the defendant's negligence is in such case the proximate cause of the injury. Carrico v. W. Va. Cent. & P. Ry. Co., 39 W. Va. 86, 19 S. E. Rep. 571.

And though the negligence of the plaintiff be in its character contributory, yet, if his injury would have occurred from the defendant's negligence just the same if the plaintiff had been in no wise negligent, the plaintiff is not prevented by his negligence from recovery. Carrico v. W. Va. Cent. & P. Ry. Co., 39 W. Va. 86, 19 S. E. Rep. 571.

Moreover, even if a plaintiff be chargeable with negligence contributing to the injury, yet, if the defendant knows of the danger to the plaintiff arising from his negligence, and can by ordinary care avoid the injury, but does not, he is liable for his negligence, notwithstanding the plaintiff's negligence. Carrico v. W. Va. Cent. & P. Ry. Co., 39 W. Va. 86, 19 S. E. Rep. 571; Downey v. C. & O. Ry. Co., 28 W. Va. 732.

F. EJECTION.

Conductor's Right to Demand Ticket or Fare—Consequence of Refusal.—A railroad conductor may demand a ticket as evidence of a passenger's right of passage, and on failure to produce it may demand payment of fare; and on failure to pay it may lawfully eject the passenger from the train using no more force than necessary. MacKay v. O. R. R. Co., 34 W. Va. 65, 11 S. E. Rep. 737. See in connection with "Ejection" *ante*, "Fares and Tickets"; also, *post* "Actions."

Ejection for Not "Otherwise Identifying" Than by Signing Ticket.—But where a ticket provides that when it is presented to the conductor the passenger shall sign his name thereto, and "otherwise identify" himself as original purchaser thereof and the passenger offers to sign the ticket, which offer the conductor refuses, and ejects him from the train on account of his refusing to pay fare, the company is liable in damages for the expulsion, as the conductor is not entitled to require a passenger to "otherwise identify" himself. N. & W. Ry. Co. v. Anderson, 90 Va. 1, 17 S. E. Rep. 757.

Right of Carrier to Eject When Ticket Has Expired.—Yet a railroad company is justified in ejecting a passenger trying to ride on a limited ticket which has expired, and who refuses to pay his fare. Grogan v. C. & O. Ry. Co., 39 W. Va. 415, 19 S. E. Rep. 563.

Passenger Ejected after Having Been Warned of Ticket's Invalidity.—And where the holder of a mileage ticket has been warned by the conductor that a ticket is not good, and has been ordered taken up, and the party pays his fare, and neglects to make inquiries at the proper place regarding his ticket, although he has several opportunities of so doing, and again boards the train with the intent of becoming a passenger, and offers the mileage ticket in payment of his fare, the conductor, upon refusal of the party to pay his fare, may take up the ticket and eject him from the car, using no more force than is necessary for that purpose. Moore v. O. R. R. Co., 41 W. Va. 160, 23 S. E. Rep. 539.

Ticket to Station Where There Is No Stop.—Nevertheless, where a plaintiff, holding a ticket for a station, at which the train does not stop, is refused the privilege of riding to an intermediate station, and is put off in the rain, against his consent, and from the exposure two months' sickness resulting, in consequence of which he loses his position, he is entitled to both compensatory and punitive damages. Richmond, F. & P. R. Co. v. Ashby, 79 Va. 130.

Change of Rules—Conductor Not Informed Ejection.—And where a railroad company fails to inform its conductor of a change in rules as to the sale of tickets and stoppage of train, and such conductor, through want of such information, wrongfully ejects him from the train, the company is liable therefor. Sheets v. Ohio, etc., Co., 39 W. Va. 475, 20 S. E. Rep. 566.

Conductor Mistakes Distance Covered by Ticket—Ejection.—In N. & W. R. R. Co. v. Neely, 91 Va. 539, 22 S. E. Rep. 367, a conductor put a passenger off the train without violence or abuse in the belief that the passenger's ticket entitled him to ride no fur-

ther, and, on discovering his mistake tried to get a conveyance to send for the passenger. It was held that, a verdict against the company for $1,000 damages for the ejection was excessive.

Agent by Mistake Gives Ticket for Opposite Direction—Conductor Refuses Recognition.—And if a passenger pay a railroad agent fare for a certain trip, and by mistake of the agent is given a ticket not answering for that purpose but only in the opposite direction, and the conductor refuses to recognize such ticket, and demands fare, which the passenger fails to pay, ejection of the passenger from the train without unnecessary force will not be a ground of action against the company as for a tort, but the action may and must, be based on the breach of a contract to convey the passenger. Mackay v. Ohio River R. Co., 34 W. Va. 65, 11 S. E. Rep. 737.

G. BAGGAGE.

Of What It Consists.—"It is impossible to define with accuracy what will be considered baggage within the rule of the carrier's liability. It may be said, generally, that by baggage we are to understand such articles of personal convenience or necessity as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, which are not, however, designed for any such use, but for other purposes, such as a sale and the like." Story on Bail. § 499.

But "what should constitute necessary baggage for a traveler depends very much upon the circumstances of each particular case. The conveniences required for the journey which has been undertaken, the duration of the absence, as well as the position of the parties, have considerable to do with it, and all these are to be considered as a question of fact for the decision of the court or jury." Hutchinson on Carriers, § 680.

Extent of Carrier's Liability.—A railroad company is liable as a *common carrier*, for the baggage of a passenger, to the same extent, if the passenger is traveling with his baggage, as if it was carried without him. Wilson v. C. & O. R. R. Co., 21 Gratt. 654. See *ante*, "Liability."

Restricting Liability.—To restrict the liability of a railroad company as a common carrier, for the loss of the baggage of a passenger, there must be proof of actual notice to the passenger of such restriction, before the cars are started; and an endorsement on the ticket given to the passenger, is not enough, unless it is shown that he knew its purport before the cars started. Wilson v. C. & O. R. R. Co., 21 Gratt. 654. See *ante*, "Contracts of Exemption and Limitation."

Liability beyond Terminus.—And although a through ticket given to a passenger specifies on its face, that each party to the contract is only liable for losses on his part of the line, the railroad is liable for loss on a stage line, the proprietors of which have contracted with the railroad company to carry passengers and their effects to their destination. Thus, under a contract between stage proprietors and a railroad company, by which the former were to carry passengers from the terminus of the railroad to their destination, it was held that the proprietors of the stage were agents of the railroad company, and the company was liable for the loss of the baggage of a passenger. Wilson v. C. & O. R. R. Co., 21 Gratt. 654.

Rules and Regulations—Peddler's Baggage.—A railroad company may make all reasonable rules for conducting its affairs. And it is a reasonable rule that it will only carry as baggage the passenger's wearing apparel, and upon refusal of the passenger to certify that "his trunk contains nothing except wearing apparel," the passenger is not entitled to damage for the company's refusal to carry such trunk. N. & W. R. R. Co. v. Irvine, 84 Va. 553, 5 S. E. Rep. 532. Thus, a passenger in the habit of carrying merchandise in his trunk, against carrier's rules, may be required to prove contents as a condition of receiving and checking it. N. & W. R. R. Co. v. Irvine, 85 Va. 217, 7 S. E. Rep. 233.

Delivery.—And where a through passenger who takes advantage of the privilege to stay all night at the terminus of the road and go on the stage next morning, takes her baggage with her to her hotel where she stays, but brings it out to the stage with her the next morning, and commits it to the agent of the line, and it is lost, the railroad company is liable for the loss. Wilson v. C. & O. R. R. Co., 21 Gratt. 654.

Recovery of Penalty Provided by Statute for Company's Failure to Transfer.—Under Va. Code, ch. 145, § 5, it is provided that if a statute giving a penalty does not expressly mention that such penalty shall be in lieu of damages, the party injured might recover the actual amount of damages suffered by reason of the breach of such statute. In construing this statute the court held that a plaintiff, who has been injured by the failure of a railroad company to transfer his baggage, is not limited to a recovery of the penalty prescribed for such failure by Va. Code, ch. 61, § 17, but may recover the amount of actual damages. N. & W. R. Co. v. Irvine, 84 Va. 553, 5 S. E. Rep. 532.

VI. ACTIONS.

A. AGAINST CARRIERS OF GOODS.

1. IN GENERAL.

Waiver of Right of Action.—Acceptance of goods which a carrier has contracted to deliver at a certain time and which it has failed to deliver until a later date is no waiver of the consignee's right of action for the delay. N. & W. Ry. Co. v. Ship. Comp. Co., 83 Va. 272, 2 S. E. Rep. 139.

And where a bill of lading does not state the location of a claim agent's office, a stipulation that notice of a claim must be given within five days is unreasonable and void. N. & W. Ry. Co. v. Reeves, 97 Va. 284, 33 S. E. Rep. 606.

Demand of Repayment of Excess before Suit.—And a repayment of freight charges in excess of those lawfully chargeable by a railway company need not be demanded before bringing suit to recover back the excess. W. Va. Transp. Co. v. Sweetzer, 25 W. Va. 434.

Assignability of Right of Action.—A right of action against a common carrier for injury to goods while in cars of transportation is assignable. N. & W. R. R. Co. v. Read, 87 Va. 185, 12 S. E. Rep. 395.

2. PLEADING AND PRACTICE.

a. Form of Action.—When there is a public employment, from which arises a common-law duty, an action may be brought in tort, although the breach of duty assigned is the doing or not doing something contrary to an agreement made in the course of such employment, by the party on whom such general duty is imposed. Southern Express Co. v. McVeigh, 20 Gratt. 264.

And in Ferrill v. Brewis, 25 Gratt. 767, the court said: "In determining the character of the first count in the declaration here, it is proper to bear in mind there is a class of cases (among them that of bailment) in which the foundation of the action

springs out of the privity of contract between the parties, but in which, nevertheless, the remedy for the breach or nonperformance is indifferently in assumpsit, or in case upon tort. Boorman v. Brown, 3 Adol. & Ellis 525; Southern Express Co. v. McVeigh, 20 Gratt. 264.

"In all these cases the contract is of course referred to to ascertain the rights of the parties and the measure of redress; but the wrongful act of the defendant is relied upon as the gravamen of the action. This is peculiarly true with regard to attorneys, surgeons, carriers and the like. The principle is, however, not confined to employments of a public character, but to all bailees, whether public or private. In cases of mere gratuitous bailment, as no consideration is paid, it has been generally considered that an action *ex delicto* is peculiarly appropriate."

Action—Nature.—And in Spence v. N. & W. R. Co., 92 Va. 102, 22 S. E. Rep. 815, it is held that, where the direction to a carrier is not to deliver the goods until payment shall be made by the consignee the property in the goods continues in the consignor, who can sue for damage caused to the same by delay, either by an action on the case, or in assumpsit. And if a shipper by compulsion, pays a common carrier more than its legal rate of charge for freight, such excess may be recovered in an action for money had and received. W. Va. Trans. Co. v. Sweetzer, 25 W. Va. 434. See B. & O. R. Co. v. Rathbone, 1 W. Va. 87.

But there is a conflict of authority as to the nature of an action to recover a penalty for illegal charges. By some courts it is considered that a penalty creates no contractual liability, and that the action is necessarily one of tort. Hart v. B. & O. Ry. Co., 6 W. Va. 336.

Some courts consider the action one of contract, and approve of either assumpsit or debt to recover the penalty. Norfolk, etc., R. Co. v. Pendleton, 88 Va. 350, 13 S. E. Rep. 709; Norfolk, etc., R. Co. v. Pendleton, 86 Va. 1004, 11 S. E. Rep. 1062.

b. Proper Parties to Proceedings.

Suit against Receiver.—And a receiver appointed to assume charge of the affairs of a railroad company may be held responsible for the damage actually sustained by a shipper of freight, through the negligence of the receiver's agents and employees, in any case in which the company could be so held. But where the receiver is appointed by a court of equity he cannot be sued at law without permission of the appointing court. Melendy v. Barbour, 78 Va. 544.

Carrier Unincorporated—How Sued.—And where common carriers are not incorporated, any one or more of them may be sued by his or their name or names only, to recover damages for loss or injury to any person, parcel, or package, and such suit shall not abate for want of joining any of his coproprietors or copartners. Va. Code 1887, sec. 1297; W. Va. Code 1900, ch. 103, § 9.

Connecting Carriers.—Act March 3, 1892, § 14 (Acts 1891-92, p. 965), authorizes the railroad commissioner to commence proceedings against any carrier which fails to make connection with other railroads, after the commissioner has requested such roads to make such connections. Two connecting railroads failed to make connection, and, on the receipt of request from the railroad commissioner suggesting the changes in time which the company should make, the So. Ry. Co. complied therewith, but the B. Co. refused to adopt such time card. *Held*, that the So. Ry. Co. was a proper party to proceedings to require the roads to make proper connections, though it had complied with the request of the commissioner, since all the parties should be before the court, so that all the matters in dispute could be determined, and a judgment binding on both corporations, be rendered. Southern Ry. Co. v. Com. (1900), 98 Va. 758, 37 S. E. Rep. 294.

c. Process.—In a case against any common carrier (other than a corporation) for a liability as such, any process against or notice to the carrier, may be served on such carrier, or on any agent, or on the driver, captain, or conductor of any vehicle of such carrier in the county or corporation wherein the case is commenced; and if the carrier be not in said county or corporation and there be no such agent, driver, captain, or conductor therein, the process or notice shall be sufficiently served by the publication thereof once a week for four successive weeks, in a newspaper printed in this state. Va. Code 1887, sec. 3228. For service of process on corporations, see Va. Code 1887, §§ 3220-27; 13 Va. L. Journal 741.

d. The Declaration.

Averments—Sufficiency.—If a declaration does not allege that the defendant is a common carrier, yet, if the facts set out constitute it such in law, it is sufficient to sustain the action against it as a common carrier. So. Exp. Co. v. McVeigh, 20 Gratt. 264.

And in an action for damages for failure to carry goods at a rate agreed, an averment in the declaration that the plaintiff delivered the goods for shipment as he had agreed to do is a sufficient averment that the goods were furnished within a reasonable time after making the contract. Southern Railway Co. v. Wilcox, 7 Va. Law Reg. 381. See also, Williams v. B. & O. R. Co., 9 W. Va. 36.

Moreover, in an action against a carrier for charging an illegal freight rate, if the declaration states the weight of the freight, the time and place where delivered to defendant for transportation, and places to which it was to be transported, distance, the amount which was demanded and received by defendant and that it was more than was lawful, contrary to the statute in such case made and provided, it is a sufficient notice of the cause of action to the defendant to enable it to make all just and proper defences. Hart v. B. & O. Ry. Co., 6 W. Va. 336.

So a declaration is sufficient in law which alleges that certain goods were delivered to and accepted by the defendant to be carried to a certain destination, for reasonable reward, to be delivered to the plaintiff; but by reason of the negligent manner in which the defendant conducted itself in regard thereto, "the goods were wholly lost to the plaintiff." Williams v. B. & O. R. Co., 9 W. Va. 33.

Similarly, an allegation that "the defendant, before and at the time of the committing of the grievances hereinafter mentioned, were the owners and proprietors of a certain railroad, to wit, the Baltimore and Ohio Railroad, and of certain carriages used by it for the carriage and conveyance of goods and chattels in, upon, and along said railway from a certain place, to wit, Parkersburg, Wood county, West Virginia, for hire and reward to it the defendant in that behalf," is a sufficient allegation that the defendant was a common carrier. B. & O. R. R. Co. v. Morehead, 5 W. Va. 293.

e. Variance.—Condition in a contract limiting a carrier's liability should be stated. If the declaration alleges an unqualified contract to carry, and

the contract proved is to carry, the defendant not being answerable for certain risks, there is a variance, and if there are provisions in the contract other than are usually embodied therein it is not necessary to aver the reasons that influenced or the purposes that controlled the shipper or carrier in inserting them. Such allegations add nothing to the legal effect of the contract. B. & O. R. Co. v. Rathbone, 1 W. Va. 87.

And under counts in a declaration in which there are no counts against the defendant except against him as a carrier, or bailee, of cattle, the plaintiff cannot recover for loss resulting from the misrepresentation of the agent, whereby he was induced to ship the cattle on a slow train of the defendant instead of on a fast train. Maslin v. B. & O. R. Co., 14 W. Va. 180.

f. Set-Off.—A consignee cannot set off against a carrier's charges the amount of damages sustained by the goods from an act of God. Galt v. Archer, 7 Gratt. 307.

But if a shipper by compulsion, pays a common carrier more than its legal rate of charge for freight, such excess may be recovered in an action for money had and received; or it may be used as an offset in an action of assumpsit brought by the carrier. W. Va. Transp. Co. v. Sweetzer, 25 W. Va. 434.

g. Bill of Exceptions.—In an action of trespass on the case against a common carrier, if it appear, by a bill of exceptions, to have been proved at the trial, that the defendant fraudulently opened certain packages and casks, being in his care, and belonging to the plaintiff, and took therefrom a part of their contents, and converted the same to his own use, but not that the said contents was feloniously carried away, such offence is to be considered as amounting to a trespass only. Cook v. Darby, 4 Munf. 444.

h. Instructions.—In an action to recover for breach of a contract in failing to transport a quantity of cord wood, by reason of which the wood was washed away by a freshet and was lost, the court properly refused to instruct the jury that "the measure of damages in case of a failure to deliver goods according to contract, and which are lost, is their market value," etc., defendants not being sued as common carriers, and there being no evidence of a delivery of the wood to them. And a further instruction that plaintiff is entitled to recover as damages whatever he may have expended in the recovery of the wood washed away, if the jury believe that it would not have been washed away if defendants had kept their contract, is also properly refused, in the absence of any evidence to show that such damage can be fairly and reasonably considered as naturally arising from the breach of the contract in question. Slaughter v. Denmead, 88 Va. 1019, 14 S. E. Rep. 833. See monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192.

i. Judgment.—In an action for damages the judgment should be for the amount assessed by the jury and interest thereon from the date of the judgment, and not from the date of the verdict. Fowler v. B. & O. R. R. Co., 18 W. Va. 579.

And a judgment in proceedings under Act March 3, 1892, authorizing the circuit court to order connecting railroad lines to make connections, which fixes a schedule for certain connecting trains, to be in effect if the companies fail to agree on a schedule making a desired connection, is erroneous, unless it provides that the connecting roads may afterwards agree on a new schedule, not in conflict with the law. So. Ry. Co. v. Com., 98 Va. 758, 37 S. E. Rep. 294 (1900).

3. EVIDENCE.

Onus.—Where a loss occurs, and the carrier attempts to excuse himself from liability by proof that the loss was caused by one of the exceptions to the general rule, the *onus probandi* lies on the carrier to exempt himself from the liability. And it is not enough for him to prove, where the goods are carried by water, that the navigation is attended with so much danger that the loss may happen notwithstanding the utmost endeavors of the watermen and crew, to prevent it; that the person conducting the boat possesses competent skill, has used due diligence, and provided hands of sufficient strength and experience to assist him. Murphy v. Staton, 3 Munf. 239; B. & O. Ry. Co. v. Morehead, 5 W. Va. 293; McGraw v. B. & O. R. Co., 18 W. Va. 361.

And a common carrier does not by limiting his common-law liabilities by special contract thereby become a private carrier; and if loss is sustained, the burden of proof is on him to show not only that such loss arose from a cause from which he was exempted from the responsibilities from the terms of his special contract but also that it arose from no negligence or misfeasance of himself or his servants. Brown v. Adams Express Co., 15 W. Va. 812; Maslin v. B. & O. Ry. Co., 14 W. Va. 180.

But, it should be observed, that in an action by a shipper to recover on excess of payment beyond the legal rates, the plaintiff does not have to prove that he demanded repayment of the excess before instituting his suit. West Va. Transp. Co. v. Sweetzer, 25 W. Va. 434.

Admissibility.—In an action against a carrier for an alleged breach of contract to carry goods at an agreed rate, the contracts of sale of goods made by the shipper to third persons, based on the rate agreed, but to which the carrier was not a party, and of which it had no knowledge until after breach, are not admissible in evidence. Such contracts do not tend to prove the making of the contract in suit. So. Ry. Co. v. Wilcox, 7 Va. Law Reg. 381.

And in assumpsit against a railroad company to recover goods alleged to have been lost by defendant, who had engaged himself as common carrier to transport them for hire, where the declaration contains only the common counts, without regard to the bill of lading, which contains valid exceptions against loss or damage by fire, etc., the bill is not admissible in evidence, not being applicable to any of the counts. B. & O. R. Co. v. Rathbone, 1 W. Va. 87.

Sufficiency.—In an action by a shipper against a railroad company for the loss of freight, it appeared that the goods were delivered to defendant at Parkersburg, W. Va., April 18, 1861, sent to a person at Culpeper Courthouse, Va., that the goods were carried as far as Baltimore, and there sold at auction by the carrier in 1864, for a grossly inadequate price. The carrier proposed to justify by showing that the war between the rebels and federal government had begun war before the date of the alleged shipment; that troops were marching through Baltimore to Washington previous to that time; and that Ft. Sumpter was fired upon April 12th or 13th, 1861; and that the president of the United States had issued his call for 75,000 men on April 15, 1861. It was held that the evidence only showed that war existed, but did not show that the defendant was thereby prevented from delivering the freight. B. & O. R. Co. v. Morehead, 5 W. Va. 293.

Moreover, evidence that plaintiff delivered a basket to a servant of a defendant railroad company to be shipped over its road, that this servant was the same person who had repeatedly shipped baskets for her, and that on this occasion he said he shipped it, and that neither she nor any one for her ever received the basket, justifies a judgment in favor of the plaintiff for the value of the basket. Quarrier v. B. & O. R. Co., 20 W. Va. 424.

B. AGAINST CARRIERS OF LIVE STOCK.

1. PLEADING AND PRACTICE.

Form of Action.—See principles, which apply, with like force, discussed *ante*, "In General"; also, "Actions against Carriers of Goods."

Who May Be Sued.—See *ante*, "Actions against Carriers of Goods."

Declaration.—Where a declaration alleges a special contract to carry certain live stock safely, and the evidence adduced by the plaintiff shows that the contract contains a stipulation that the defendant shall not be held liable for any injury thereto, except such as might result from the gross negligence of the defendant's employees, it will be error to refuse to instruct the jury that the variance will warrant them in finding for the defendant. B. & O. R. Co. v. Skeels, 3 W. Va. 556. See *ante*, "Actions against Carriers of Goods."

Variance.—Where a declaration in assumpsit charges common carriers or bailees for hire, for loss or damage generally, and an agreement is proven, showing that the transportation was at the plaintiff's risk, which imposes a different liability than that charged, and a verdict is rendered against the carrier, it should be set aside and a new trial granted for reason of the variances. B. & O. R. Co. v. Rathbone, 1 W. Va. 87. See B. & O. Ry. Co. v. Skeels, 3 W. Va. 556.

Instructions.—If a shipper contract to load and care for live stock at his risk, and the evidence tends to show that the cars were overloaded, and the stock neglected by the shipper, in an action by the shipper for injury to the stock he is not entitled to an instruction that injury to the stock in the custody of a common carrier for shipment raises a presumption of negligence against the carrier, and that the burden is on the carrier to show that the injury arose from a cause for which it is not responsible. Such instruction should be qualified by adding "except such injury as results, or may have resulted, from the negligence of the shipper, or the inherent vice or propensity of the animal." Norfolk & Western Railway Co. v. Reeves, 97 Va. 284, 33 S. E. Rep. 606. See monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192.

Verdict.—If in an action for injury to horses through failure of the defendant railroad company to provide suitable means for unloading the same, it appears that the defendant did not furnish the usual gangway for unloading stock leading from the car to the ground, but the horses were unloaded directly upon the depot platform, one side of which was unguarded, and that one horse was injured by either being crowded from or jumping from the unguarded side of the platform, a verdict that defendant failed to furnish suitable means for unloading the stock should not be disturbed. C. & O. Ry. Co. v. American Exch. Bk., 92 Va. 495, 23 S. E. Rep. 935.

And where evidence shows that 147 lambs died because of defendant's negligence; that they averaged 77 pounds each and were worth from seven and one-half to eight cents per pound at the point of destination, a verdict for $742, with interest from date of injury, is justified. N. & W. R. Co. v. Harman, 91 Va. 601, 22 S. E. Rep. 490.

Damages.—Where a railroad company agrees to deliver cattle from a point on its own line to a point on the line of another railway company, and the company makes a mistake in reloading, whereby some of the cattle are sent to another point, and other cattle are mixed with these, by which the loss occurs to the owner, the company is liable for the consequent loss occasioned by such default on its part. N. & W. R. Co. v. Sutherland, 89 Va. 703, 17 S. E. Rep. 127. And where the evidence shows that 147 lambs died because of defendant's negligence; that they averaged 77 pounds each, and were worth from seven and one-half to eight cents per pound at the point of destination, it was held that a verdict for $742.00, with interest from date of injury, was justified. N. & W. R. Co. v. Harman, 91 Va. 601, 22 S. E. Rep. 490. See monographic *note* on "Damages" appended to Norfolk, etc., R. Co. v. Ormsby, 27 Gratt. 455.

2. EVIDENCE.

Admissibility—Hearsay.—In an action against a common carrier to recover for loss on cattle delayed in transit, the testimony of the shipper as to what his commission merchant reported as the amount of the sales of the cattle is hearsay. The amount of such sales should be shown by a witness who has positive knowledge of the transaction, and the defendant should have an opportunity to cross-examine the witness. N. & W. R. Co. v. Reeves, 97 Va. 284, 33 S. E. Rep. 606.

Sufficiency.—And in an action against a carrier for injuries to animals through its failure to unload them for rest, etc., as required by the Revised Statutes of the U. S. § 4386, evidence merely that the car was detained by a storm for hours, is insufficient to show that the failure to unload was caused by a "storm or other accidental cause." C. & O. R. Co. v. American Exch. Bk., 92 Va. 495, 23 S. E. Rep. 935.

C. AGAINST CARRIERS OF PASSENGERS.

1. PLEADING AND PRACTICE.

a. Form of Action, Parties, Venue and Questions for the Jury in General.

Form of Action.—An action on the case in tort may be maintained in any case in which trespass will lie. Therefore if a passenger is wrongfully ejected from a car when he has paid his fare, though no force was used in ejecting him, he may bring an action on the case in tort against the carrier. Barnum v. B. & O. Ry. Co., 5 W. Va. 10; Boster v. C. & O. Ry. Co., 36 W. Va. 318, 15 S. E. Rep. 158; So. Exp. Co. v. McVeigh, 20 Gratt. 264.

Who May Sue or Be Sued.—Where common carriers are not incorporated, any one or more of them may be sued by his or their name or names only, to recover damages for loss or injury to any parcel, package, or person, and such suit shall not abate, for the want of joining any of his coproprietors or copartners. W. Va. Code 1900, ch. 103, § 9; Va. Code 1887, § 1297. As to suit against a receiver appointed by a court of equity, see Melendy v. Barbour, 78 Va. 544. Also, see this subject discussed *ante*, "Actions against Carriers of Goods."

Venue—Removal of Cause.—Where a railroad company, which was incorporated in another state, leases a railroad lying in this state, and operates the same as owner thereof, any person injured may sue the railroad company in the courts of this state, and such company has no right to remove the suit

to the federal court. B. & O. R. R. Co. v. Wightman, 29 Gratt. 431.

Questions for the Jury.—In Va. Cent. R. Co. v. Sanger, 15 Gratt. 230, contractors were employed by defendant railroad company to deliver stone to be used to preserve the track; they placed it in ridges near the rails, where a train was passing; one of the stones fell upon the track, causing the train to be derailed, and a passenger, the plaintiff in the case, was injured. As to whether the company had used due diligence to guard against danger, was a question, as held by the court, for the jury to determine. Carrico v. W. Va. Cent., etc., Ry. Co., 35 W. Va. 389, 14 S. E. Rep. 12.

b. The Declaration.—A declaration against a railroad company for personal injuries alleged that plaintiff had a ticket over defendant's road, and boarded a freight train, which did not carry passengers, in the belief that the ticket was good on such train; that the conductor refused to stop the train, and ordered him to get off while it was running at a high rate of speed; and that the conductor, in violent language, threatened to eject plaintiff from the train if he did not obey the order, and had force at his command to execute such threats; and that upon belief that resistance would result in greater injury than leaving the train, he jumped off and was injured. The court held that there was sufficient allegation of compulsion to excuse plaintiff from the charge of contributory negligence in jumping off. Boggess v. C. & O. Ry. Co., 37 W. Va. 297, 16 S. E. Rep. 525, 23 L. R. A. 777.

Moreover, where a declaration avers that decedent was killed by the oversetting and throwing down of the railroad car in which he was being carried at the time by the defendant as a passenger, and that the oversetting and throwing down of the car were caused by the negligence of the defendant, it is not demurrable on the ground that allegation is too general. Searle v. Kan. & O. Ry. Co., 32 W. Va. 370, 9 S. E. Rep. 248.

And in Birckhead v. C. & O. Ry. Co., 95 Va. 648, 29 S. E. Rep. 678, a declaration alleged that a carrier, disregarding its duties, negligently permitted the train on which the plaintiff was a passenger to stand on a track where it was in danger of a collision; that the carrier negligently permitted another train to collide with the train on which the plaintiff was a passenger; and that the carrier had knowledge of the danger in time to stop the other train, and prevent the collision, but failed to do so; and that the plaintiff was injured. *Held*, that the declaration described the plaintiff's cause of action with sufficient particularity.

But in an action for being ejected from a railroad car, it is not sufficient to aver generally that the party was wrongfully ejected, but it must be sufficiently set forth that his expulsion was improper, and wrongful, *i. e.*, being rightfully in the car but illegally expelled. Barnum v. B. & O. R. Co., 5 W. Va. 10.

c. Instructions.—In action for refusal to receive and check plaintiff's trunk, an instruction is erroneous, which leaves it doubtful whether the occasion alluded to therein as that when plaintiff had not endeavored to deceive defendant, was the occasion mentioned in the declaration, or some other. N. & W. R. Co. v. Irvine, 85 Va. 217, 7 S. E. Rep. 233.

And in Shen. Val. R. Co. v. Moose, 83 Va. 827, 3 S. E. Rep. 796, a passenger who had been suffering from rheumatism of the thigh was thrown from his seat in a car by collision of the train, and his leg was broken. In a suit for damages, counsel for the railroad requested the court to instruct the jury that, "Although the jury believe from the evidence that the injury complained of in the declaration was inflicted by the defendant upon the plaintiff, in the manner therein set out, yet the plaintiff is not entitled to recover if they shall further believe from the evidence that he was in a feeble and infirm state of health, and such as would have prevented a prudent man from running the risk of travel; and that but for his diseased and helpless condition the plaintiff would not have suffered the injury so inflicted by the defendant." Such instruction was properly refused.

So in an action against a railroad company for injuries to passengers caused by the negligence of defendant in allowing stones to be piled so near the track as to strike plaintiff's arm, the defence was contributory negligence on plaintiff's part in allowing his arm to protrude from the window of the car. The court held, that an instruction that plaintiff was entitled to recover if the servants in charge of the train were in a position to see the pile of stone, or might have seen it by the use of ordinary care, and could thereby have prevented the injury by stopping the train, and failed to do so; and that it was immaterial whether the servants did see the stones, it being their duty to do so, was erroneous, since it was for the jury to say whether the servants should have seen the stones; and for the further reason that it ignored the evidence of contributory negligence. Carrico v. W. Va. Cent., etc., Ry. Co., 35 W. Va. 389, 14 S. E. Rep. 12.

d. Damages.

When Amount Governed by the Judgment of the Jury.—In actions by passengers against carriers, for injuries sustained, the judgment of the jury as to the amount of the damages, must govern, unless the damages allowed are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case. Farish v. Reigle, 11 Gratt. 697.

When Excessive.—But in N. & W. R. Co. v. Lipscomb, 90 Va. 137, 17 S. E. Rep. 809, $500 was held excessive compensatory damages to a passenger who was mistakenly assigned a berth in a sleeping car which was cut off from the main train, and who was thus delayed, and temporarily lost his baggage containing medicines which were required for the proper care of his sick child.

Punitive, Penal and Compensatory, in General.—The terms "punitive," "exemplary," "vindictive," and "penal" damages, are used interchangeably and indiscriminately by some of the several courts, and text writers. Others draw a distinction between damages which are exemplary, and within the discretion of the jury in view of all the circumstances, and "penal" or "vindictive" damages which are defined to be those over and above determinate damages resulting directly, as from a loss of property, or indirectly, as consequential pecuniary loss; and over and above what are termed indeterminate, or those resulting from mental anguish, suffering or humiliation. Determinate damages being in their nature compensatory, the direct and dominant purpose is to make whole the defendant in all respects, as nearly as possible. Yet it is evident that in doing so the defendant is punished and warned as he must be in all cases where damages are recovered against him. Still this punishment comes as an indirect and consequential result, and is, as it were, disregarded,

being overshadowed by the chief object to be effected by the allowance of the recovery, viz. :—to compensate the person wronged by giving such damages as will be a recompense for actual pecuniary loss, as in case of personal injury, for time lost, medicines and physicians' bills, and in addition his measure of loss resulting from mental anguish, suffering or wounded feelings. Whereas, if the damages are "penal" or "vindictive," in the sense used by some courts, a sum additional to compensatory, in the most comprehensive sense, is allowed, regardless of extenuating circumstances, merely to inflict punishment upon the wrongdoer for his malicious, wanton, vicious or oppressive conduct, and is in no sense compensatory, the chief purpose being to penalize the wrongdoer.

In defining these terms, or in applying the principles to particular facts, these discriminations have not been made in the treatment of this subject. The only distinction made is that between compensatory in its restricted sense, and punitive, which is regarded as covering all damages allowed beyond the extent of the amount necessary to reimburse for actual loss. For a well-considered opinion, which defines these terms, and makes careful and acute distinctions between the several classes of damages, see Pegram v. Stortz, 31 W. Va. 220, 6 S. E. Rep. 485. See also, Minor's Conflict of Laws, §§ 10, 74, 198.

Compensatory and Punitive Damages Defined and Compared.—Actual or compensatory damages are the measure of the loss or injury sustained, while exemplary or punitive damages are something in addition to full compensation, and something given, not as one's due, but for the protection of the public. The law awards the former where, in the unlawful act, there is an absence of intentional wrong, fraud, or malice, or the act is not oppressively or recklessly committed; while the latter are given where the wrongful act is done with a bad motive, or with such gross negligence as to amount to positive misconduct, or in a manner so wanton or reckless as to manifest a willful disregard of the rights of others. Punitive damages are damages against a person who has wronged another in a wanton, willful, or oppressive manner, in disregard of his rights, as a warning to him and others to prevent them from committing like offences in the future. N. & W. R. R. Co. v. Neely, 91 Va. 539, 542, 22 S. E. Rep. 367 (1895).

Compensatory Damages—When Awarded.—A master is liable to the extent of compensatory damages for the unlawful act of his agent, committed in the course of his employment, whether ratified or not. Thus, a passenger who is unlawfully expelled from a train by the conductor is entitled to recover damages therefor of the company. If the expulsion, though unlawful, did not proceed from any ill motive, and was not rudely or recklessly done, nor in such manner as to show a conscious disregard of the rights of others, and was simply the result of a mistake, only compensatory damages can be recovered, and, on the evidence certified, the plaintiff's damages should be limited to compensation for the inconvenience, delay, and fatigue to which he was put, and a suitable recompense for the injury done to his feelings, and for being expelled from the train. Norfolk, etc., R. R. Co. v. Neely, 91 Va. 539, 22 S. E. Rep. 367.

Punitive Damages—When Awarded against a Corporation.—Punitive damages belong alone to actions of tort; they do not lie for breaches of contract. N. & W. R. Co. v. Wysor, 82 Va. 250.

As to the question of recovery of punitive damages against a corporation the rule differs in the several state courts and in the federal court. The supreme court of the United States holds that the question whether a railroad corporation can be charged with punitive damages for the illegal, wanton, and oppressive conduct of the conductor of one of its trains towards a passenger, is a question, not of local law, but of general jurisprudence, upon which the judgment of the supreme court of the United States, in the absence of express statute regulating the subject, is not controlled by decisions of a state court. Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101.

Federal Rule.—The federal court adheres to the rule that a corporation is not liable in punitive damages for injury committed by its servant upon a passenger on the train merely on the ground that the conductor's illegal conduct was wanton and oppressive. In order to recover punitive damages against a corporation it is necessary to show that the company had knowledge that such servant was unsuitable for the position he occupied, or that the company participated in, approved, or ratified his treatment of the passenger. See Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, and cases cited.

The weight of authority in the several state courts is opposed to this view, and in most of the states the rule is laid down, that a corporation is liable in punitive damages for the malicious and wanton wrongs of its servants, done in the course of its employment. See Spellman v. R. & D. R. Co., 28 Am. St. Rep. 858, 870–883, containing an exhaustive note upon the subject, and quoting a full line of authorities. See also, Lile's Notes on Mun. Corp., p. 117 *et seq.*

West Virginia Rule.—In Ricketts v. C. & O. Ry. Co., 33 W. Va. 433, 10 S. E. Rep. 801, it is held that, a railroad company cannot be made responsible for exemplary damages on account of injuries done by one of its servants, even though the act was wanton and malicious, *unless* the act was expressly or impliedly authorized or ratified by the company. See Downey v. C. & O. R. Co., 28 W. Va. 732.

Virginia Rule.—The position of the Virginia court is uncertain. In N. & W. R. Co. v. Anderson, 90 Va. 1, 17 S. E. Rep. 757 (June, 1893), a passenger was ejected by the conductor under the following circumstances: The passenger's ticket provided that when presented to the conductor, the passenger should sign his name thereto, and "otherwise identify" himself as original purchaser thereof. The passenger offered to sign the ticket, but the conductor refused this offer, demanded payment of fare, and ejected him because he refused to comply with such demand. The court held that the passenger was entitled to punitive damages but on the ground that the company *subsequently ratified* the conductor's acts.

In a later case, N. & W. R. Co. v. Lipscomb, 90 Va. 137, 17 S. E. Rep. 809 (July, 1893), a passenger with his wife and two children, one of whom was very sick, bought a ticket at Bristol, Tenn., for Washington, D. C., and was assured by the company's officials that a through sleeper was attached to the train. Entering the train he paid for two berths, and was assured by its conductor that it would go through. Suddenly, without notice to him, the sleeper was cut loose and the train went on carrying the sick child's clothing and medicine, part of which was lost. The

sleeper was left on the track at night when it was too late to get into a hotel or drug store. The jury found that the situation was produced by the negligence of the defendant's officials, of whom the conductor was one. The court held, in conformity with the rule laid down in the federal court, that the plaintiff was not entitled to punitive damages. This part of the opinion, however, seems not to have been necessary to the decision. The federal rule was adopted, as it would seem, unhesitatingly, and without reference to or notice of the great weight of conflicting authority.

In N. & W. R. Co. v. Neely, 91 Va. 539, 22 S. E. Rep. 367 (1895), the rule laid down in the Lipscomb Case was approved by the court *obiter*, namely, that to recover exemplary damages of the master for the tortious act of the servant, the act must have been previously authorized, or subsequently ratified, or the company must have had knowledge of the servant's unfitness. The tendency of these decisions would seem to indicate, however, that the supreme court of appeals of Virginia favors the rule laid down in the federal court. See R., F. & P. R. R. Co. v. Ashby, 79 Va. 130, a case in which punitive damages were held proper. See also, 1 Va. Law Reg. 471, 620, for articles bearing upon the subject of punitive damages against corporations. See, in this connection, B. & O. Ry. Co. v. Noell, 32 Gratt. 394.

2. EVIDENCE.

Presumption and Onus.—The upsetting of a stage coach is *prima facie* evidence of negligence. Farish v. Reigle, 11 Gratt. 697. And when injury or damage happens to a passenger by the breaking down or overturning of a railroad train, or the breaking down of a bridge, or wheel, or axle, or by any other accident occurring on the road, the presumption, *prima facie*, is that it occurred by the negligence of the railroad company, and the burden of proof is on the company to establish that there has been no negligence whatsoever, and that the damage has been occasioned by an inevitable casualty, or by some cause which human care and foresight could not prevent. B. & O. R. R. Co. v. Wightman, 29 Gratt. 431. See Carrico v. W. Va. Cent., etc., R. Co., 35 W. Va. 389, 14 S. E. Rep. 12.

Furthermore, a plaintiff must be presumed to have been without fault; and if defendant relies on the defence of contributory negligence, he must prove it. B. & O. R. R. Co. v. McKenzie, 81 Va. 71.

And where a train separates, and the separated cars collide so that a passenger is injured, the burden of proof is on the company to show want of negligence. So. Ry. Co. v. Dawson, 98 Va. 577, 36 S. E. Rep. 996.

Admissibility.

Hearsay.—Declarations of the mother of an injured child passenger immediately after accident, are mere hearsay and no more binding on the estate of the child than would be declarations of a stranger. N. & W. R. Co. v. Groseclose, 88 Va. 267, 13 S. E. Rep. 454.

When Evidence of Frequently Recurring Accidents Admissible.—And a street-car company, using electricity, is bound to employ the best mechanical contrivances and inventions; and evidence that a particular trolley wire has been the subject of frequently recurring accidents is admissible, as showing that the company had notice of its unsafe condition. Richmond Ry. & E. Co. v. Bowles, 92 Va. 738, 24 S. E. Rep. 388.

Contributory Negligence—Evidence Certified.—But where the evidence, and not the facts, is certified, and the defendant in such action is the exceptor, any evidence it may have adduced, tending to show contributory negligence on the part of the exceptee and contrary to the exceptee's evidence, must be rejected. Va. Code 1887, § 3484; N. & W. R. Co. v. Groseclose, 88 Va. 267, 13 S. E. Rep. 454.

Damages—Condition of Decedent's Family.—And in an action against a railroad corporation for the killing of a person, evidence is admissible to show the condition and circumstances of the family of the deceased, his business qualifications, the condition of his health, the amount he was realizing annually from his employment, the value of his services to his family, and the damage suffered by them in the loss of his care, nurture and instruction. B. & O. R. Co. v. Wightman, 29 Gratt. 431.

Usual Stopping Place.—Moreover, testimony as to what had been the stopping place at a certain station is admissible in an action for personal injuries, when defendant contends that plaintiff was injured whilst alighting from its train before it reached its usual stopping place, while in motion, and the plaintiff denies such contention. A. & F. R. R. Co. v. Herndon, 87 Va. 193, 12 S. E. Rep. 289.

Baggage Checks.—So railway baggage checks are admissible in evidence, in an action to recover for a loss of baggage, to show what the company's undertaking was. Wilson v. C. & O. R. Co., 21 Gratt. 654.

Weight.

Contributory Negligence—Projection of Arm.—On a question whether plaintiff voluntarily put his arm out of the car window, or whether it was cast out by a lurch of the train, and came in contact with a bridge through which the car was passing, it appeared that the rail on plaintiff's side was one-half inch lower than the other, that neither the plaintiff nor the other passengers were moved from their seats by the lurch complained of, that plaintiff immediately after the injury said that he got his arm hurt by putting it out of the car window, and that the top of the car did not touch the bridge, as it must have done in case of a violent lurch, it was held insufficient to show involuntary projection of plaintiff's arm from the window, and that the verdict in his favor must be set aside. Richmond & D. R. Co. v. Scott, 88 Va. 958, 14 S. E. Rep. 763.

Same—Forcible Ejection.—And in Boggess v. C. & O. R. Co., 37 W. Va. 297, 16 S. E. Rep. 525, 23 L. R. A. 777, a person having a ticket for passage upon a railroad, boarded a freight train which did not carry passengers, believing the ticket good on that train. The conductor ordered him to get off the train while it was running at a speed which would endanger him in getting off, and refused to stop the train so that he might get off safely, and in violent and insulting language threatened to eject the person from the train by force if such order was not obeyed, and he had force at his command to execute the threat, and as a result, the person jumped from the train to avoid ejection by force. The court held that he was to be treated as a passenger and not as a trespasser; and there was sufficient compulsion or show of force to excuse the person from the charge of contributory negligence in so jumping from the train.

Speed of Train—Negligence.—But the mere speed of a train, or the fact that it was behind time, when the accident occurred, is not evidence of the negligence of the employees having it in charge. N. & W. R. Co. v. Ferguson, 79 Va. 241.

VII. CRIMINAL LIABILITY.

Violation of Statutory Regulations.—Any common carrier failing to comply with the provision of ch. 55, Va. Code 1887, Pol. Supl. ch. 55, or of the general laws of the state relating to the transportation of freight and passengers by common carriers when not otherwise provided for by such act of the general law, shall for each violation be deemed guilty of a misdemeanor, and on conviction thereof in any court of competent jurisdiction shall be fined not less than one hundred nor more than five hundred dollars.

Embezzlement.—And if any carrier or other person to whom money or other property which may be the subject of larceny, may be delivered to be carried for hire, or any other person who may be intrusted with such property, embezzle or fraudulently convert to his own use or secrete with intent to do so, any such property, either in mass or otherwise, before delivery thereof at the place at which, or to the person to whom, they were to be delivered, he shall be deemed guilty of larceny thereof. W. Va. Code 1900, ch. 145, § 20. See, in this connection, Smith v. Com., 4 Gratt. 532; Com. v. Adcock, 8 Gratt. 661.

Packages Fraudulently Opened, and Goods Converted.—But in an action of trespass on the case against a common carrier, if it appear, by a bill of exceptions, to have been proved at the trial, that the defendant *fraudulently* opened certain packages and casks, being in his care, and belonging to the plaintiff, took therefrom a part of their contents, and converted the same to his own use, but not that the said contents were *feloniously* carried away, such offence is to be considered as amounting to a trespass only. Cook v. Darby, 4 Munf. 444.

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724 *Nelson's Adm'r v. Cornwell.

October Term, 1854, Richmond.

(Absent ALLEN, P.)

1. **Equity Jurisdiction—Specific Legacies—Delivery of.**—Courts of equity have jurisdiction in all cases to compel the delivery of a specific legacy by the executor.
2. **Specific Legacies—Assent to—Refunding Bond.***—Though an executor may have assented to a specific legacy, he does not thereby dispense with a refunding bond.
3. **Same—Same—Same—Waiver of.**—If the executor has assented to a specific legacy and waived a refunding bond, the legatee may maintain an action at common law against the executor for its recovery: But the intention to waive the refunding bond must be very clear.
4. **Equity Practice—Parties—Case at Bar.**—In a suit by a residuary legatee against the representative of two estates, in which it is contended that property specifically bequeathed by one testator is the property of the other estate; *quære*, if the specific legatee is not a necessary party; and therefore whether not having been a party, the record of that suit is evidence against him.
5. **Same—Cause Heard on Bill, Answer and Exhibits—Record—Quære.**†—A cause is brought on to be heard upon the bill, answer, exhibits and award; *quære*, if the deposition and commissioner's report are a part of the record, and evidence as such in a case in which the record is evidence.
6. **Executors and Administrators—Submission of Matter to Arbitration—Devastavit.**‡—An executor, though he has authority to submit a matter to arbitration, yet is responsible as for a *devastavit*, if by the award his testator's estate is injured.
7. **Same—Same—Same.**—An executor making an improvident submission to a ward, as to a part of his testator's estate which has been specifically bequeathed; and the result of the submission being that the property is left in his hands as his

*Executors and Administrators—Assent to Specific Legacy—Refunding Bond.—The intention to waive the refunding bond must be very clear, and it will not be inferred from a mere assent to the legacy, because the executor may be willing to assent to a legacy, and even to hold it for the benefit of the legatee, and still not willing to part with the possession of it without a refunding bond. Whitehead v. Coleman, 31 Gratt. 789, citing *Nelson v. Cornwell, 11 Gratt. 724;* Drake on Attachments, § 499; Daniel on Attachments, §§ 63, 226.

†Equity Practice—Depositions—Failure to Refer to in Decree—Effect.—In Bloss v. Hull, 27 W. Va. 505, it is said: "Depositions of the plaintiff and others taken on his behalf are copied into the transcript of the record, with a memorandum of the clerk that they had been filed in the cause March 23, 1881, but said depositions are not referred to or recognized in any order or decree of the court, nor is there anything in any order or decree to show that they were made a part of the record, or that they were read on the hearing of the cause; therefore according to the repeated decisions of this court, said depositions are no part of the record and cannot be considered by the appellate court. Camden v. Haymond, 9 W. Va 680; Hill v. Proctor, 10 *Id.* 59; Hilleary v. Thompson, 11 *Id.* 113; Park v. Petroleum Co., 25 *Id.* 108; Handy v. Scott, 26 *Id.* 710; *Nelson v. Cornwell, 11 Gratt. 724*; 4 Min. Inst. (2d Ed.) 1198.

"The rule is qualified to some extent in Day v. Hale, 22 Gratt. 146, and Turnbull v. Clifton Coal Co., 19 W. Va. 299. According to these cases, when depositions are taken and filed in the cause, and the decree is supported by and obviously based upon them, the omission to refer to them in the orders or decrees of the court will be considered a clerical mistake; and the cause will be treated as having been heard upon them as well as upon the other papers in the cause. Warren v. Syme, 7 W. Va. 474."

See also, Turnbull v. Clifton Coal Co., 19 W. Va. 306, 307, where the principal case is cited, and the rule modified as said in the paragraph above.

‡Executors and Administrators—Submission of Matter to Arbitration—Devastavit.—In Wamsley v. Wamsley, 26 W. Va. 46, it is said: "The court of appeals of Virginia in Wheatley v. Martin, 6 Leigh 62, decided that it is competent for an executor or administrator to submit to arbitration any controversy concerning the estate, whether the estate claims to be a debtor or a creditor; that this results necessarily from the full dominion which the law gives him over the assets and the full discretion which it vests in him for the settlement and liquidation of all claims due to and from the estate. And so far as relates to debtors and creditors, parties to the award, it is binding upon the legatees and distributees in the same manner, as if the adjustment had been made by the executor or administrator without an award, in virtue of the general powers belonging to his fiduciary character. This is simply the announcement of the common-law rule, that a fiduciary as such

own property, and he is compelled to pay for it, the legatee is not precluded by the award from recovering the specific property.

8. **Same—Holding Specific Legacy—Statute of Limitations.**—The statute of limitations cannot bar the legatee's claim to his specific legacy, whilst it is held as such by the executor, though he had long before assented to the legacy.

9. **Same—Same—Same—Case at Bar.**—A delay of seventeen years by a specific legatee to sue for his legacy, held under the circumstances not to bar his claim.

Jesse Cornwell of the county of Prince William, died in 1805, leaving a will,
725 which does not seem to *have been recorded until August 1813. By his will he gave to his wife Constance Cornwell, the whole of his estate whilst she remained his widow. But if she should marry again, or upon her death without marrying, his whole estate, after the payment of his debts, was to be divided equally amongst his children: And he appointed her and his son Gustavus his executors.

At Cornwell's death he left five children, his son Gustavus who died in the life time of his mother, intestate and unmarried, and four daughters, Nancy who married Nehemiah Brockley, Lydia who married Cornelius Hoff, Catharine who married first Petty and afterwards John Appleby, and Kitty Cornwell.

Constance Cornwell took possession of the estate and paid the debts, and seems to have divided some of the slaves among the four daughters during her life. In April 1810 Cornelius Hoff executed a paper by which he acknowledged the receipt of a slave named Martin and a horse, which, with what he had before received, was in full of the interest of his wife in the estate of Jesse Cornwell; and Gustavus Cornwell purchased the interest of Brockley in the estate.

Some six or seven years after the death of Jesse Cornwell, Constance Cornwell purchased of her father a negro girl named Prucy, then about ten or twelve years old, for two hundred dollars; and some three or four years after this purchase, she sold a negro man named Juba, belonging to her husband's estate.

In 1825 Constance Cornwell died, having made a will, which was admitted to record in the County court of Prince William; and Thomas Nelson qualified as her executor; and at the same time qualified as administrator de bonis non with the will annexed of Jesse Cornwell deceased. By her will Constance Cornwell bequeathed to her grand son John Cornwell, the oldest son of her daughter Kitty Cornwell, the following slaves, viz:
Letty, Prucy and her two children
726 *Elizabeth and Albert, and the increase of the females forever, and also a horse: And she directed that he should not sell any of the slaves or their future increase; and if he attempted to sell them, they were to be free. And she directed that the proceeds of the sale of her stock, after paying her debts, should be retained by her executor, and applied to the use of the slaves until John Cornwell came to the age of twenty-one years; at which time the slaves were to be delivered to him by the executor. The remainder of her estate she directed to be sold and divided among her four daughters.

The personal estate of Constance Cornwell, including the slaves and horse given to John Cornwell, was appraised at five hundred and seventy-nine dollars and forty-eight cents. Prucy and her children, of whom there were then three, were appraised at four hundred and fifty dollars, and Letty was appraised at ten dollars. There was also a small tract of land, which was sold by the executor in 1833, to Catharine Petty, for one hundred dollars. The estate of Jesse Cornwell, which came to the hands of the administrator, was a slave named Frank, appraised at three hundred and twenty-five dollars, and Betsy and her two children, who were in the possession of Catharine Petty, and were claimed by both herself and Kitty Cornwell; and there was then a suit pending by the latter against the

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might submit to arbitration matters affecting the estate or trust represented by him; and that an award made in pursuance of such submission would be binding upon the parties to the same extent that it would be if made between parties acting in their individual rights. 3 Leonard 53; 1 Lomax on Ex'rs (1st Ed.) 356.

"The same rule is announced in *Nelson v. Cornwell, 11 Gratt. 724*, decided in 1854, but upon a controversy, which arose prior to the enactment of section five, chapter one hundred and fifty-three of the Code of 1849, and therefore said statute had no effect upon said decision.

"In both of these Virginia cases the court held, that notwithstanding the administrator had the right to submit to arbitration any claim for or against his intestate's estate, and an award made thereon was binding, still, if injustice was thereby done to, or loss sustained by such estate, the administrator may be chargeable therefor as for a *devastavit*.

"To relieve the apparent harshness of this rule in its operation upon the responsibility of the fiduciary, the statute-law was amended by the Code of 1849, by declaring that: 'No such fiduciary shall be responsible for any loss sustained by an award adverse to the interest of his ward, insane person or beneficiary under any such trust, unless it was caused by his fault or neglect.' Code of Va., sec. 5, chap. 153.

"This statute was seemingly too liberal, in the opinion of the legislature, in relieving the fiduciary from responsibility, and it therefore amended it by adopting the statute of 1882 (sec. 5, ch. 63, Acts 1882), before mentioned, which requires the fiduciary to act not only without fault or neglect in order to excuse himself from responsibility for an adverse award, but it requires him, in good faith, to file a petition, stating the facts to the circuit court and then obtaining the permission of that court to submit any fiduciary claim to arbitration, before he can claim exemption from liability for an adverse award even though it was not 'caused by his fault or neglect.'" See also, Tennant v. Divine, 24 W. Va. 391; Brewer v. Hutton, 45 W. Va. 116, 30 S. E. Rep. 85, both cases citing and approving the principal case.

See monographic *note* on "Executors and Administrators"; also, monographic *note* on "Arbitration and Award."

former for the recovery of them; which suit went off in 1834.

In June 1828 Kitty Cornwell, Brockley and wife, Catharine Petty and Cornelius Hoff entered into a covenant with each other to submit their rights in the estates of Jesse and Constance Cornwell, to arbitration; and on the 5th of December 1829 the arbitrators made their award. They decided that Constance Cornwell had no right to dispose of the property disposed of by her will,
727 and that it should *be considered as the property of Jesse Cornwell's estate. That Hoff and Brockley were not entitled to any further portion of Jesse Cornwell's estate. And treating the property mentioned in the inventory and appraisement of both estates, as belonging to that of Jesse Cornwell, and deducting from the amount of the whole, the probable worth of Betsy at the age of fourteen years, two hundred dollars, and the further sum of two hundred dollars to which the children of Betsy were appraised, and the further sum of six hundred dollars, to which Gustavus Cornwell was entitled, so as to equalize the advancements to Mrs. Petty and Kitty Cornwell, they divided the balance into four parts, of which they gave to each of these one part, and directed that the other two parts should be divided among the four surviving children of Jesse Cornwell, as heirs of Gustavus Cornwell.

In 1835 Kitty Cornwell instituted a suit in equity in the Circuit court of Fairfax against Nelson, Hoff and wife, Brockley and wife, Catharine Petty and others, for the purpose of enforcing the award of the 5th of December 1829, and also of enjoining a judgment recovered against her by William J. Weir, as assignee of Nelson, on a bond given by her to Nelson for one year's hire of the slave Frank belonging to the estate of Jesse Cornwell. In her bill, after stating the foregoing facts, and that under the award she was entitled to Betsy and her children, then four in number, she charged that Nelson had become possessed of these slaves, then as she believed worth two thousand dollars, and that she was entitled to a share of the other estate in his hands. That she had not been able to obtain from Nelson any part of the property. That pending these questions as to the right of property in Jesse Cornwell's estate, Nelson had hired to her one of the slaves belonging to the estate, for the sum of forty
728 dollars, for which she had *given her bond, bearing interest from the 1st of January 1831, which he had passed away, so that it had come into the hands of William J. Weir, who had obtained a judgment upon it. That there were no debts of Jesse Cornwell to be paid, and she was about to be compelled to pay the amount of this bond given for the benefit of the estate to which she was herself entitled.

She further charged that Nelson had taken possession of the slaves Betsy and her children, and had them appraised as a part of the estate of Jesse Cornwell; and that by some fraudulent combination between Nelson, Catharine Petty and John Appleby, who claimed one of the children, to deprive the plaintiff of her just rights, the said slaves had been sold and carried off to the south.

The prayer of the bill was for a settlement of Nelson's accounts as administrator of Jesse Cornwell's estate, and that he might be compelled to pay her the amount due to her from said estate; and that Williams, one of the parties made defendants, might be enjoined from paying away the purchase money of said slaves until the further order of the court; and for general relief. An injunction was awarded according to the prayer of the bill; but was afterwards dissolved as to the judgment obtained by Weir.

Catharine Petty answered, denying the validity of the award, on various grounds, one of which was, that Constance Cornwell by her will left property to a considerable amount, which it was contended she had acquired after the death of her husband, to a certain John Cornwell, and that this property was decided by said arbitrators to be divisible among the parties to the award, when John Cornwell was no party thereto, and not bound by their decision.

That as to Betsy and some of her increase, she had held adverse possession of these
729 slaves more than five *years before the institution of this suit, and thus independent of any other pretension, had acquired a perfect title to them. That the property of Jesse Cornwell not having been distributed at the death of Constance Cornwell, the complainant had hired the negro man Frank from Nelson, and had not paid any of her bonds for the hire since 1827; and had finally, as respondent was informed and believed, sold the said slave to a trader; that the said slave would have sold for eight hundred dollars; and thus the complainant had received a proportion of the estates of Jesse and Constance Cornwell greater than she would have been entitled to upon an equal division of the estates. She admits she sold the slaves Betsy and her children for one thousand five hundred dollars.

Nelson also answered the bill. After referring to the death of Jesse and Constance Cornwell, he stated that Constance Cornwell by her will, amongst other things, bequeathed to her grand son John Cornwell a slave called Prucy and her children, and the increase of the females of them; also a horse; with a proviso, that he should not be at liberty to sell the said slaves; and that if he attempted to do so, they should be free. And he stated the other provisions of the will. He alleged that the slaves Prucy and her children were the absolute property of Constance Cornwell in her own right; and were not held or claimed by her under the will of her husband.

He further states that the complainant had hired the slave Frank from him, from 1827 to 1835, and had never paid the hire; and that she had fraudulently sold him, and he had been sent out of the state. That Catharine Petty had gotten possession of Betsy and of one child she then had, and afterwards sold her and her four children, to some person unknown to him, by whom they were removed from the state: And he

730 *denies that he was in any manner accessory to said sale.

He further states that he had settled his accounts of administration upon both the estates of Jesse and Constance Cornwell; and that he settled with Hoff and Nancy Brockley for their shares in both estates, and had their receipts. That charging the complainant with the hires of Frank and his value, she will be found largely a debtor to the estates; and that he is ready to settle with Catharine Petty.

He said that he had no personal knowledge of the award mentioned in the bill, but insisted it could not extend his liabilities; and having been founded on a gross error of fact, it was not obligatory even on the parties to the submission. That as to the land held by Constance Cornwell in her own right, and as to the slave Prucy and her children, and the horse devised to her grand son John Cornwell, who was yet alive, her will was in all respects valid. And the arbitrators had by their award, under a mistake as to this fact, taken away the property devised to John Cornwell, who was no party to the submission, and had adjudged it to others. And he insists that for this and other reasons the award is void.

In May 1837 the court made a decree directing Nelson to settle his accounts of administration on the estates of Jesse and Constance Cornwell before a commissioner of the court: And it was further ordered that said commissioner take any and all such evidence as either party may require, and report the same to the court. At the May term 1838 the report of the commissioner was recommitted, and he was directed to enquire what portions of the slaves or other property in the proceedings mentioned, belonged to the estates of Jesse and Constance Cornwell, respectively; what amounts in money

731 or property had been received *by the respective legatees; that he settle accounts between said legatees, and that he equalize their shares of the same as near as may be, according to their respective rights and interest.

At the May term 1842 an order was made by consent of parties, that the matters in dispute between the parties be referred to Algernon S. Tebbs and Ferdinand D. Richardson, with umpire, whose award or the award of such umpire, should be final. And on the 8th day of June 1844, the cause came on to be finally heard upon the bill, answers, exhibits and the award of A. S. Tebbs and F. D. Richardson, which was filed at the preceding term of the court; and no exceptions having been taken thereto, it was decreed that the said award be confirmed, and that the complainant Kitty Cornwell recover of the defendant Thomas Nelson, the sum of four hundred and seventy-four dollars and sixty-four cents, with legal interest on three hundred and fifty-eight dollars and twenty-two cents, a part thereof, from the 1st of October 1843 till paid, and the costs of this suit; and that the said Thomas Nelson recover of Catharine Appleby, formerly Catharine Cornwell, the sum of three hundred dollars, with interest from the 14th of October 1843, without costs.

There is a memorandum of the clerk, made in the foregoing cause, that the award referred to in the foregoing decree, is not now among the papers in the cause; the same having been lost or taken from the bundle.

The report of the commissioner in this cause does not appear; but there are a number of depositions, exhibits, &c., which the clerk states is a part of the record in the cause, and were referred to and returned with the commissioner's report. These depositions generally related to the slaves Frank and Betsy and her children; but there

732 were some of them which related *to Prucy and her children. Although there was some contradiction in the testimony, yet it was clear that Frank had been carried off and sold in 1835, and that Kitty Cornwell had received the purchase money: How much that was the evidence did not disclose; and the estimate of his value varied from three hundred and fifty dollars to eleven hundred dollars. Prucy and her six children were valued at that time by two witnesses at one thousand seven hundred and twenty dollars. A witness, who was called on by the commissioner, speaks of them as being of very light complexion; some of the children would be taken to be white, and they were generally delicate. They were valued at small prices, on account of their complexion and health.

In a memorandum of notes of the evidence and points in the cause, returned by the commissioner with his report, it is stated that Nelson was indebted as administrator and executor, on the 1st of May 1838, four hundred and eleven dollars and twenty-four cents of principal, and two hundred and four dollars and sixty-six cents, interest to that date. Up to that time he had advanced to Catharine Petty two hundred and ninety-eight dollars and thirteen cents of principal, and seventy-four dollars and five cents of interest, and to Kitty Cornwell three hundred and nineteen dollars and seventy-seven cents of principal, and one hundred and twenty-two dollars and ninety-six cents of interest. He estimates the value of Frank, when sold in 1835, at one thousand dollars; and Betsy and her children, at same time, at one thousand five hundred dollars. Of Prucy and her children, he says, they cannot be brought into this controversy, John Cornwell not being a party; and Kitty Cornwell makes no claim to them in her bill or otherwise, except that she has taken some evidence leaning that way. These slaves are in the possession of Thomas Nelson the defendant.

733 *Thomas Nelson died in 1845, and John C. Weedon qualified as his administrator. Prucy and her children having been in the possession of Nelson at his death, Weedon took possession of them as a part of his estate: He sold two of the children to a trader, who took them to Washington city; and in June 1847 John Cornwell, then living in Georgetown, instituted proceedings to recover them, as

belonging to him under the will of Constance Cornwell.

In July 1847 John Cornwell instituted this suit in the Circuit court of Prince William, against Weedon, to recover Prucy and her other children. In his bill he set out the bequest to him by Constance Cornwell, of the slave Prucy and her children, to be delivered to him when he attained to the age of twenty-one years; the taking possession of the slaves by Nelson as her executor, the death of Nelson without having delivered the slaves to him, that the estate of his testatrix was not indebted or the debts were all paid; that Weeden had sold two of the slaves, and the plaintiff apprehended he would sell the others, and have them sent off to the south. And stating their names, he said that he could not prove that Nelson had ever assented to the legacy, or that all or which of the slaves were in the possession of Weeden. He calls upon Weeden to say in whose possession the slaves are; and he prays for an account of their value and profits since the death of Constance Cornwell; for a delivery of them to the plaintiff; and for general relief.

Weedon demurred to the bill for want of equity, and because a personal representative of Constance Cornwell should have been made a party. He also pleaded the statute of limitations; and answered. In his answer he says that he has been informed that Prucy and her children were not the property of Constance Cornwell, though she may have attempted to dispose of them by her will; and he calls for
734 strict *proof of the fact that they were hers. He says further that Nelson made an effort to assert his testatrix's title to said slaves, but without success, and that they were held to be the property of Jesse Cornwell's estate, and that Nelson had been compelled to account for them as such. That Prucy and her children belonged to Nelson in his life time, having been, as he was informed, accounted for by him to the legatees of Jesse Cornwell's estate, as part of that estate; and after Nelson's death they came into defendant's possession; and two of them had been sold by him to pay Nelson's debts. That the slaves had been kept openly by him as a part of Nelson's estate, and he had never heard of any claim set up to them by the plaintiff until the month of January 1847. He insisted further that the plaintiff was a free negro or mulatto, and therefore had no right, since the act of March 15th, 1832, to maintain any action or suit in equity for the purpose of recovering or otherwise acquiring a permanent ownership of any slave in any of the courts of the state of Virginia. And further, that the plaintiff having slept upon his rights for more than twenty years, was not entitled to the aid of a court of equity, after the death of Nelson, and the loss of proof by death of witnesses and otherwise, for the purpose of asserting any demand under Constance Cornwell's will.

A number of witnesses were introduced by the plaintiff, who testified as to the purchase of Prucy, then a girl of ten or twelve years of age, by Constance Cornwell; and that she and her children were always claimed by her and considered as her own property. Some of them also testified to the admissions of Nelson, up to a short period before his death, that the slaves were the property of John Cornwell; and that he held them for him. The credibility of some of these witnesses was as-
735 sailed by the defendant; and *witnesses were introduced by both parties, whose opinions as to their character for veracity differed.

It appeared that the plaintiff was the son of Kitty Cornwell, and was a mulatto. He attained the age of twenty-one years in 1830; and in 1828, when a minor, he received from Nelson the value of the horse left him by Constance Cornwell, and left the state; and, so far as the record shows, was not heard of again until 1839, when he was living in Georgetown in the District of Columbia, where he has continued to live ever since. It appeared too that Prucy herself was a light mulatto, and her children were very light mulattoes, some of them showing scarce a trace of negro blood; and it seemed that the children were the children of Nelson. The other facts appearing in the cause have been already stated, except the evidence of A. S. Tebbs, one of the arbitrators upon whose award the decree of the 8th of June 1844, in the case of Kitty Cornwell against Nelson and others, was founded. His testimony is stated by Judge Moncure in his opinion.

In the progress of the cause the personal representative of Constance Cornwell was made a defendant, and the case was removed to the Circuit court of Spotsylvania.

The cause came on to be heard on the 24th of May 1852, when the court overruled the demurrer and plea, and made a decree in favor of the plaintiff for the slaves in controversy, and for an account of profits. And from this decree Weedon applied to this court for an appeal, which was allowed.

Patton, for the appellant.
Heath and Neale, for the appellee.

MONCURE, J., delivered the opinion of the court.

The questions which arise in this
736 case are: First. *Whether a court of chancery has jurisdiction of it? Secondly. Whether the slaves in controversy belonged to the estate of Jesse Cornwell instead of to Constance Cornwell, at the time of her death? Thirdly. Whether the claim of the appellee John Cornwell to the said slaves is concluded by the award of 1829, and the award, decree and other proceedings in the suit of Kitty Cornwell against Thomas Nelson, administrator of Jesse and executor of Constance Cornwell and others? And fourthly. Whether it is concluded by the act of limitations, or by acquiescence or laches on the part of the appellee? Another question was raised in

the court below, viz: Whether the appellee, being a free mulatto, was capable of acquiring permanent ownership of the slaves. But no notice having been taken of that question in the petition for the appeal, or the argument in this court, it may be considered as having been abandoned: and was properly so; the act of 15th March 1832, Sup. Rev. Code, p. 246, having been passed since the death of the testator; and the law of the state prior to the passage of that act, not having prohibited the acquisition or ownership of slaves by free persons of color.

Proceeding to consider the other questions in the order above stated, let us enquire:

First. Whether a court of chancery has jurisdiction of the case?

Formerly, in England, suits for legacies were generally brought in the ecclesiastical courts. But they are now rarely brought in those courts, on account of their not possessing adequate jurisdiction to afford complete relief in most cases. 2 Roper on Legacies 1792. From the time of Lord Chancellor Nottingham, if not from an earlier period, courts of equity have exercised concurrent jurisdiction of such suits with the ecclesiastical courts. They now exercise jurisdiction in many cases
737 in exclusion of those courts: *as for instance, where the legacy is to a married woman, or an infant, or involves a trust, or where a discovery of assets is required. In this state, suits for legacies are brought in courts of equity only; except in the few cases in which a court of common law has jurisdiction. No suit will lie at common law to recover a legacy, unless the executor has assented thereto. If no such assent has been given, the remedy is exclusively in the courts of equity. 1 Story's Equ. Jur. § 591. Since the decision of Deeks v. Strutt, 5 T. R. 690, it has been considered as the settled doctrine in England, that no action at law will lie to recover a general legacy; even though there be assets, and the executor expressly promised to pay it. 2 Roper on Legacies 1798; 1 Story's Equ. Jur. § 591, 592. This doctrine, however, has not been recognized in any case decided by this court; and Tucker, P., in Kayser, ex'or, v. Disher, 9 Leigh 357, seemed to be unwilling to admit it in its whole extent. It is well settled in England, that an action at law is maintainable against an executor for a specific legacy, after assent given: and that would no doubt be regarded as sound doctrine in this state; at least, where the executor waives his right to require a refunding bond. But it is laid down in 1 Story's Equ. Jur. § 593, as very certain, that courts of equity now exercise jurisdiction in cases of legacies, whether the executor has assented thereto or not. "The grounds of this jurisdiction (he says) are various. In the first place, the executor is treated as a trustee for the benefit of the legatees; and therefore, as a matter of trust, legacies are within the cognizance of courts of equity, whether the executor has assented thereto or not. This seems a universal ground for the jurisdiction. In the next place, the jurisdiction is maintainable in all cases where an account or discovery or distribution of the assets is sought, upon general principles." And "in the
738 next place, there is in *many cases, the want of any adequate or complete remedy in any other court." I have seen no case in which it was decided that a court of equity has not jurisdiction in a suit for a legacy, brought by the legatee against the executor. The assent of the executor to the legacy may give a right of action at law, but will not take away the right of suit in equity. Until the legacy is paid or delivered by the executor to the legatee, the former's trust is executory, and may be enforced in a court of equity. The executor may retract his assent, if given upon a reasonable ground for considering the assets as sufficient for all demands, but which prove deficient in consequence of unknown debts unexpectedly claimed. 2 Lomax on Ex'ors 132. The legatee cannot be expected to know the state of the assets, and the executor cannot complain that the suit against him is brought in a court in which an account can be taken of the assets; and if found deficient, the legacy may be applied to make up the deficiency. These observations apply with increased force in this state, in which an executor, before he can be compelled to pay or deliver a legacy, has a right to require a refunding bond for his indemnity; unless the legatee pursue the course prescribed by the Code, p. 554, § 32.

An executor may certainly agree to dispense with a refunding bond, and to pay or deliver the legacy to the legatee, or hold it for his benefit; and in the latter case, the legacy would in effect be paid or delivered to the legatee: the executor holding the subject as his agent, and the possession of the agent being that of the principal. In such a case the remedy of the principal against his agent would probably be at law, and not in equity. But to create such a case the evidence of intention to waive the right to require a refunding bond should be very clear. An executor may be willing to assent to a legacy, and even to hold
739 *it for the benefit of the legatee, and still not willing to part with the possession of it without a refunding bond. Assent is generally given, and may be enforced by a court of equity, when all debts known to be in existence are paid. But there may be other debts; and against them, the refunding bond is intended to guard. An intention to waive the right to require such bond will not be inferred from a mere assent to the legacy. The assent, in the absence of clear evidence to the contrary, will be presumed to be on condition that the bond be given.

Applying these principles to this case, it is unnecessary to enquire whether the executor Nelson ever assented to the legacy of the slaves in controversy; as there can be no doubt that he never parted with the possession of them as executor, nor waived his

right to require a refunding bond. Upon this ground, therefore, I am of opinion that a court of chancery has jurisdiction of the case. Whether it has jurisdiction upon any of the other grounds relied on in the bill, is a question which need not be considered.

Secondly. Did the said slaves belong to the estate of Jesse Cornwell, instead of to Constance Cornwell, at the time of her death?

The appellant contends that she sold Juba, who belonged to the estate of her husband Jesse Cornwell, and bought Prudence or Prucy with the proceeds; intending to substitute the latter in place of the former: and that whether she so intended or not, the legatees in remainder of Jesse Cornwell had a right to claim Prudence and her issue as having been acquired by means of a trust fund to which they were entitled: or at all events, that these slaves were liable for the debt due by the testatrix for the proceeds of the sale of Juba.

If the case be considered without reference to the record of the suit before men-
740 tioned, and the depositions *copied therein, there can be no doubt as to the title of the testatrix to the slaves at the time of her death, nor as to the right of the appellee to claim them as legatee under her will, free from any claim of the legatees in remainder of her husband. The evidence shows that she bought Prudence when a little girl, shortly after her husband's death in 1805, about four years before the sale of Juba, at the price of two hundred dollars, which she paid out of her own money: that she always claimed, and was reputed, to be the absolute owner of Prudence and her children until her death in 1825, when she bequeathed them to her grandson, the appellee: that they were inventoried and appraised as part of her estate shortly after her death: and that they were always held and claimed by her executor Nelson as part of her estate until his own death in 1845. Besides the record and depositions aforesaid, there is nothing in the case to oppose this strong evidence of title, except some evidence introduced by the appellant to impeach the credit of some of the witnesses of the appellee. Conceding the impeachment to be successful, as far as it goes, the testimony remaining unimpeached is amply sufficient to sustain the title of the testatrix and the claim of the appellee.

In regard to the additional evidence afforded by the record and depositions in the suit aforesaid: I think it is at least questionable whether the appellee ought not to have been a party to that suit; and not having been so, whether the record and proceedings therein are admissible evidence against him. I also incline to think that even if the record be admissible, the depositions copied therein are not properly a part thereof. They all appear to have been taken by the commissioner and returned with his report which was recommitted; and before another report was made, there was an order of reference in the suit, an
741 award, and *a final decree thereon.

The decree recites that the cause came on to be heard on the bills, answers, exhibits and award; saying nothing of the commissioner's report and depositions; which seem therefore to be no part of the record, according to the case of Shumate v. Dunbar, 6 Munf. 430. But without expressing any definitive opinion upon these questions, and considering the said record and depositions as admissible evidence, I am still of opinion that it does not alter the case, and that upon all the evidence therein the testatrix was clearly entitled to the slaves at the time of her death.

It is contended, however, that if she was entitled to the slaves they were at least liable for the proceeds of the sale of Juba, as a debt due by her at the time of her death. If any such debt ever existed, it has, I think, been fully satisfied. Though entitled to a life estate in all the property of her husband, and though she survived him twenty years, she appears long before her death to have made large advances of slaves and other property to most of her children. As early as 1810, fifteen years before her death, she had made advances to one of them, Lydia Hoff, in full of her interest in the estate. She was one of the four distributees of her deceased son Gustavus, who, besides his own share of the estate, claimed to have purchased the share of his sister Nancy Brockley; on account of which two shares, nothing had been advanced. She left some other estate, besides the slaves in controversy and her interest as distributee aforesaid, which came to the hands of her executor Nelson, and on account of which a balance of two hundred and thirty-eight dollars and seventy-three cents was found to be due by him on the settlement of his administration in 1836. The legatees in remainder have received the benefit of that balance, and of her interest as distributee of her deceased
son; which, saying nothing of the
742 *benefits received in the way of advancements, must have much more than satisfied and compensated any claim they could have against her on account of the price of Juba. But in fact no suit was ever brought to recover any such claim; and if one were now brought, the act of limitations or lapse of time would be a sufficient defense against it.

Thirdly. Is the claim of the appellee concluded by the award of 1829, and the award, decree and other proceedings in the suit aforesaid?

I do not understand it to be now contended that the award of 1829 is conclusive; or that it can have any effect upon the case. Neither the appellee, nor Nelson the administrator of Jesse and executor of Constance Cornwell, was a party to the submission. The award was void, even for matter appearing upon its face; was not acted upon or executed by any of the parties; was expressly repudiated by some of them; and was claimed to be enforced by none of them, except Kitty Cornwell, who attempted

to set it up in her suit brought in 1835. It may therefore be dismissed from further consideration.

Then, as to the effect of the award, decree and other proceedings in the suit aforesaid: In the argument of this case, the question was raised and discussed, Whether the slaves in controversy were disposed of, or intended to be disposed of by that award and decree? The counsel for the appellant maintained the affirmative, and the counsel for the appellee the negative, of this question. The award itself has been lost; and the decree is merely for certain sums of money in pursuance of the award. The contents of the award can only be conjectured, or inferred from the pleadings and proofs in the suit. The slaves are not expressly named in the bill; the main object of which was to recover the slaves Betsy and her children claimed to have been advanced to the complain-
743 ant *by her mother, and adjudged to be hers in the award of 1829; but which had been sold by her sister Mrs. Petty for one thousand five hundred dollars. Another object of the bill was to enjoin a judgment which had been recovered against her on one of her bonds for the hire of the slave Frank belonging to her father's estate; which slave she secretly sold about the time she filed her bill, and was of the value of eight or ten hundred dollars. But for these objects the suit would probably not have been brought. For the purpose of attaining them, and especially the one first named, she attempted to set up the award of 1829, and to have the estates of Jesse and Constance Cornwell disposed of according thereto. Notwithstanding the invalidity of that award, it was competent for the court, under the prayer for general relief (if all proper parties were before it), to decree an account and distribution of the estates of Jesse and Constance Cornwell; and, for that purpose, to determine to which of the said estates the slaves in controversy belonged. Whether the court did in fact so determine, is the question. The appellee John Cornwell was of all persons the most interested in such a determination; and was certainly a proper, if not a necessary party to the suit, if it involved his title to the slaves in controversy. The fact that he was no party to the submission, is relied on by the executor Nelson as one of the grounds of the invalidity of the award of 1829. Commissioner Macrae, in his report in the suit, says, "Prucy and her increase cannot, it is conceived, be brought into controversy, and adjudicated in this cause, whilst John Cornwell to whom they were bequeathed by the will of C. Cornwell deceased is not a party to this suit; whose claim cannot be affected by the litigation of the parties, of whom he is not one; and the plaintiff Kitty Cornwell makes no claim to Prucy and children in her bill, or
744 otherwise, *except that she has taken some evidence leaning that way." That after this, the appellee was not made a party to the suit, is an important fact to be considered in deciding the question whether the slaves were disposed of by the award and decree; especially since, if they were so disposed of, they were thereby made the property of the executor Nelson himself. The executor is a sufficient representative of the legatees, only when his interest is not adverse to theirs. The small amount of the decree is also relied on by the counsel of the appellee as strongly tending to show that the slaves in controversy could not have been charged to the appellant in the award. There are but two sums decreed in the suit: One, to wit, four hundred and seventy-four dollars and sixty-four cents, with interest on three hundred and fifty-eight dollars and twenty-two cents from the first October 1843, in favor of Kitty Cornwell against Nelson; and the other, to wit, three hundred dollars, with interest from the same day, in favor of Nelson against Caty Cornwell or Petty.

The lowest estimate which was put upon the value of these slaves in 1838, when the commissioner's report was made, was one thousand seven hundred and twenty dollars. They seem to have increased rapidly in value after that time until 1850, when they were valued at about five thousand dollars. What was their value in 1843 when the award was made, or in 1844, when the decree was made, does not appear, though it probably much exceeded the value in 1838. Setting down the value only at one thousand seven hundred and twenty dollars, and deducting from it six hundred dollars, which is the highest estimate made of the expense of keeping the slaves over and above their hires while they were in the hands of Nelson prior to 1838, a balance would remain of one thousand one hundred dollars,
745 which is the lowest sum with *which it is contended he was charged for the slaves. It is difficult to understand how he could have been charged even with this small sum, consistently with the small amount of the decree against him. It is not pretended that he paid anything on account of these slaves to Lydia Hoff or Nancy Brockley, as to whom the bill was dismissed. He says in his answer that in 1830 and 1833 he settled with these parties for their shares of both estates, and held their acquittances; and the fact is confirmed by the commissioner's report and the failure of these parties to assert any claim. In the same answer, filed in 1837, he affirms the continuing title of the appellee to the slaves in controversy, which is inconsistent with the idea that he had previously accounted with Lydia Hoff or Nancy Brockley, or any of the other legatees in remainder, for any part of the value of the slaves in controversy. Therefore, he could have accounted only with Kitty Cornwell, and perhaps Caty Petty, if with any of the said legatees, and with them only by means of the award and decree aforesaid. And yet the amount decreed against him is little if any more than he seems from the materials in the record to have owed, independently of any charge on account of the slaves. On

the other hand, one of the arbitrators, Mr. Tebbs, whose deposition was taken five years after the award was made, testifies that the purpose of the award was to settle the claims in dispute between the heirs of Jesse and Constance Cornwell and Nelson the administrator. "The arbitrators took into their estimate and settlement all the negroes of said decedents' estates. About these there was much difficulty. Some had been sold: Perhaps all of them. Some were claimed by one party, and the same by another. There had been one or two valuations of the negroes. I recollect negro Pru and her children had been valued, and there was much evidence taken as to
746 the *value of them. So it was, the arbitrators took the whole of the negroes into their calculations and estimates with the other property of the estate, and made their award accordingly; aiming at a final settlement of affairs between the personal representative and the distributees of said decedent." He does not say what disposition the award made of Prucy and her children; whether it left them in the hands of Nelson, as executor of Constance Cornwell, or agent of the appellee; or whether it converted them into the individual property of Nelson, and charged him in some way and to some extent with their value. Either of such dispositions would be consistent with his testimony; though the latter would have been very irregular if not illegal, and difficult to be reconciled with the amount of the decree. The deposition of the other arbitrator, F. D. Richardson, was not taken, and the inference is that he could give no information on the subject. The only other testimony in the case which can tend to show that the claim of the appellee was intended to be concluded or affected by the award, is the deposition of his mother Kitty Cornwell, who says, the arbitrators in their award, at her instance, introduced Prucy and her children, as she believes.

This evidence of the contents of the last award is altogether too vague to conclude and defeat the claim of the appellee; and I think the Circuit court was right in the opinion that "the slaves were left unaffected and undisturbed by the said decree, in the hands of Thomas Nelson the executor, who held the same until his death."

I also think the Circuit court was right in the opinion that, even if the award and decree were as contended for by the appellant, "they were produced as the consequence of an improvident submission to arbitration of the interests which the said Nelson was holding as executor of
747 Constance Cornwell *and agent of the legatee; he the said Nelson holding as executor a title in the slaves, shown to have been incontrovertible, and free from all question, in law or in equity; and which ought not, therefore, to have been submitted to arbitrators, to be decided upon according to their vague and undefined and uncontrollable notions of law and equity:" that such submission was a devastavit in the executor, for which he was answerable to the legatee, if thereby the slaves were lost to the latter. And "that as the result of the said award and consequent decree has been to leave the slaves in question in the undisturbed possession of the said Nelson, who it is contended became the entire owner absolutely of the same, the legatee is not deprived of his recourse upon them, notwithstanding the award made under such improvident and wrongful submission."

It is stated in the petition for the appeal, that this case is believed to be the first instance in which an executor, acting bona fide, has been held responsible for an award under a submission made by him. And it was argued by the counsel for the appellant, that so unreasonable a doctrine ought not to be sustained.

It would be difficult to maintain that the executor acted bona fide in this case in making the submission, if the award was in pursuance thereof, and the effect of it would be to conclude the claim of the appellee to the slaves, and invest the executor individually with the absolute ownership thereof. The circumstances under which the submission was made have been already sufficiently stated.

But is it true that an executor or administrator will be responsible for a devastavit in no case in which he acts bona fide in making the submission? In a case decided in 15 Elizabeth, and reported in 3 Leonard 53, it was held that an executor may as such submit to arbitration. But if
748 the arbitrators do not award as *much as he would be entitled to at law, it will be a devastavit for the residue; for the submission was his own act. The principle declared in that early case has been recognized in many subsequent cases, and denied in none that I have ever seen. It is stated as the settled doctrine in all the digests and abridgments of the law, and in all the elementary works on the subject. Comy. Dig. Administration, I 1, Assets, C; Viner's Abr. Executors, G a 3; 1 Bacon's Abr. 314, Arbitrament and Award, C; 1 Dana's Abr. C, 13, Art. 2; Russell on Arbitration, p. 36, 63 Law Library 84; 1 Lomax on Ex'ors 356. The doctrine was expressly admitted by two of the judges of this court in Wheatley v. Martin's adm'r, 6 Leigh 62. And in the opinion of Judge Cabell in that case, is contained a clear summary of the law in regard to the powers and responsibilities of executors and administrators in this respect. While the power of an executor or administrator to refer to arbitration, results from his power to settle all claims due to or from the estate he represents; and while the award is binding on him in his fiduciary character, and so far as relates to debtors and creditors, parties to the award, is binding on legatees and distributees in the same manner as if the settlement had been made by him without an award; yet if injury has been done to legatees and distributees by the award, it may be redressed by charging

it as a devastavit by him, on the settlement of his accounts. Id. p. 71. The burden of proving such injury would of course devolve on the party complaining of it, and every fair presumption would be made in favor of the award. This doctrine has been altered by the Code, p. 611, § 5; which, however, does not apply to this case.

The reason assigned for the doctrine in the case in Leonard, was that the submission was the executor's own act. While he has the power to submit, as a
749 *means of settlement, he is not bound to do so; and the award, therefore, before the law was altered by the Code, gave him no more protection against the consequence of paying an unjust claim than his voluntary settlement would have done. An award in pursuance of a submission, if there be no error apparent on its face, and in the absence of fraud or mistake, is conclusive. However incompetent the arbitrators may be, and however grossly they may err in their judgment of the law or fact, there can be no appeal from their decision. It may have been considered unsafe and dangerous to permit an executor or administrator to refer to the final arbitrament of such judges a controversy affecting the estate of his decedent, without holding him liable for a devastavit if any injury resulted to the estate from the award. But whether the doctrine was reasonable or not, and what were the reasons on which it was founded, are immaterial enquiries, if I am right in saying that it was well settled.

The result of its application to this case is that the appellee is entitled to recover the slaves in controversy, notwithstanding the award, if he has shown that he would have been so entitled if no such award had been made; and that he has so shown, I think sufficiently appears from what has already been said. The award and decree thereon may, therefore, be put out of the case, and the only remaining question is:

Fourthly. Whether the claim of the appellee is concluded by the act of limitations; or by acquiescence or laches on his part.

The claim is certainly not barred by the act of limitations. The executor never held the slaves adversely to the appellee, at least before the decree of 1844, and this suit was brought in 1847. Nor is it concluded by acquiescence or laches on his part. He left the state in 1828, two years before he arrived at age, and was not heard of for many years thereafter. It does
750 not appear *where he was until 1839, since which time he has resided in Georgetown, D. C. It does not appear that he was ever informed by the executor Nelson, or any other person, or had any knowledge of the pendency of Kitty Cornwell's suit, or of any of the proceedings therein. She says that at the time the suit was brought, she believed that he was dead, or had gone where she would never see or hear from him again. Her interest in regard to the slaves was adverse to his. She was interested in setting up and enforcing the award of 1829, which declared Betsy and her increase to be hers, and the slaves in controversy to be a part of her father's estate, of which she was one of the distributees. It is true that before he left the state the executor seems to have accounted with him for the horse bequeathed to him by the testatrix; and he was doubtless aware of the legacy of the slaves. But by the terms of the will the slaves were not to be delivered to him by the executor until he was of age; and if he attempted to sell them, they were to be free. Whether the latter condition was valid or not, he probably believed it to be so, and the effect was the same. They were chargeable slaves, incapable, it seems, of producing any hire; and they were in the care of one whose relation to them gave assurance that they would not be neglected. It may have been inconvenient or illegal to remove them to his place of residence. Under these circumstances, it was natural and reasonable that he should permit them to remain in the possession of the executor. His having done so from the time of his arrival at age in 1830, until the institution of his suit in 1847, a period of seventeen years, is not of itself sufficient evidence of acquiescence, or sufficient laches, to conclude his claim, and entitle the executor to the slaves in his own right. The evidence against him afforded by the lapse of time, is repelled, and not strengthened, by the sur-
751 rounding circumstances. *There is no evidence that the executor ever held, or claimed to hold, the slaves adversely, unless it can be found in the award and decree of 1843 and 1844, the effect of which has been fully considered. On the contrary, he continued to affirm that he held them as executor of Constance Cornwell, or as agent of the appellee, down to a recent period before his death.

I think there is no error in the decree, and that it ought to be affirmed.

DANIEL, J., dissented on the last ground stated in the opinion of the court. He thought the appellee was barred by his laches.

Decree affirmed.

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752 *Smith's Adm'r v. Betty & Others. Same v. Thurman & Others.

October Term, 1854, Richmond.

1. **Chancery Practice—Issue Out of Chancery—When Improper.***—In a chancery cause, if upon the state of the proofs at the time an issue is directed, the bill should be dismissed, it is error to direct it: And although the issue is found in favor of the plaintiff, the bill should, notwithstanding, be dismissed at the hearing.

*__Issue Out of Chancery—When Improper.__—It, upon the state of proofs at the time an issue is directed, the bill should be dismissed, it is error to direct it; and although the issue is found in favor of the plaintiff, the bill should notwithstanding be dismissed at the hearing. This proposition of the principal case was approved in McFarland v. Doug-

2. **Same—No Evidence to Support Bill Denied by Answer—Issue Improper.**†—When the allegations of the bill are positively denied by the answer, and the plaintiff has failed to furnish two witnesses, or one witness and corroborating circumstances, in support of the bill, it is error to direct an issue. The *onus* must be shifted and the case rendered doubtful by the conflicting evidence of the opposing parties, before an issue should be ordered.

3. **Deeds—Evidence‡—Declarations of Agent.**—Declarations of a person who has been the agent in procuring a deed for another, made either before the negotiation for the deed was commenced, or after the execution of the deed is completed, are incompetent evidence against the grantee in the deed, to show that provisions which were intended to be inserted in the deed, have been fraudulently omitted.

4. **Same—Same—Same.**—But acts and declarations of such person, done or made whilst the negotiation was pending, or the deed was in process of execution, are competent evidence against the grantee to show the fraud.

5. **Same—Same—Declarations of Grantor.**—The declarations of the grantor in a voluntary deed, made after its execution, are not competent evidence against the grantee, to show that provisions which were intended to be inserted in the deed have been fraudulently omitted.

6. **Same—Same—Same.**—Nor are the declarations of the grantor made before the execution of the deed, competent evidence against the grantee in favor of the grantor's heirs and next of kin, to show that the deed was fraudulently procured.

7. **Conveyances—Slaves.**§—A conveyance of land and slaves, upon a trust to permit the slaves to live upon the land and take the profits of the land and of their own labor to their own use, they still continuing to be slaves, is null and void, and passes nothing to the grantee or to the slaves.

The first of these cases was a suit in equity in the Circuit court of Hanover county, instituted by Betty and others suing in forma pauperis against William C. 753 *Smith in his life time, and revived against his personal representative, to recover their freedom. The bill was filed in January 1835, and set out, that William Gooch, late of the county of Hanover, the father of several of the plaintiffs, the children of Betty, being an unmarried man, and being anxious to secure to the plaintiffs, to whom he stood in the relation of a master, but particularly to Betty and her children, the full enjoyment of that liberty which he had always permitted, and intended them always to enjoy, but being an extremely illiterate and uninformed man, applied to one William C. Smith to counsel and advise him as to the best mode of effecting this wish, and the further design which he entertained, of devoting the whole of his property to the plaintiffs; and it was determined to vest the whole legal title to the persons and property aforesaid, in the said Smith, for the purposes aforesaid. That in pursuance of this purpose a deed was executed. That this was the sole consideration and purpose of the deed, though by the fraud of Smith this purpose is omitted to be expressed in the deed. That this fraud was perpetrated, as they believe, by falsely reading the deed to Gooch, who therefore did not know its contents and real character, but thought he had only made a will.

They further state that when the deed was first executed, Smith admitted, as he had since done, the true purpose for which it was made; but a short time afterwards, Gooch being informed that Smith would claim the subject of conveyance as his own, he executed another paper, which they exhibited, in which he declares the real intent and purpose of the conveyance aforesaid, which he calls his will, and directs

lass, 11 W. Va. 645; Vangilder v. Hoffman, 22 W. Va. 8. See, in accord, Wise v. Lamb, 9 Gratt. 294; Jarrett v. Jarrett, 11 W. Va. 585. For other cases in point, see monographic *note* on "Issue Out of Chancery" appended to Lavell v. Gold, 25 Gratt. 473.

Same—Issue Improper—Appellate Practice.—In Jarrett v. Jarrett, 11 W. Va. 627, it is said: "It is the duty of an appellate court, in reviewing a decree founded on the verdict of a jury, rendered on an issue out of chancery, to look to the state of the proofs at the time the issue was ordered; and if satisfied that the chancellor had improperly exercised his discretion in directing the issue, to render a decree notwithstanding the verdict, according to the merits, as disclosed by the proofs, on the hearing when the issue was ordered. *Smith's Adm'r v. Betty et als., 11 Gratt. 760*, and cases there cited." See also, the principal case cited in Fant v. Miller, 17 Gratt. 205; Mahnke v. Neale, 23 W. Va. 82. See also, Vangilder v. Hoffman, 22 W. Va. 8; Pryor v. Adams, 1 Call 382; Wise v. Lamb, 9 Gratt. 294. See also, monographic *note* on "Issue Out of Chancery" appended to Lavell v. Gold, 25 Gratt. 473.

Same—Questions of Sound Judicial Discretion.—On this subject, the principal case was cited in Crebs v. Jones, 79 Va. 386; *foot-note* to Hord v. Colbert, 28 Gratt. 49. See also, *foot-note* to Mettert v. Hagan, 18 Gratt. 231; *foot-note* to Beverley v. Walden, 20 Gratt. 147. See generally, monographic *note* on "Issue Out of Chancery" appended to Lavell v. Gold, 25 Gratt. 473.

†**Same—No Evidence to Support Bill Denied by Answer—Issue Improper.**—The proposition laid down in the second headnote was approved in Beverley v. Walden, 20 Gratt. 154, citing the principal case; Pryor v. Adams, 1 Call 382; Wise v. Lamb, 9 Gratt. 294; Grigsby v. Weaver, 5 Leigh 197. See also, *foot-note* to Beverley v. Walden, 20 Gratt. 147, and cases there cited. For further information on this subject, see monographic *note* on "Answers, in Equity Pleading" appended to Tate v. Vance, 27 Gratt. 571; monographic *note* on "Issue Out of Chancery" appended to Lavell v. Gold, 25 Gratt. 473.

‡**Assignments—Evidence—Subsequent Declarations of Assignor.**—The declarations of an assignor after assignment are inadmissible in evidence against his assignee. Daily v. Warren, 80 Va. 519; Brock v. Brock, 92 Va. 175, 23 S. E. Rep. 224, both citing the principal case, and Barbour v. Duncanson, 77 Va. 76-83.

§**Slaves—Conferring Civil Capacities on.**—See principal case cited in Bailey v. Poindexter, 14 Gratt. 193; Dunlop v. Harrison, 14 Gratt. 259; Williamson v. Coalter, 14 Gratt. 397; Wood v. Ward, 30 Fed. Cas. 482. See also, *foot-note* to Bailey v. Poindexter, 14 Gratt. 132.

that all control over the subject shall be taken from Smith, if he attempts to hire out or sell any of his negroes, or to sell his land.

They further state that Gooch died
754 in the spring of *the year 1832, and that Smith permitted the plaintiffs to remain in possession of the land and other property left by Gooch, and employed Jesse Barker to superintend and manage the whole, until recently, when he had set up a claim to the plaintiffs and the property, had sold that which was perishable, and had rented out the land; and had attempted to sell some of the plaintiffs; and threatened to sell the land and the plaintiffs, and would without doubt do so unless restrained by an order of the court.

The prayer of the bill was that Smith might be enjoined from selling or hiring them out, or otherwise molesting them, until the matter could be heard; and that they might be protected in the enjoyment of the land until their rights were ascertained, and they were fully emancipated.

The deed from Gooch to Smith bears date the 21st of April 1831, and for the love and affection he has for Smith, and for divers acts of kindness and favor done by the said William C. Smith, and for the further consideration of one dollar, he conveys to him, with general warranty, his land, his slaves, and all his property of every description; but with a condition that Gooch shall keep possession, and have free use and enjoyment of all the property named in the deed, for his life; and at his death Smith shall have the land, slaves and their future increase, and all other property of every description, both real and personal, which Gooch may have or possess at the time of his death.

On this deed was endorsed the certificate of the deputy clerk of the County court of Hanover, that it was acknowledged in his office by Gooch on the day of its date.

The other paper exhibited with the bill was executed by Gooch, and bears date the 10th of November 1831. In it he says, I, William Gooch, being willing that William Smith should hold all my people
755 *and plantation, according to my will, which is recorded in Hanover office; but if he should attempt to hire out, sell or convey any of said negroes, or sell my land that I have for my said negroes, I wish it to be taken from him, and put in the hands of Jesse Barker immediately; that it never was my intention for any of my negroes to be sold or hired.

William C. Smith answered the bill. Referring to the deed of April 21st, 1831, he says, So far as the bill seeks to charge him with any fraudulent or unfair transaction either in the procurement or execution of the said deed, or in obtaining the property thereby conveyed, he denies the statement and charges of the bill, and avers that they are utterly false. That he was particularly acquainted with Gooch, and had rendered him many acts of kindness. Amongst other things done by him in that way, he permitted Gooch to retain in his service a negro man slave named Reuben for the space of five years; and that slave having fallen into bad health, at the request of Gooch, he took said slave home, and permitted Gooch to have in his place another slave named Aaron, who was retained by him until his death; a period of four years. That Gooch had the services of these slaves for nine years, and never paid to the defendant a cent for them. Gooch had also the use of a mare of the defendant for some length of time. That these facts might and probably did operate on Gooch in making the disposition of his property in said deed.

He further stated that the deed had been acknowledged by Gooch before the clerk in his office. That the defendant was not present either at the execution or acknowledgment of the deed, and had no participation in either; and that on the 25th of January 1830 Gooch had executed another deed in all its provisions like that exhibited with the bill. That this deed was also executed in the absence and without
756 *the agency of the defendant, was attested by three witnesses, two of whom were yet living; and was found by the defendant amongst the papers of his father Charles Smith, one of the attesting witnesses.

He denied that Jesse Barker had held the property for the defendant up to the time of filing the bill; he was employed to do some work upon the farm, but never had permanent occupancy of it. He questions the right of the plaintiffs to impeach the provisions of the deed, as whether valid or not, they can have no right to freedom under or against it.

The deed of the 25th of January 1830 is as to its provisions a duplicate of that of February 21st, 1831; and it is attested by Charles Smith, Joseph Ladd and William L. Dennett.

The second of these suits was instituted in March 1837, in the same court, by Littleberry Thurman and others, heirs and next of kin of William Gooch, against William C. Smith, for the purpose of setting aside the deed of April 21st, 1831, and recovering the property. They charge that the deed was fraudulently procured by misrepresenting its contents, and stating its purport to be altogether different from what it really was.

Smith in his answer averred that the charge in the bill was altogether groundless and untrue. He says that he had nothing to do with the drawing and preparing the deed, and was not present when it was prepared and executed, or when it was placed on record. That Gooch was much attached to him, and had for many years before his death declared that he intended to give him all his property at his death. That he had determined that his relations, who had neglected him, should have none of it; and he voluntarily employed a highly respectable gentleman to prepare said deed for him. That there was no consideration moving Gooch to execute the deed but

757 *his attachment to and friendship for the defendant for his many acts of friendship rendered to said Gooch for a series of years, unless he considered that the various sums of money lent him, amounting to six or seven hundred dollars, was a consideration in part.

On the 17th of April 1840 the court made a decree in both causes, that an issue be made up and tried by a jury at the bar of the court, to ascertain and determine: First. Whether the deed of the 21st of April 1831, was acknowledged by William Gooch with a full knowledge of its contents and legal effect; and with intent to convey and pass to William C. Smith the negro slaves in the said deed mentioned, as his absolute property. Secondly. If the said deed was so executed and acknowledged by the said William Gooch, whether it was obtained by William C. Smith, or by any one acting for and on his behalf, by fraud and circumvention. Third. If the said deed was not executed and acknowledged by the said Gooch with intention to convey and pass the negro slaves therein mentioned, to the said William C. Smith, as his own absolute property, whether it was executed and acknowledged by the said Gooch as a deed to emancipate and set free the said negro slaves, and with intent that it should be a deed for that purpose.

At the time the issue was directed, the evidence in the record showed that the deed of April 21st, 1831, was written by Charles Smith, the father of William C. Smith, and that Charles Smith went with Gooch to the clerk's office when it was acknowledged there by Gooch. That Gooch was very ignorant and illiterate, unable to write. And that Charles Smith had borrowed money from Gooch, and owed him five hundred and fifty dollars, for which he (Smith) had executed to Gooch his bond. A witness, George Turner, testified that he saw Charles Smith and Gooch, and Smith said he was going to carry a conveyance of
758 Gooch's property *and that he (Smith) was to stand master for the negroes, provided he should be the longest liver. And he further stated that Gooch was so drunk the witness could not understand anything that he said. Another witness, Wat. H. Tyler, stated that he met Charles Smith and Gooch on their return from the court house. That Gooch had been drinking; and witness was told by Smith that Gooch had fallen out of the gig. That they both said that Gooch had been to the office, and Smith said he had been with him; and Gooch said he had fixed his business. These witnesses stated that before the execution of the deed they had heard Gooch say he never meant to make his people slaves; but meant to get a man to act for them; and that they were to remain on the place. Tyler says he named William C. Smith, but Turner says he never heard him mention William C. Smith as such agent, but Gooch often told him that his cousin Charles Smith was to act. Another witness, Kally Tucker, stated that on the night before Gooch died he told the witness that everything was given to William C. Smith, but he was not to carry the negroes off the place. There were other witnesses, who testified as to Gooch's declarations that he did not intend to make his negroes slaves, and that he intended to get some man to stand master for them. Some of these slaves, it was proved, he stated were his own children; and Turner stated that Gooch came to him and told him that he had understood that the conveyance he had made to Charles Smith was made to William C. Smith, and that he wanted if that was so, to make a conveyance to Jesse Barker to keep his people on the place, and not make slaves of them: And that at the request of Gooch, witness drew an instrument of writing to that effect.

There was also evidence as to the declarations of Charles Smith. Charles
759 Barker testified that when *Charles and William C. Smith were taking an inventory of the property after Gooch's death, Charles told the plaintiff Betty to bring all the things; they were hers. Another witness stated that Charles Smith told him that he put a negro named Reuben into the possession of Gooch for the interest of five hundred dollars, which Smith had borrowed of Gooch, and that he being in bad health, he had taken him home and put Aaron in his place. And there was evidence of similar statements by Gooch. Nathaniel White testified that he proposed to buy Lucy, one of the slaves, from Charles Smith, and he replied that William C. Smith could not and should not sell her.

The declarations of Gooch and Charles Smith, made before and after the execution of the deed of April 21st, 1831, and also the paper filed with the bill, were excepted to by Smith as incompetent evidence. The other evidence in the cause is stated by Judge Daniel in his opinion.

The issues directed were tried in October 1848. The evidence excepted to as before stated was offered in evidence by the plaintiffs, and though objected to by the defendant, was admitted by the court; and the defendant excepted. The jury found: First. That the deed from Gooch to William C. Smith, dated 21st April 1831, was executed without a knowledge of its contents and legal effect, and that he did not intend to convey to said Smith an absolute title to the slaves mentioned therein. Secondly. That the said deed was procured for said Smith by his father Charles Smith, by fraud. Thirdly. That the said Gooch intended to emancipate the said slaves by the said deed.

There was a motion to the court for a new trial, which was overruled; the court being of opinion that it had no power, sitting as a court of law, to grant such a new trial. The defendant thereupon moved the court to certify to the court directing the is-
760 sues in *these causes, along with the verdict of the jury, the facts proved upon the trial, and also the bill of exceptions filed by the defendant; but the court

being of opinion that it was not competent to the court to make any such certificate, overruled the motion, and certified the verdict and bill of exceptions. There was then a motion on the equity side of the court, to set aside the verdict and award a new trial on the issues directed; which was overruled. And in June 1852, the court made a decree emancipating the plaintiffs in the first suit, and their descendants born since the institution of the suit; and that the deed of April 21st, 1831, be set aside and canceled, as having been obtained fraudulently by Charles Smith. The defendant thereupon applied to this court for an appeal, which was allowed.

Griswold and R. T. Daniel, for Smith's adm'r.

Young and Lyons, for the paupers.

Crump, for the Thurmans.

DANIEL, J. In the case of Pryor v. Adams, 1 Call 382, this court held, that it was its duty, in reviewing a decree founded on the verdict of a jury, rendered on an issue out of chancery, to look to the state of the proofs existing at the time when the issue was ordered; and, if satisfied that the chancellor had improperly exercised his discretion in directing the issue, to render a decree, notwithstanding the verdict, according to the merits, as disclosed by the proofs, on the hearing when the issue was ordered. The rule has been followed in several cases since, and in the recent case of Wise v. Lamb, 9 Gratt. 294, its propriety was fully recognized and vindicated in the opnion of the court delivered by Judge Lee: And the elaborate review there made of the precedents ascertaining the principles that should guide the discretion of a chan-
761 cellor, in determining *on the propriety of ordering an issue, precludes the necessity of our entering on such a task here.

Upon the authority of the two cases just mentioned, and those cited in the opinion delivered in the latter, it may be considered as well settled, that in no case ought an issue to be ordered merely to enable a party to obtain evidence to make out his case; that when the allegations of the bill are positively denied by the answer, and the plaintiff has failed to furnish two witnesses, or one witness and strong corroborating circumstances in support of the bill, it is error in the chancellor to order an issue; that no issue should be ordered until the plaintiff has shown enough to throw the burden of the proof on the defendant; that until the onus is shifted and the case rendered doubtful by the conflicting evidence of the opposing parties, the defendant cannot be deprived, by an order for an issue, of his right to a decision by the court on the case as made by the pleadings and proofs.

To apply these rules to the cases under consideration, is, in the view which I have taken of the state of the proofs when the issues were ordered, to decide their fate.

Much of the testimony offered in support of the bills is of a character to forbid its being followed as a guide to judicial action in any case without the strictest scrutiny, consisting as it does mainly of supposed admissions and declarations, deposed to by ignorant and illiterate witnesses, many years after such admissions and declarations are said to have been made. And a portion of it is of a character to be excluded altogether, on the score of incompetency.

I cannot perceive on what ground declarations of Charles Smith, made long before the execution of the deed of the 21st April 1831, and before there was any treaty or negotiation in relation to the subject matter conveyed, can be received to
762 impeach the deed, or to *affect injuriously, in any manner, the rights of William C. Smith, the grantee. Nor can I see why William C. Smith should be held responsible for any declarations of Charles Smith, made after the deed was executed and recorded, and the whole transaction in relation thereto perfected and ended.

In his answer to the bill in the first of these cases, William C. Smith denies expressly that he was guilty of any fraud in the procurement or execution of the deed, or in obtaining the property thereby conveyed; and, in his answer to the bill in the second case, after again explicitly denying all fraud, he avers that he had nothing to do with the drawing and preparing of the deed, and was not present when it was prepared and executed, or when it was placed on record. He further states that he is informed and expects to prove that Gooch the grantor was much attached to him, and had for many years before his death declared that he intended to give him all his property at his death; that he had determined that his relations, who had neglected him, should have none of it, and that he voluntarily employed a highly respectable gentleman to prepare the deed for him; and that as far as he (the respondent) knew, there was no other consideration moving Gooch to execute the deed but his attachment to and friendship for him (the respondent) for his many acts of friendship rendered said Gooch for a series of years, conducive to his comfort and convenience; unless he considered that various sums of money lent him, amounting to six or seven hundred dollars, was a consideration in part.

And there is an entire absence of any proof to show that William C. Smith had anything to do with the procuring, executing or recording of the deed. If any improper inducement was held out, or false representation made, or art, device or fraud practiced, by Charles Smith in the
763 procurement or execution of the *deed, there is nothing to show that William C. participated in it or had any knowledge of it. No concert, agreement or understanding in relation to the transaction between the two Smiths is established. Charles is no party to the deed, and William C. claims no title through him. It is true, there is proof going to show that Charles advised and aided in the execution of the

deed, and William C. is the grantee, and has accepted it and claimed under it.

In this state of facts, anything said or done by Charles Smith during the transaction, and in reference to it, may be properly treated as part of it; and William C. Smith is bound by it. It may be very properly said, that claiming the benefit of the transaction, he must take it as a whole. But there is no relation between the parties which justifies us in holding him bound by any acts or declarations of Charles, which were not strictly parts of the res gestæ. Any act done by Charles Smith, before the transaction commenced, or after it was finished, tending to impeach, or cast suspicion on, its fairness, cannot be regarded otherwise than as res inter alios acta. And proof of any declarations made by him of a like tendency, at any time, except pending the transaction, is but hearsay.

Much of the testimony in relation to the declarations of Gooch the grantor, is liable to a like objection. His declarations, made after the execution of the deed, fall within the influence of the well established rule, that no admissions or declarations, in whatever form, of a party to a sale or transfer, made after such sale or transfer, and going to destroy and take away the vested rights of another, can ex post facto work that consequence, or be received as evidence against the vendee or assignee. 5 John. R. 426; Petit v. Jennings, 2 Rob. R. 681.

Whether his declarations made before the commencement of the transaction were
764 properly received *in the first of these suits, I have not thought it necessary to examine with much particularity, for reasons which will hereafter appear: Though I am strongly inclined to the opinion that they were not. Be this as it may, I think it clear that such declarations are not evidence for the plaintiffs in the second suit. To receive them as evidence to vacate the deed, and to cast the property on the heirs and next of kin, would be equivalent to permitting a party to testify in his own behalf.

These rules necessarily exclude from the second case the whole of the depositions of Kalley Tucker, Anderson Tucker and George W. Barker, and a large portion of the several depositions of William E. Tyler, George Turner and Nathaniel White. The paper B ought also, I think, to be excluded from both cases, being nothing more than a subsequent written declaration of Gooch, by which he endeavors to destroy the legal force and effect of his deed executed some six months before.

Any further designation of the portions of the evidence in behalf of the paupers, which ought to be treated as incompetent, is, in the view which I have taken of it, unnecessary. For looking upon the testimony in support of their claim as a whole, it appears to me vague, conflicting and inconclusive, and as tending (so far as it points to one result rather than another) to make out a case which could be of no benefit to them. So far as it goes to establish any purpose on the part of Gooch, inconsistent with the deed, it tends to prove, not that he designed to confer on them a state of absolute freedom, but that he designed to leave them in a qualified condition intermediate between absolute slavery on the one hand and absolute freedom on the other; in which, whilst they might enjoy many of the rights and privileges of freed men, the relation of master and slave between
765 Smith and *them might be left subsisting, so far at least as to shield them from the penalties which would otherwise attach to their residence in the state as free negroes.

Such a purpose is in conflict with the policy of our laws, and this court has uniformly refused to recognize it, no matter how solemnly expressed, or clearly proved, as conferring any rights or benefits on the slave. Rucker's adm'r v. Gilbert, 3 Leigh 8; Wynn v. Carrell, 2 Gratt. 227.

In the case last cited it was, however, also declared, that when by will slaves are bequeathed to a legatee to be held by him in such a qualified or intermediate condition, that the whole provision is void, and that the slaves (if there is no other disposition of them in the will,) stand as if the testator had died intestate in respect to them.

It becomes, therefore, important to look further into the state of the proofs in the second suit, and to see whether, as between the parties thereto, there was sufficient testimony to justify the chancellor in ordering an issue.

Throwing out of view the testimony which I have treated as incompetent, there remains proof to be found in the depositions of White and others, that Charles Smith borrowed of Gooch, some years before his death, money at different times, amounting in all probably to five hundred and fifty dollars, and that about the date of the last loan a negro man Reuben was placed by Charles Smith in the possession of Gooch, where he remained for some years, when being taken sick, his place was supplied by another negro man Aaron, who remained in the service of Gooch probably till his death. This testimony was no doubt offered, in connection with certain declarations of Gooch, (to the effect that these negroes were placed with him by Charles Smith, to discharge, by their services, the interest on the money loaned,) for the
766 *purpose of falsifying that portion of the answer of William C. Smith to the bill of the paupers, in which he states that he had permitted these slaves to remain in the possession of Gooch without compensation; and suggests this act of kindness on his part towards Gooch, as one of the motives which probably induced the latter to make the deed in his favor. It is hardly necessary to say that this testimony, apart from the excluded declarations, whilst tending to establish the conclusions sought to be drawn from it, is yet wholly insufficient for the purpose. The fact that Charles Smith borrowed money of Gooch, and placed

these slaves in his possession, is not inconsistent with the idea that they may have belonged to William C. and that he had, as an act of friendship, permitted Gooch to enjoy their services without compensation.

There yet also remains in the cause the deposition of Foster Higgins, who states that he was at the house of Gooch, and was called on by him and Charles Smith to witness a will, as they said, the day before they went to Hanover clerk's office to record the same; that Smith and Gooch said the negroes were to be kept on the land, and that Smith was to act as master for them. And that Gooch, some time after his return from the office, said that he had acknowledged the will that he (the witness) had witnessed.

There is also the deposition of Jesse Barker, who states that William C. Smith employed him to act as master for the slaves, stating that the law required some person to do so; that he (Smith) lived too far off to attend to them; that he did not wish to be pestered with them; and that the slaves were to support themselves by their own labor.

There is also the testimony of George Turner, who states that he met Gooch and Charles Smith, as they were going to Hanover court-house, and that Smith said they were going to record a conveyance
767 of Gooch's *property, and that he (Smith) was to stand master for the slaves, provided he should be the longest liver: And he also states that Gooch was then very drunk.

Another witness, W. E. Tyler, states that he met Gooch and Smith as they were returning from the court-house; that he thought Gooch had been drinking, but did not think him drunk.

This, together with the fact, which is very fully established, that Gooch was an ignorant and illiterate man, constitutes (with the exception of the testimony excluded) substantially the evidence in behalf of the plaintiffs in the second cause.

It must be conceded that it does tend to excite the suspicion that all was not fair; that Gooch intended to leave to his negroes his land after his death; and to allow them to live upon it and enjoy the fruits of their own labor, under the supervision of Smith, who should stand as master for them, so as to prevent their being subjected to the operation of the laws with respect to the residence in the state, of free negroes; that he designed to express and effectuate his intentions by means of a will; and that Smith, whose aid and advice he sought, fraudulently palmed upon him the deed under consideration, by falsely representing and reading it to him as a will expressing his intentions.

But when we come to examine the proofs on the other side: The fact that the deed was regularly acknowledged by the grantor before the clerk of the county, whose position, in the absence of proof to the contrary, is a guaranty that he was an intelligent and honest man, who would not have taken the acknowledgment, until first satisfied that Gooch was in a condition to understand what he was doing; that Gooch had, the year before, executed a deed containing exactly the same provisions, in the presence of witnesses, who attested it by his request; one of whom states that the grantor
768 told him that the deed *was as he wanted it; that after consulting counsel as to whether the slaves, if emancipated, could remain in the state, and being informed by him that they could not, the grantor had declared that the slaves would prefer being servants to any good man, to being sent off to a free country; that he had declared that the plaintiffs should never have any of his property, and frequently said that he intended to give it to the grantee Smith; if any doubts or impressions, unfavorable to the fairness of the transaction, still remain, they ought, I think, to be treated as falling far short of that judicial doubt, as to the preponderance of conflicting proofs, which alone could justify a chancellor in calling in the aid of a jury.

Several grounds for reversing the decrees, taken here by the counsel of Smith, which might otherwise have been well worthy of consideration, have been passed over, in as much as the result of the views already presented is to terminate the controversy in his favor.

I see nothing in the character of the claim or nature of the controversy, in either case, calling for the application of rules in respect to the ordering of the issues different from those prevailing in other chancery causes: And I think that the decree should be reversed and the causes remanded, with instructions to the Circuit court, after taking the proper steps for ascertaining and collecting in the fund arising from the rents and hires, to decree its payment to Smith's representatives and heirs or devisees, according to their respective rights, and to dismiss both bills.

LEE and SAMUELS, Js., concurred in the opinion of Daniel, J.

MONCURE, J., concurred in so much of the opinion as reverses the decree in favor of the paupers, and dismisses their bill, on the ground that they were not in-
769 tended *to be free. But he thought that the deed was either obtained by fraud or on a secret trust in favor of the slaves: And there was sufficient evidence to authorize an issue in the second suit.

ALLEN, P., concurred with Judge Moncure. As to the heirs and next of kin, it was proper to direct an issue upon slight proof in analogy to the proceedings in the case of a will. But in fact the proof was strong.

The decree was as follows:

The court is of opinion, that the testimony offered to impeach the deed of the 21st day of April 1831, was insufficient for the purpose; and that the said deed should have been treated by the court below as a good and bona fide conveyance, investing the grantee William C. Smith, with a full

and absolute title in and to the land, slaves and other property in said deed mentioned.

And the court is further of opinion, that the decree of the 17th day of April 1840, directing certain issues therein mentioned, to be made up and tried, is erroneous; and that the chancellor, instead thereof, ought to have rendered a decree sustaining the said deeds and that after collecting in the fund arising from the rents and hires, and ordering the same to be paid to W. C. Smith, he should have proceeded to dismiss the bills in each case; the bill of the paupers without costs, and the bill of L. Thurman & als. at the costs of said last mentioned plaintiffs.

And the court is also of opinion, that the Circuit court erred in its decree of the 22nd of June 1852; and that instead of rendering such decree, the said court ought still, and notwithstanding the verdict on the issues, to have observed the course above indicated as proper for the chancellor
770 when he made his decree *of the 17th April 1840. The court is also of opinion that the order of the 7th of October 1843, is erroneous. Said decrees in each case reversed; those in behalf of the paupers, without costs. Those in the second case, with costs to the representative of W. C. Smith, as the party substantially prevailing.

And the causes are remanded, with instructions to the Circuit court to take proper steps for calling in the fund arising from the rents of the land and the hires of the negroes; and to make a decree, directing the payment of so much thereof as has accrued from the hires, to W. C. Smith's representative, after first deducting therefrom the expenses, if any, incurred in the maintenance of any of said paupers pending this suit; and apportioning so much thereof as has accrued from the rents, among the representatives and the heirs or devisees of said Smith, according to their respective rights. And then to dismiss both bills; the bill of the paupers without costs, and the bill of Thurman, &c., with costs to Smith's representative.

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771 *Cheshire v. Purcell.

October Term, 1854, Richmond.

1. **Wills—Rule of Construction.***—In construing a provision in a will, the whole instrument is to be looked to, to ascertain the intention of the testator.

2. **Same—Construction—Case at Bar.**—Testator devises the whole residue of his real and personal estate to B and L, in trust, that his niece Ann shall have the whole profits during her life, for the support of herself and her son J. At her death the trust to cease, and the estate to go to J and his heirs, if he survived his mother; if he died before her, to his children, if he left any. If J die before his mother, without children, and she have other children and die, they to take the same estate which J would have taken if he had survived her. But if Ann and J die without children to inherit the estate, then the estate to go to L and his heirs. Testator authorizes Ann to sell the land and slaves, if necessary for her comfort, with approbation of B and L, and purchase other property, which is to be in the same situation, and to descend in the same way as that left to Ann and her son, in the event of their death. HELD: Upon J's surviving his mother, he took the absolute fee; and there is no further limitation of the estate in that event.

This was a writ of forcible entry and detainer, brought in the County court of Prince William, and removed to the Circuit court of the same county, by James Purcell against George W. Cheshire. Both parties derived their title from the will of Francis Cannon. By his will, after giving certain slaves to two of his nephews, and emancipating two other slaves, the testator says: "All the residue of my estate of every description, consisting of land, negroes, stock, &c., &c., I leave to my nephews Barnaby Cannon and Luke Cannon, junior: In trust, nevertheless, for the following uses, interests and purposes, viz: that my niece Ann Sowden shall have the entire use and the profits of the same during her natural life, for the maintenance and support
772 *of herself and her son John Sowden. At the death of the said Ann, it is my will that the said trust shall expire, and that the estate here left in trust shall go to the said John Sowden and his heirs forever, should he survive his mother; or if he should die before her, then to his children, if he should leave any. If the said John Sowden shall depart this life before his mother, and should have no child, and the said Ann Sowden should have other children and die, it is my desire that they should take and enjoy the same estate which her son John would have taken provided he had survived his mother. But if the said Ann Sowden and her son John shall both depart this life, without leaving children to inherit the said estate, in that case it is my will that at the death of the said Ann Sowden and her son John, the estate here left in trust shall go to my nephew Luke Cannon, junior, and his heirs forever. As in leaving a portion of my estate to my niece Ann Sowden for her life, I had in view her ease and comfort, I think proper to stipulate,

*Wills—Rule of Construction.—In M'Camant v. Nuckolls, 85 Va. 337, 12 S. E. Rep. 160, it is said: "The cardinal rule for the interpretation of wills is, to collect the intention of the testator from the whole will, taken together as a consistent whole formed of all its parts; and, if such intention be lawful, full effect must be given to it. Intention is the life and soul of a will, and the great point to be ascertained; when it is clear, and violates no rule of law, it must govern with absolute sway. Wootton v. Redd's Ex'or, 12 Gratt. 196; Boisseaus v. Aldridges, 5 Leigh 233-243; Lucas v. Duffield, 6 Gratt. 456; Parker v. Wasley's Ex'or, 9 *Id.* 477; *Cheshire v. Purcell, 11 Id. 771;* Wyatt v. Sadler's Heirs, 1 Munf. 537; Rushton's Ex'ors v. Rushton, 2 Dall. 244; Finley v. King's Lessee, 3 Peters, 377; Smith v. Bell, 6 Peters, 68-75; Land v. Otley, 4 Rand. 213; Reno's Executors v. Davis, 4 H. & M. 283; Boothe v. Blundell, Vesey, Jr. 521."

that in the event of any of the negroes left her becoming refractory and disobedient, or the land so unproductive as to make it either necessary or desirable to her to sell or exchange them for other property of the same kind, I hereby authorize her to do so, with the consent and approbation of my trustees, or the survivor of them, hereinbefore named; recommending it to her, however, to exercise this power cautiously and with a sound discretion. And it is furthermore my will and intention, that the property so exchanged for, or purchased by the said Ann Sowden and my trustees aforesaid, shall be considered precisely in the same situation and subject to the same course of descent with that which I here leave to the said Ann Sowden and her son John Sowden, in the event of their death."

Ann Sowden died leaving no other
773 children but John *Sowden; and he afterwards died leaving no child, and never having had any. Luke Cannon, junior, died after the testator and before the institution of this suit, leaving heirs. Purcell claims under a conveyance from John Sowden; Cheshire claims under a lease from the heirs of Luke Cannon, junior. And it was agreed that Purcell was in possession and that Cheshire forcibly entered upon and ousted him.

The case was submitted to the court below, upon the facts agreed; and that court gave a judgment in favor of Purcell. Whereupon Cheshire applied to this court for a supersedeas to the judgment, which was awarded.

Patton, for the appellant.
Morson and Williams, for the appellee.

ALLEN, P. The decision of this cause depends upon the construction of the will of Francis Cannon deceased, disposing of the property in controversy. The intention of the testator must be gathered from the face of the will itself: In the enquiry we can derive but little aid from adjudged cases. In Shermer v. Shermer's ex'ors, 1 Wash. 266, Pendleton, president, quotes with approbation the saying of a judge, "That in disputes upon wills, cases seldom elucidate the subject, which depending on the intention of the testator to be collected from the will and from the relative situation of the parties, ought to be decided upon the state and circumstances of each case." And Judge Pendleton remarks, that "he had generally observed that adjudged cases have more frequently been produced to disappoint than to illustrate the intention."

In the case under consideration, looking at the different clauses under which the parties respectively claim; and considering each clause a part and uninfluenced
774 *by the other clause and the residue of the will, it is apparent that under the second clause standing alone, John Sowden, if he survived his mother, would have taken the absolute estate. Whilst the clause, under which the plaintiff in error claims, providing for the contingency of the death of Ann Sowden and her son John, without leaving children to inherit the estate, and in that case giving the estate over at their death to his nephew Luke Cannon, junior, and his heirs, would, if standing alone, have been a good executory limitation of the fee to Luke Cannon, junior, in derogation of, or substitution for, the preceding estate in fee. But the intention of the testator is not to be collected from any isolated clause, but from the whole will, so as to ascertain in the event which has happened, whether it was provided for; and what disposition in view thereof the testator contemplated. The relative situation of the parties and the state and circumstances of the case, appear upon the face of the will only. From that it is evident that his niece Ann Sowden and her son John were the leading objects of the testator's bounty. It does not appear that she then had any other children. After some specific legacies to his two nephews, and a provision emancipating some slaves, he bequeathed the residue of his estate to trustees in trust, that his niece should have the entire use and profits of the same during her natural life, for the maintenance of herself and her son John. Having thus secured a support for his niece, and protected the property from waste by the interposition of trustees during her life time, in the following clause he directs that at her death the trust should expire, and the property left in trust should go to John Sowden and his heirs forever, should he survive his mother. But looking to the possibility of his dying before his mother, leaving children; and intending to
775 secure a fee simple estate *to John and his children, if John survived, or left any child capable of taking at the death of the mother, he in the next place provides, that if John should die before her, the estate should go to his children, if he should leave any. These clauses show an intention to provide for John and his children after the trust was satisfied; that he looked alone to the death of his niece as the time when the whole estate was to pass to some one or more of the designated beneficiaries; that John, in the event which has happened, was the first beneficiary; and that after the estate once vested in him, there was no intention to make any limitation over, or to tie up the property in his hands. Otherwise, although he might have survived his mother and had children, yet as he might have outlived them, he could not have exercised full dominion over the property. This intention more clearly appears from the next provision of the will. Having fully provided for the niece and her son during her life time, for the son if he survived her, giving him the whole estate, for his children, if he died before her; giving them in that event the whole estate, although one degree farther removed from him; he in the next place looked to and provided for another contingency; that was the death of John before his mother, leaving no child. In that event, he directs the estate to go to any other children of said

Ann Sowden at her death, who should take and enjoy the same estate which her son John would have taken provided he had survived his mother. The devise to the other children of Ann is upon the contingency of John's dying before his mother, leaving no child. He makes no devise over to these other children of Ann, if she should have any, provided John survived his mother, and then died leaving no child; because he had before given the whole estate to John if he survived, and did not look to the contingency of John's dy-
776 ing without leaving a *child after the estate had vested in him on his mother's death.

It is much more reasonable to suppose that if the testator had ever looked beyond the period of the death of his niece, as the time for the complete vesting of the whole estate, he would have made a provision in favor of any other of her children in event of John's surviving and then dying without leaving a child, than in favor of another nephew. This clause furthermore directs that these other children of Ann should take and enjoy the same estate that John would have taken if he had survived his mother. They must have taken the fee absolutely, for it is not pretended that the will contains any limitation over after their deaths. Yet this estate, so to be vested in them on the event designated, is by the testator described as the same estate which John was to take if he survived.

After these various dispositions in favor of his niece and her son John, his and her other children, if any, the testator proceeds to provide for another contingency which he anticipated; that was the possibility of his niece outliving her son John, and neither of them leaving any child or children surviving her, so that there would be no descendant of said Ann in being at the time of her death, to inherit the estate. He therefore provides that if the said Ann and her son John shall both depart this life without leaving children to inherit the estate; in that case, at the death of the said Ann and her son John, the estate is devised to his nephew Luke Cannon, junior.

The context I think shows clearly, that the testator looked alone to the period of Ann's death as the period when the trust should expire and the whole estate pass absolutely. By express words to John if he survived his mother, or to his children, if he died before her, leaving children, or to her other children, if any, if he
777 *died before her, leaving no children. There is no limitation over after the estate should have vested in John's children on one contingency, or the other children of Ann on another contingency.

It would be a forced construction to suppose that the testator intended to make a limitation over in favor of the last devisee, which he had omitted to make in favor of the immediate descendants of Ann Sowden. The phrase is elliptical. When he speaks of the said Ann and her son John both departing this life without leaving children, he meant to refer to preceding clauses, which had provided for such an event, and is not to be understood as referring to the death of John at any time after his mother's death, leaving no children. The clause, to effectuate the intention and make the will consistent with itself, should be read as if he had said, "But if the said Ann and her son John should both depart this life as aforesaid, without leaving children as aforesaid to inherit the estate."

It seems to me that the testator intended, in the event which has happened, of John's surviving his mother, that the whole estate should vest in him absolutely, and the limitation over in favor of Luke Cannon could never thereafter take effect.

I think the judgment should be affirmed.

DANIEL and MONCURE, Js., concurred in the opinion of Allen, J.

LEE and SAMUELS, Js., dissented.

Judgment affirmed.

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778 *Dance & als. v. Seaman & als.

October Term, 1854, Richmond.

Assignments to Secure Creditors—Postponement of Sale—Reservations to Grantor—Effect.*—A deed of trust to secure *bona fide* creditors, conveying land, slaves, and crops cut and growing, not to be enforced for two years, reserving the profits in the mean time to the grantor, and directing the surplus proceeds of sale, after payment of the debts secured, to be paid to the grantor, is not fraudulent *per se*, though made without the knowledge of the creditors.

***Assignments for Benefit of Creditors—Postponement of Sale—Reservations to Grantor.**—See principal case cited with approval in Quarles v. Kerr, 14 Gratt. 48, 55, and *foot-note*; Sipe v. Earman, 26 Gratt. 566; Brockenbrough v. Brockenbrough, 31 Gratt. 591; Young v. Willis, 82 Va. 297; Lewis v. Glenn, 84 Va. 960, 6 S. E. Rep. 866; Keagy v. Trout, 85 Va. 394, 7 S. E. Rep. 329; Paul v. Baugh, 85 Va. 961, 9 S. E. Rep. 329; Norris v. Lake, 89 Va. 517, 16 S. E. Rep. 663; Didier v. Patterson, 93 Va. 540, 25 S. E. Rep. 661; Catt v. Knabe Mfg. Co., 93 Va. 740, 26 S. E. Rep. 246; Livesay v. Beard, 22 W. Va. 290; Landeman v. Wilson, 29 W. Va. 724, 2 S. E. Rep. 205; Cohn v. Ward, 32 W. Va. 39, 9 S. E. Rep. 43; Harvey v. Anderson (Va.), 24 S. E. Rep. 915, 2 Va. Dec. 38; Peters v. Bain, 10 Sup. Ct. Rep. 359, 133 U. S. 670; *foot-note* to Gordon v. Cannon, 18 Gratt. 387; *foot-note* to Cochran v. Paris, 11 Gratt. 348; 2 Va. Law Reg. 62; 3 Va. Law Reg. 298.

See further, monographic *note* on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348; monographic *note* on "Assignments for the Benefit of Creditors."

Same—Preference of Creditors.—See principal case cited with approval in Evans v. Greenhow, 15 Gratt. 157; Gordon v. Cannon, 18 Gratt. 387, 395, 411, and *foot-note*; Sipe v. Earman, 26 Gratt. 563, 566, and *foot-note*; Young v. Willis, 82 Va. 297; Gardner v. Johnston, 9 W. Va. 407; Livesay v. Beard, 22 W. Va. 590; Landeman v. Wilson, 29 W. Va. 724, 2 S. E. Rep. 205; Wilson v. Jones, 76 Fed. Rep. 488; Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. Rep. 359.

See monographic *note* on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris,

This was a bill by Seaman and others, creditors of Benjamin L. Belt and Humphrey S. Belt, to set aside two deeds executed by these parties, on the ground that they were fraudulent, and intended to hinder and delay their creditors. The trustee answered, denying any knowledge of a fraudulent intent, and the Belts denied all fraud: And the only question in the cause was, whether the deeds were fraudulent on their face. Both the deeds were dated on the 4th day of August 1848, and each conveyed one moiety of the same property; and their provisions were substantially the same. One of them, executed by Benjamin L. Belt, conveyed to Willis J. Dance a moiety of a tract of land in the county of Powhatan, the grantor's interest in three slaves, and in the crops on hand made the then present year, and those then growing. And it provided that Belt should be permitted to remain in possession of the property, and receive the profits thereof until the 4th of August 1850, unless he should give his written consent to a sale before that time. And after that time the trustee was authorized upon the request of any one of the preferred creditors, to proceed to sell the property on a credit, as to the land, of one and two years; and the personal property for cash, and apply the proceeds to the payment of the
779 *debts intended to be secured thereby, in the order therein prescribed. The deed of Humphrey S. Belt conveyed the other moiety of the same land, slaves and crops, and also the plantation utensils, to the same trustee, reserving the profits for the same time; and then upon trust, first to pay certain debts of his own, and then other debts for which he was security as endorser for B. L. Belt.

The trustee did not sign the first of these deeds, though he did the second. Nor were any of the creditors present when they were executed, though some of them afterwards assented to them. At the time the deeds were executed, both the Belts were insolvent.

The plaintiffs were provided for in both deeds; in that of B. L. Belt they were in the first class, in that of H. S. Belt, so far as he was bound for their debts, in the second class; but they declined to claim under the deeds, and sued and recovered judgments, which were docketed in the clerk's office of the County court of Powhatan.

The plaintiffs Seaman and Muir alleged and proved that B. L. Belt had contracted with them, that if their debts were not paid by a certain time, he would give them a deed of trust upon the goods in his store; and that he failed to do it.

When the cause came on to be heard, the court below held that the deeds were fraudulent as to the creditors; and proceeded to decree in their favor. And the trustee, and the creditors claiming under the deed of H. S. Belt, applied to this court for an appeal, which was allowed.

Steger, for the appellants.
Griswold and Claiborne, for the appellees.

ALLEN, P. If the questions presented by the record in this case were of the
780 first impression in this court, *it would be matter for grave consideration, whether deeds of trust, such as those assailed by the bill of the appellees, did not contravene the spirit of the statute against fraudulent conveyances: Whether a deed of trust executed by a debtor on the verge of insolvency, creating preferences amongst his creditors, postponing the time of sale, the possession in the mean time remaining with the grantor, and the profits to be received by him, and executed without the knowledge of or consultation with the creditors, should not be treated as made with a fraudulent intent, because the reservations and conditions may tend to hinder and delay creditors, in the prosecution of

11 Gratt. 348; monographic *note* on "Assignments for the Benefit of Creditors."

Same—Express Power Given to Sell on Credit.—In Kyle v. Harveys, 25 W. Va. 727, 728, the court citing as authority, among others, the principal case, and Skipwith v. Cunningham, 8 Leigh 273, 274, said that many of the southern states hold that an express power to sell on credit on the face of an assignment does not render the assignment fraudulent on its face. See also, Peters v. Bain, 133 U. S. 70, 10 Sup. Ct. Rep. 359; Harvey v. Anderson (Va.), 24 S. E. Rep. 915, 2 Va. Dec. 387, both citing the principal case.

Deeds of Trust—Fraud—Presumption.—In Williams v. Lord, 75 Va. 400, it was said: "There is no doubt that the provisions of a mortgage or deed of trust may be of such a character as of themselves to furnish conclusive evidence of fraudulent intent; but the presumption of law is in favor of honesty, and 'the court cannot presume fraud unless the terms of the instrument preclude any other inference.' *Dance and Others v. Seaman and Others, 11 Gratt. 778;* Brockenbrough's Ex'or and Others v. Brockenbrough's Adm'r and Others, 31 Gratt. 580, 591." See the principal case also cited on this subject in Young v. Willis, 82 Va. 299; Hickman v. Trout, 83 Va. 495, 3 S. E. Rep. 131; Rixey v. Detrick, 85 Va. 46, 6 S. E. Rep. 615; *foot-note* to Sipe v. Earman, 26 Gratt. 563. See also, *foot-note* to Brockenbrough v. Brockenbrough, 31 Gratt. 580; *foot-note* to Quarles v. Kerr, 14 Gratt. 148.

Assignments—When Void as to Creditors.—In Kyle v. Harveys, 25 W. Va. 721, it was said: "Our statute of frauds provides, that 'every assignment given with intent to delay, hinder or defraud creditors shall as to such creditors be void.' Code, chapter 74, section 1. To make an assignment void as to creditors under this statute, it is not sufficient that the effect of it is to delay or hinder creditors; for every assignment of a man's property however good and honest the consideration must necessarily hinder and delay his other creditors, for it diminishes the fund, out of which his creditors may obtain satisfaction of their debts. But, to render it void against them, it must be made with intent to delay, hinder or defraud them. (Meux v. Howell, 4 East 13; *Dance v. Seaman, 11 Gratt. 778.*)" See the principal case also cited in Greer v. O'Brien, 36 W. Va. 287, 15 S. E. Rep. 77; Wilson v. Jones, 76 Fed. Rep. 488; Peters v. Bain, 133 U. S. 70, 10 Sup. Ct. Rep. 359, in support of this proposition.

their legal remedies to enforce the payment of their debts. But these questions have been settled by a series of adjudications in this court. It would disturb many titles, if the principles heretofore established, and sanctioned by the practice of the country, were now to be questioned. If inconvenience results from the construction heretofore given to the statute against fraudulent conveyances, the remedy should be administered by the law making power. An act of the legislature would operate prospectively, and men could regulate their transactions so as to conform to its provisions. But a decision of this court, giving a new and different rule of construction, would have a retrospective and therefore an unjust operation.

Preference of favored creditors is forbidden by the bankrupt law in England. But where that law does not apply, the right to make such preferences is admitted. In Estwick v. Caillaud, 5 T. R. 420, Lord Kenyon says, It is neither illegal or immoral to prefer one set of creditors to another. The same doctrine was avowed in Nunn v. Wilsmore, 8 T. R. 521. The same rule has been sanctioned in courts of equity. Small v. Oudley, 2 P. Wms. 427. The right results from the ownership of personal
781 property, and the unrestricted *power of alienation. The debtor, if no lien has attached, can sell it or transfer it to any creditor or purchaser, and apply the proceeds to the payment of any creditor he pleases. And if he may do so with the property or its price, there would seem to be no good reason why he should not have the right to cover it by a deed of trust for the same purpose. The right to do so was affirmed in Brashear v. West, 7 Peters' R. 608; in Murray v. Riggs, 15 John. R. 571; and it is believed in most of the states.

The cases of McCullough v. Somerville, 8 Leigh 415; of Skipwith v. Cunningham, Id. 271; and Phippen v. Durham, 8 Gratt. 457, have recognized the doctrine in Virginia. The same cases decide that it is not necessary to the validity of such a deed, that the creditors should have been consulted beforehand. In Skipwith v. Cunningham, 8 Leigh 271, the subject is examined by Tucker, president, who observes, "that if the grantor seals and acknowledges, and delivers (though not to the grantor personally or to his agent), a deed setting forth a bargain and sale for a valuable consideration, that consideration instantly raises a use, which the statute instantly executes, and vests the estate in the bargainee, with or without his assent, leaving him, indeed, the capacity to avoid it at his pleasure, by renouncing it." And "that there is no instance in which the courts of Virginia have decided that such deeds were incomplete and ineffectual, for such a decision would shake every title in the commonwealth." And in the recent case of Phippen v. Durham, 8 Gratt. 457, the deed was executed without the knowledge of the creditors, and was not signed by the trustee.

That the reservation of an interest in the property, by postponing the time of sale, or directing a sale on credit, or providing for the payment of the surplus after satisfying the creditors secured, do not of themselves furnish evidence of fraudulent intent, has been affirmed by the repeated decisions of this court. Skipwith
782 *v. Cunningham, 8 Leigh 271; Kevan v. Branch, 1 Gratt. 274; Lewis v. Caperton's ex'ors, 8 Gratt. 148; Cochran v. Paris, supra 348; Janney v. Barnes, 11 Leigh 100.

The fact that creditors may be delayed or hindered, is not of itself sufficient to vacate such a deed, if there is absence of fraudulent intent. Every conveyance to trustees interposes obstacles in the way of the legal remedies of the creditors, and may, to that extent, be said to hinder and delay them.

Postponing a sale to an unreasonable time may be a circumstance, in connection with other circumstances, tending to prove a fraudulent intent. If made with such an intent, the time to which the sale was postponed would not affect it. Neither the stipulation to postpone the sale or to return the surplus, can operate to the exemption of any portion of the debtor's property from the payment of his debts. The surplus is rightfully his property; everything not embraced by the conveyance belongs to him for the benefit of his creditors; is liable for his debts. The mode of subjecting it may be different, but there can be no question of the right of the creditor to do so. A deed of trust for the security of a future or contingent liability, as for the indemnity of a surety or endorser, could not be impeached for that cause alone, if made bona fide. Such deeds are of every day's occurrence; and their validity has never been questioned. Such a deed may interpose obstacles to the legal remedies of creditors for an indefinite period of time. But the interest of the debtor would still be subject to his debts, and could be reached, if not by legal process, by a proceeding in chancery; which, in a proper case, would no doubt sequestrate and apply the rents of the land, the hires of his slaves, and the interest arising from the sale of the perishable estate, to the discharge of his debts.

The cases of Spencer v. Ford, 1
783 Rob. R. 648, and *Spence v. Bagwell, 6 Gratt. 444, are supposed, by the counsel of the appellees, to modify the doctrine held in other cases, and to establish principles which would show the deeds in this case to be invalid. In the first case there were two deeds of trust, the first not appearing to have been made with the knowledge of, or to have been ratified by, any creditor or trustee named therein; and under which no claim was asserted until the execution of the second deed, and the application of the proceeds thereunder; and then the claim was asserted by a creditor not named in the deed, or known to be a creditor. It was held that such creditor was not entitled to relief against the cestui que trust in the last deed. The refusal of

relief under such circumstances does not decide that a deed made without consultation with creditors, is for that reason fraudulent. Before any right or claim under the first deed was known or asserted, the property had been conveyed, and the proceeds applied to a fair creditor, against whom, under the circumstances, there was no just cause of reclamation.

In Spence v. Bagwell, 6 Gratt. 444, the deed contained such limitations and conditions as secured to the debtor a full control over the property, and would have enabled him to defeat the conveyance. The deed reserved the right of possession from November 1841 until March 1843; that he should be considered the agent of the trustees, with full power to sell and collect the proceeds; and with a provision that if he paid off the debts or any part of them, by moneys not raised by the sale of the trust property, he should be considered a creditor of the trust fund, and might retain the amount out of the proceeds arising from a sale of the property conveyed. The deed on its face showed a contrivance to retain as owner first, and as agent, the control of the property, with authority to convert the proceeds of his labor into debts charging it, so as to keep it beyond the reach of his gen-
784 eral *creditors. Neither of these cases impairs the authority of the cases before referred to; and which it seems to me are decisive of the case under consideration. The fraudulent intent is denied by the grantors, and there is no proof except that arising from the face of the deed. The court cannot presume the fraud unless the terms of the instrument preclude any other inference. As to the cestuis que trust, it is not pretended that they participated in any fraud. They were not consulted; and though if the fraudulent intent clearly appeared on the face of the instrument, they would be affected by it if they claimed under it, the reservations on the face of the deeds do not raise under the doctrines of this court, an irresistible presumption of fraud which would of itself vacate the deed.

The violation by B. L. Belt of his engagement of the 17th of May 1848, to give a deed of trust on other property to secure the appellees Seaman and Muir, can have no bearing on the deeds under consideration. They embrace other property. It does not appear that the other creditors had any notice of the agreement; and the failure of the debtor to give one creditor a deed of trust on specific property, does not even tend to prove a fraudulent intent in the execution of another deed, on other property, to secure all his creditors; the creditor in question being one of the class of preferred creditors.

I think the decree was erroneous, and that the same should be reversed, and the bill dismissed with costs.

The other judges concurred in the opinion of Allen, J.

Decree reversed.

785 *Robinsons v. Allen & Others.

October Term, 1854, Richmond.

1. **Wills—Probate—Effect.***—A will, appearing upon its face to have been made by a married woman, if it has been regularly admitted to probat in the proper court, its validity cannot be questioned in a collateral suit.

2. **Same—Construction—Case at Bar.**†—Testatrix gives certain property, real and personal, to her husband for his life, with authority to use the same as he pleases in every respect. She then says: At the death of my husband, or before, if he chooses to relinquish his rights, I give all the land and other property to one or more of the children of R, as he may designate; or authorize, should it be necessary, him to make such other disposition of the same as he may deem proper, having full confidence in him that he will do what is right. R was the daughter of the husband by a former wife. The husband died in the life time of the testatrix. HELD:

   1. **Same—Same—Uncertainty of Provision.**—The provision in favor of the children of R is void for uncertainty.

   2. **Same—Same—Same.**—The testatrix did not dispose of the remainder in the property after the life estate given to the husband; but authorized the husband to dispose of it: And as he died in her life time, the property was not disposed of by her will; but passed to her heirs and next of kin.

This was a suit in the Circuit court of Fauquier county by Susan Allen and others, the heirs at law and next of kin of Catharine Bradford deceased, against William H. Gaines, administrator with the will annexed of Catharine Bradford and Samuel Robinson and others, claiming to be legatees under Mrs. Bradford's will.

Mrs. Bradford died in 1851; and her will was duly admitted to record in the County court of Fauquier. By her will, which bears date the 17th of October 1848, she provides as follows:

The worldly goods which it hath pleased God to bless me with, I give, devise
786 and dispose of as follows: *To my husband Thomas G. Bradford, who has devoted his time and means to my comfort, and given his attention to my business, for many years, that his few remaining days may be comfortable, I give for his life the plantation on which we have resided, and all the land thereto attached, and every species of property on it, not disposed of otherwise by me, with authority to use the same as he pleases in every respect.

*Wills—Probate—Effect—Collateral Attack.—Upon the question of the conclusiveness of probate proceedings, see Ballow v. Hudson, 13 Gratt. 678, and *foot-note*, where the principal case is cited, and also other authorities on the subject. The principal case is also cited and followed in Norvell v. Lessueur, 33 Gratt. 224. See also, *foot-note* to same case.

†Same—Construction.—Upon the question of the construction of wills the principal case is cited in Whelan v. Reilly, 3 W. Va. 611; Senger v. Senger, 81 Va. 696. In Milhollen v. Rice, 13 W. Va. 545, the principal case is said to have no application to the case under consideration.

At the death of my husband, or before, if he chooses to relinquish his rights, I give all the land and other property on the premises we now occupy, to one or more of the children of Caroline A. Robinson, as he may designate; or authorize, should it be necessary, him to make such other disposition of the same as he may deem proper, having full confidence in him that he will do what is right.

Caroline A. Robinson was the daughter of Thomas G. Bradford by a former wife. He died in 1850, in the life time of Mrs. Bradford.

The cause came on to be heard in September 1852, when the court below held that the devise in the will of Mrs. Bradford to one or more of the children of Caroline A. Robinson, was void for uncertainty; and gave a decree in favor of the plaintiffs as heirs and next of kin of Mrs. Bradford. From this decree the Robinsons applied to this court for an appeal, which was allowed.

Patton, for the appellants.
Morson and Williams, for the appellees.

SAMUELS, J. This case grows out of a contest for the succession to the estate, real and personal, of Catharine Bradford deceased.

The appellants claim under an alleged will of the decedent, conferring on them, as they insist, the estate in controversy; the appellees claim as heirs at law and next of kin of the decedent.

787 *In a contest of this nature between such parties, it is incumbent on the parties claiming under a will, to establish their claim: for if property be not effectually disposed of by will, it passes to the heirs at law and next of kin, by operation of the statute of descents and the statute of distributions.

The appellants, to sustain their claim, rely upon a paper, in form a will, exhibited to the County court of Fauquier county, where Catharine Bradford resided up to the time of her death; and by that court admitted to probat as a will. It was suggested, however, by the appellees' counsel, in the argument here, that in as much as it appears on the face of the paper, that Catharine Bradford was a married woman at the time of executing it, it cannot have the effect of a will: and that she must be regarded as dead intestate. This objection could have had no force, in this suit, even if made in the court below: for it is well settled by the decisions of this court, that the sentence of a court of probat, of competent jurisdiction, admitting a will or writing in nature of a will, to probat, is conclusive evidence of the due making thereof, and that it cannot be denied in any collateral proceeding touching the will: that its validity can be tested only by resorting to the means provided by law for that specific purpose. See West v. West's ex'or, 3 Rand. 373; Vaughan v. Doe ex dem. of Green, 1 Leigh 287; Wills v. Spraggins, 3 Gratt. 555; Parker's ex'ors v. Brown's ex'ors, 6 Gratt. 554.

The only remaining question before the court is, whether or not the will gives the estate to the appellants? The sole purpose in the construction of a will, is to find out how the maker of it intended to dispose of the property, and to apply the rules of law to such disposition; thus the duty of a court is the same as in all other judicial enquiries, to wit, to ascertain the facts and declare the law thereon. In the

788 *first branch of this duty, the court must look chiefly to the will itself. Although extrinsic proof is admissible under certain circumstances, for limited purposes, it is enough (for the purposes of this case) to say, it is not admissible to explain ambiguities patent on the face of the will. The language of the will itself must be relied on as the chief guide. If that language be ordinary and popular, its meaning is to be construed according to its usual acceptation; if technical, legal terms be used, they are to be construed in the sense which the law affixes. The courts, in their anxiety to seek aid in their investigations, have frequently and usually looked to adjudged cases, although it is said by high authority, that they can and do seldom afford assistance in ascertaining the intention in any case. Shermer v. Shermer's ex'ors, 1 Wash. 266. The justice of this remark is fully verified by turning to the cases cited in the argument of this case: they are found in conflict with each other; and many of them are made to turn upon distinctions so exceedingly refined, not to say capricious, that they should be regarded as very unsafe guides in seeking for the intention of a plain testatrix, who expressed herself in the ordinary language in popular use. I hold that there is enough plainly expressed on the face of the will before us, to leave no doubt of the facts to what extent, and to whom the testatrix intended to dispose of the property herself; and to what extent she intended to confide the further disposition of her property to another.

After giving her husband an estate for life in the property, free from restrictions usually thrown around life estates, the will proceeds thus: "At the death of my husband, or before, if he chooses to relinquish his rights, I give all the land and other property on the premises we now occupy, to one or more of the children of Caroline A. Robinson, as he may designate; or authorize, should it be necessary, him

789 to make such *other disposition of the same as he may deem proper, having full confidence in him that he will do what is right."

The husband died in the life time of his wife, the testatrix; and thus the power of appointment, contemplated by the will, never vested in him, and was never executed. It is insisted by the appellants that the will, of itself, is sufficient to convey the estate to them; that is, to all the children of Caroline A. Robinson.

The testatrix, if she had thought it proper, might herself have given the estate directly

to all the children of Mrs. Robinson, or to one or more of them, as she herself might have designated. So, if she thought it proper, she might forego the exercise of her power of disposition, and confer that power on another. There is a substantial and distinctly marked difference between the purpose of disposing of her property herself, and the purpose of authorizing another to make such disposition as he may deem right. If the testatrix had said in terms, "I will not, for my own reasons, dispose of my estate after the life estate I have given to my husband; but I authorize him to dispose of it after his death, to one or more of the children of Caroline A. Robinson; or to make such other disposition of it as he may deem proper," it would clearly be held that the testatrix had not disposed of the remainder after the life estate at least to those children. The legal effect of the terms used is identical with that of the terms supposed; expressio unius exclusio est alterius: Having declared her purpose of authorizing another to make the disposition, is equivalent to a declaration that she will not herself make it.

If the testatrix had conferred the estate immediately upon the whole class of Caroline Robinson's children, giving her husband authority to appoint the pro-
790 portions *in which it should be divided, or giving him authority to designate one or more of the class who should take it, to the exclusion of all others of the class, in the events which have happened, the whole class would take equally. The will before us differs widely from the case supposed; it gives to "one" or "more" of the class; that is, to one or more of a class, six in number. The questions are at once presented, Which "one?" How many "more" than "one?" And which of them? The answer is obvious: Such "one or more" as the husband may designate. I am not prepared to say, as a matter of fact apparent on this will, that the terms one or more mean all; or that an attempt to confer a power without limits on another, is in itself identical with a definite exercise of that power by the principal. Such would be my construction, if the disposing clause had ended with the word "designate." If, however, any doubt remained, it must be apparent from the next clause, that the whole class, or any one or more of them, were not the certain objects of the testatrix's bounty. She in terms authorizes her husband, should it be necessary, to make such other disposition of the estate as he might deem proper; she having confidence in him that he would do what is right.

The appellant's counsel argued here, that this latter clause is to be understood as enlarging and defining the husband's authority about the estate conferred on Mrs. Robinson's children; that it was intended to give him power to make family settlements, or impose changes, as the necessities of the family might require. Such, I conceive, is not the true reading of the clause. It gives authority to dispose directly of the whole subject itself; not merely of a part thereof, or indirectly, by changes or otherwise. In terms, he is authorized to make a disposition of the whole subject, other than that contemplated for a part of
791 the Robinson *family. The power conferred is coextensive with testatrix's confidence in her husband; which is declared to be full.

The appellant's counsel argued here, that the will was intended to vest the husband with a power coupled with a trust; and that the execution of the power having been prevented by death, the court should execute the trust. There are cases in which the courts have taken upon themselves the duty of executing trusts which would otherwise be defeated for want of trustees. These, however, are cases in which trusts, either express or implied, did exist. This is not the case here. The argument to have availed anything, should further have shown that the appellants are the cestuis que trust; which it has not done, and could not do.

On the whole case, I am of opinion that the objects, if any, of the testatrix's bounty, so far as the remainder after the life estate is concerned, are so vaguely described that the will is void for ambiguity on its face.

I am further of opinion, that the testatrix had no definite purpose of disposing of that remainder herself, but only intended to confer a power of disposition on her husband.

It is immaterial to consider whether the unrestricted life estate given to the husband, together with his unlimited power of disposition, should be regarded as giving him the absolute title to the estate; he having died in the life time of the testatrix, his interest, whatever it was, lapsed under the law then existing.

I am of opinion to affirm the decree.

ALLEN, MONCURE and LEE, Js., concurred in the opinion of Samuels, J.

DANIEL, J., concurred in affirming the decree.

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792 *Powell v. Stratton & als.

October Term, 1854, Richmond.

1. **Foreign Administrators*—Accountability in Virginia†—Case at Bar.**—Under the circumstances a person who had qualified as administrator of an estate in Mississippi, held to account for his administration in Virginia.

2. **Same—Purchase of Land—Liability—Case at Bar.**—

*Foreign Administrators—Suits by or against.—As a general rule, a foreign administrator cannot sue or be sued out of the state granting him authority. Andrews v. Avory, 14 Gratt. 229, and *foot-note*. The principal case is cited as an exception to this rule in Davis v. Morriss, 76 Va. 29. But see Andrews v. Avory, 14 Gratt. 240, where it is said, that the principal case is only an apparent exception to the general rule and not a real one. See also, principal case cited in Leach v. Buckner, 19 W. Va. 45; Oney v. Ferguson, 41 W. Va. 571, 23 S. E. Rep. 711.

†See generally, monographic *note* on "Executors and Administrators."

An administrator in Mississippi having purchased for the estate, land sold for the payment of a debt due to the estate, held under the circumstances not bound to keep the land and account for the price; but the land is to be treated as the property of the estate.

3. **Same—Loss of Funds Deposited—Case at Bar.***—Under the circumstances the administrator not responsible for money which became worthless in his hands by the insolvency of the bank.

This was a suit in equity in the Circuit court of Powhatan county, and afterwards removed to the Circuit court of Goochland, instituted by Elizabeth Stratton the widow, and three others, the infant children of Milner S. Stratton, against Benjamin H. Powell and Henry Gordon, to recover moneys of the estate of Milner S. Stratton, which the plaintiffs alleged Powell had collected in the state of Mississippi.

Powell demurred to the bill on various grounds, and among others, on the ground that the court had no jurisdiction to compel him to account for his administration upon the estate of Milner S. Stratton in Mississippi. He also answered, stating in detail his action in his efforts to collect the debts due to that estate.

On the 16th of October 1839, Henry Gordon and Elizabeth Stratton, the personal representatives of Milner S. Stratton in Virginia, entered into a contract under seal with Benjamin H. Powell, by which they employed Powell to go to Mississippi for the purpose of collecting certain debts due in that state to their testator's estate.

793 One was a large debt of *about twelve thousand dollars due from John D. King and Samuel M. Puckett, which was secured by a deed of trust on land and slaves. Another was a debt due by account from Richard M. Hobson, for about two thousand three hundred and sixty-five dollars and eighty-one cents; and a third was a certificate of deposit for six hundred dollars of the Brandon Bank.

Powell went to Mississippi, and arrived in Jackson about the 1st of December 1839; and finding it would be necessary to become the administrator of Milner S. Stratton, he qualified as such about the end of the month of December. He found King, Puckett and Hobson insolvent, though Puckett had a number of slaves in his possession, which he shortly after carried out of the state. These slaves were included in the deed of trust to secure Stratton's debt; and Powell attempted to prevent Puckett's removal of them by an injunction; but the judge to whom he applied for the injunction, held that he could only grant it when his court was in session; and before that time the slaves were gone.

In order to enforce the collection of the debt due from King and Puckett, Powell directed the trustees Richard M. Hobson and William R. Crane to proceed to sell the land embraced in the deed; which they did accordingly. Powell having a short time previous to the sale broken his leg, could not be present himself; but believing as he says in his answer, that it was important to get the land out of the possession of Puckett, and to keep the purchase money out of the possession of Hobson, he authorized Thomas P. Nash to attend the sale and buy in the land for the benefit of the estate of Stratton. Nash did attend and buy the land at the price of four dollars and twelve and a half cents an acre; making the whole purchase money amount to two thousand seven hundred and forty-seven dollars and twenty-five cents: and the

794 trustees in Powell's *absence conveyed the land to him. This item was the principal subject of controversy in this suit; Powell insisting that the land was purchased for the estate, and the other parties insisting that it was a purchase for himself. The evidence shows that the land was sold for greatly more than land equally good had been sold for, and could be purchased for, in the part of country where it lies. The sheriff of the county says, that such lands had sold for fifty cents and a dollar per acre; and no one estimates it higher. It seems too that there was but one other bidder for the land; and he was the agent of Puckett. It appeared too that when Powell heard the land had been conveyed to him personally, he said it was an error, and wished to have it corrected; but was advised by his counsel that it was a matter of no importance. And it was further proved that certainly Dr. Gordon, and probably Mrs. Stratton, had been informed by Powell, upon his return to Virginia from Mississippi, that the land had been purchased for Stratton's estate.

As before stated, Powell found, on getting to Mississippi, that Richard M. Hobson was insolvent. All that he could obtain from him in satisfaction of his debt to Stratton, was the assignment of a debt due to him from another person, which that other person could only pay in money of the Brandon Bank. This, as he could do no better, he accepted. In his answer he says, the Brandon money so received, and that embraced in the certificate of deposit, never was disposed of by him; and he never could obtain for it specie funds or Virginia money, at any discount, however great. On the 6th of February 1840 he deposited what he so received, as well as six hundred dollars which was before in the bank, making the sum of two thousand six hundred and three dollars and seventy-eight cents in the Brandon Bank, and took a certificate of the deposit.

795 *It appears that when Powell first arrived in Mississippi, in December 1839, Brandon money was very much depreciated: One of the witnesses for the plaintiffs states, that during the first part of the year 1839, it was worth about fifty cents on the dollar, in exchange for other Mississippi money, which was somewhat below par; but they had not a fixed exchangeable value; and by the 1st of May had depreciated to forty cents in the dollar; and continued

*See generally, monographic *note* on "Executors and Administrators."

gradually to depreciate during the summer, and were worth about twenty-five cents about the month of October; about which time judgments to a very large amount, probably to about half a million, were obtained against the bank, and its issues depreciated more rapidly; and on the 1st of January 1840, it was worth from about five to ten cents, having no fixed value, and shortly afterwards became wholly worthless, and had so continued. Two other witnesses for the defendant say, that they cannot say that Brandon money was, in the latter part of 1839 and the beginning of 1840, worth any particular amount in specie funds or Virginia money. They did not think it was possible to have purchased with Brandon money, more than a few dollars in specie or Virginia money, at any rate of discount. Notwithstanding its enormous depreciation, it continued to be received at its nominal value, to a considerable extent, by collecting officers and others in ordinary business transactions, until some time in the spring of 1840, when it suddenly commenced to go down, and soon got to be regarded universally as worthless. Many persons continued to receive it up to that time, confiding in the assurances of the managers of the bank, that the return of sales of cotton, which the bank had shipped to Europe, would give it the means of redeeming its paper. And it was proved that in the year 1840, the president of the bank and other directors declared that in the end the bank would be solvent and its notes at par.

796 *The plaintiffs filed in the cause two letters from Powell to Henry Gordon. The first from Jackson in Mississippi, dated December 1st, 1839, a few days after he arrived there. In it he says, "Well, this Brandon money; if you have altered your mind about it write me; it is now worth about twenty-four cents in the dollar. I think there are great doubts whether it will be better or not: Write me your notions on the subject." The second from the same place, written just after he qualified as administrator on Stratton's estate, and dated December 27th, 1839. In it he says, "With respect to the Brandon money, I will, on Monday next, take it out of the bank. If I could have had it when I first got to the state, I think I could have sold it for twenty-five or thirty cents in the dollar. Since that the marshal here has levied on thirty thousand dollars of specie that is said to belong to the Brandon Bank; it here laid in the Planters Bank. Since that it has been going down, and the last accounts from New Orleans it was worth only fifteen cents to the dollar. That market governs all money here, and we get mails from there here every three or four days. There was ten thousand dollars offered the other day in Vicksburg for one thousand dollars in Union post notes. I have been expecting a letter from you several mails with advice on the subject. I think now, as I have for the last twelve months, it will get to nothing."

The fidelity and zeal of Powell in the administration of Stratton's estate was testified to in the strongest terms; and the record affords abundant evidence that he shrunk from no effort, expense or personal liability which seemed to hold out a probability of recovering the money due to the estate of Stratton.

The court below held that Powell must keep the land he purchased, and account to the plaintiffs for the amount of the purchase money; and that he must also account for the Brandon money, as well the

797 six hundred *dollars which was on deposit in the bank, as that which he received on account of the debt of Hobson; and he was charged with it at the rate of ten cents on the dollar. The account thus settled made Powell a debtor on the 31st of December 1844, in the sum of three thousand and forty-six dollars and seventy-one cents, of which two thousand four hundred and twenty-six dollars and thirty-one cents was principal; and for this sum, after deducting one hundred and fifty dollars for his second trip to Mississippi, which by the agreement aforesaid he was to receive, a decree was made in favor of the plaintiff, giving to Mrs. Stratton one-third, and dividing the balance among the three children of Milner S. Stratton. From this decree Powell applied to this court for an appeal, which was allowed.

Stanard & Bouldin and Irving & Johnson, for the appellant.

Patton, for the appellee.

SAMUELS, J. It is unnecessary in this case, to consider whether a personal representative, holding his appointment under authority of foreign laws, if found in Virginia, can under all circumstances, be sued here in his official character. There is enough in the peculiar circumstances of this case to give jurisdiction to our courts. The appellant, the defendant below, resided in Virginia at the date of those transactions out of which this litigation arises: those transactions had their origin in this state. The bill alleges a case of fraud, and want of proper diligence against the appellant; and upon that charge they predicate a claim merely personal and pecuniary. The appellant resists this demand, but admits that he is invested with the legal title to certain land lying in the state of Mississippi, and to certain choses in action payable in that state; the equitable title to

798 all which, on certain *terms, enures to the benefit of complainants. It is not alleged by the appellant that creditors of Stratton's estate in Mississippi or elsewhere, are in anywise concerned in the property in his hands; nor is it alleged by either party in pleading, or shown by proof, that the subject in controversy is affected in any degree by laws peculiar to the state of Mississippi; the case seems to have proceeded upon the theory that it was governed by the general principles prevailing in courts of equity. The appellant being within the jurisdiction of the court, full

effect may be given to its decree by the exercise of its authority over his person. Thus the parties who are exclusively interested are before the court; they are at issue whether the appellant is liable to a demand of the appellees merely pecuniary, or whether he shall be held to be a mere trustee for their benefit, on equitable terms. The facts above stated bring the case within the jurisdiction of our courts. This conclusion is fully sustained by the decision of this court recently made in the case of Dickinson v. Hoomes' adm'r, 8 Gratt. 353, upon a review of many decisions touching the question.

Passing from the question of jurisdiction to the merits of the case, we are met at the threshold, by the fact that such of the debts due Stratton's estate in Mississippi, as give rise to this controversy, were either in a very precarious condition, or utterly insolvent. That due from King and Puckett was partially secured by a deed of trust on land and slaves. The land was about six hundred and sixty-six acres in quantity; and the witnesses differ as to its value; some of them estimate it at fifty cents per acre; others at prices ranging from fifty cents up to a dollar and fifty cents. The weight of proof, however, induces the belief that it could not have been sold for as much as fifty cents per acre, payable in specie or its equivalent. This land and the slaves
799 conveyed by the deed *of trust, were in the hands of Samuel M. Puckett, one of the debtors: This party and John D. King, with whom he was bound, are proved to have been utterly insolvent. It is moreover shown that Puckett removed the slaves beyond the limits of the state of Mississippi, with the fraudulent intent to defeat the trust; and thus the security afforded by the slaves was destroyed. No attempt is made to charge the appellant on account of these slaves; it is therefore unnecessary to say more about them. The land, the only remaining security, was in the hands of Puckett, the fraudulent debtor. The trustees were Richard M. Hobson and William R. Crane; and Hobson is shown to have been insolvent. Such was the security, and such the means of making it available.

Powell having become the administrator on Stratton's estate in Mississippi, caused the trustees to sell the land, and caused it to be bought in for the benefit of the estate at the price of four dollars twelve and a half cents an acre. That he bought the land with the view of benefiting the estate, and without any purpose of individual profit, is sufficiently shown by the proof. Powell assigns as a reason for buying the land, his anxiety to get it out of the hands of Puckett, and to prevent Hobson, the insolvent trustee, from receiving the price, if it had been sold to another. He alleges moreover that the land was run up to the price of four dollars by Puckett's agent, with a view to defraud Stratton's estate by means of collusion with Hobson, the trustee. There is no direct proof of this fraudulent intention; however, considering the exorbitancy of the price of four dollars per acre, we have reason to believe there was no purpose of paying it in good faith.

Powell says nothing about the pecuniary condition of Crane, the other trustee, nor does he say whether, by the law of Mississippi, he would have been responsible
800 *for money paid to his cotrustee Hobson, or by him covinously released to the purchaser.

In view of the small intrinsic value of the land, and the utter insolvency of the debtors for all beyond that value, and the insolvency of Hobson the trustee, I am of opinion Powell did the best for the estate which could be done in the difficult circumstances in which he was placed. The land, the only available security, is saved to the estate; this was done at a price nominally far above its value, yet it was paid out of the debt due from King and Puckett, which was of no value; and the estate loses nothing thereby. If Powell, under the circumstances, had in some degree mistaken his duty, yet his great diligence and perfect integrity of purpose should exempt him from liability. The extraordinary embarrassment in the monetary affairs in Mississippi, at the time of Powell's administration there, would seem to require some relaxation of the rules governing the administration of estates there; at least, the administrator should not be held responsible when it appears that the ordinary course of administration would probably, not to say inevitably, have resulted in a greater loss. In this case the administrator acted wisely in buying the land, which would not, as far as we can now judge, have sold to another for more than fifty cents per acre, if so much, payable in a sound medium. I am of opinion the appellant should not be held to a personal liability on account of his purchase of the land.

Another question between the parties is, whether Powell the appellant should be charged for his failure to dispose of the debt due from the Brandon Bank? The appellees take no exception on account of the fact that a portion of this debt accrued from receiving it indirectly in payment of a debt due from Richard M. Hobson above named, to Stratton's estate. They insist, however, that Powell should be
801 charged with *the market value of the Brandon Bank debt, which the commissioner fixes at ten per cent. of the nominal amount. He accordingly charges the appellant one hundred and ninety-six dollars and seventy-seven cents, that sum being ten per cent. on the Brandon Bank notes received on Hobson's debt as aforesaid; and the further sum of sixty-five dollars and twenty-two cents, that being ten per cent. on the principal and interest on the certificate of deposit made by Stratton in his life time in that bank.

The principle on which this claim is made, is in conflict with that on which the claim is made to charge the appellant in regard to the land. It is said in regard to the land, that he was going beyond his

official duty in purchasing; yet it is said he should have sold this Brandon Bank debt, whereas his official duty required the collection and not the sale of it. I am of opinion the appellant acted with prudence at the time in refusing to sell, although subsequent events have shown that if a sale could have been effected on any terms, it had better been made. The proof shows that the credit of the bank had fallen so low about the date of Powell's qualification, that its paper was selling at a discount, which is variously stated by the witnesses to be from eighty-five to ninety-five per cent.; that it would have been very difficult, if not impossible, to have disposed of a large amount of it for specie even at that discount. The bank has since failed entirely; and thus the debt is of no value. The appellant had been told, or others had been told, by the directors, that the bank would meet its liabilities; having as they said the means of doing so. Thus the alternative was presented, of selling, if a sale could be made, at a discount ranging from eighty-five to ninety-five per centum, or awaiting the chance of full payment. The appellant decided properly under the circumstances existing at the time;

802 *and he should not be made to suffer because of subsequent events. If the circumstances could be reversed, that is, if the sale had been effected at the discount, and if the bank had become able to pay its debts, he would justly have been held responsible for the loss.

On the whole case, I am of opinion the appellees have shown no right to charge the appellant with any amount on account of the specific charges alleged. His diligence, discretion and perfectly good faith give him a claim to the protection of a court of equity.

The land in the hands of Powell, and any rents and profits received by him, and the Brandon Bank debt, should be regarded as trust subjects, to be administered under the direction of the court, in the manner pointed out by the decree of this court.

The other judges concurred in the opinion of Samuels, J.

The decree was as follows:

The court is of opinion, that the said decree is erroneous; it is therefore adjudged, ordered and decreed that the same be reversed and annulled; and that the appellant recover of the appellee Ann Elizabeth Stratton, sometimes called Elizabeth Stratton, and William E. Royall the next friend of the infant appellees, the costs of the appellant expended in the prosecution of his appeal here. And the court proceeding to render such decree as the Circuit court should have rendered, it is further decreed and ordered, that Benjamin H. Powell be held and treated as a trustee holding the land in the proceedings mentioned, and any rents and profits thereof by him received, and the debt due from the Brandon Bank, as a trust subject to be administered under the direction of the Circuit court. With the purpose of ascertaining the proper application of any funds arising from said

803 *subject, it is further decreed and ordered, that an account be stated between Benjamin H. Powell and the estate of Milner S. Stratton deceased, in which account said Powell shall be permitted to debit the estate with all reasonable disbursements made by him in Mississippi, with the view to protect the interests of the estate there; also with any money paid over to the executor or executrix in Virginia; also with the sum of one hundred and fifty dollars as a compensation for his second trip to Mississippi; also with a reasonable commission on money due the estate and received by said Powell. In the said account the estate is to have credit for any money received by said Powell as administrator, and for the avails of the trust subject, which are to be paid to Powell, after deducting the costs of executing the trust. Upon the account so to be taken, if the appellant shall be in debt to the estate, the several legatees of Milner S. Stratton deceased, may have decrees for the balance, ratably, in proportion of the amounts of their legacies. If, however, the administrator shall be in advance with the estate, the court does not deem it proper to give him a decree against the assets in Virginia.

The cause is remanded, to be proceeded in according to the principles herein declared.

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804 *Maddox & al. v. Maddox's Adm'r & als.

October Term, 1854, Richmond.

1. **Legacies—Conditions in Unreasonable Restraint of Marriage—Case at Bar.**—A member of the Society of Friends, by his will, gives a legacy of a remainder after a life interest, to his niece M, "during her single life, and forever, if her conduct should be orderly, and she remain a member of the Society of Friends." When M arrived at a marriageable age, there were but five or six unmarried men of the society in the neighborhood in which she lived: And during the life estate she married a man not a member of the Society of Friends, and by that act she ceased to be a member of the society. HELD:
   1. **Same—Same—Effect.***—The condition is an unreasonable restraint upon marriage, and is void.
   2. **Same—Same—No Bequest Over—Effect.**†—There being no bequest over, and no specific direction that upon breach of the condition the legacy shall fall into the residuum of the estate, the condition is therefore *in terrorem* merely, and does not avoid the bequest.
2. **Same—Condition of Religious Qualification—Effect.**—On a bequest of a legacy upon a condition requiring any religious qualification, the condition is

*__Legacies—Conditions in Restraint of Marriage__—See principal case cited in Selden v. Keen, 27 Gratt. 582; Reuff v. Coleman, 30 W. Va. 173, 3 S. E. Rep. 598. As to what is a reasonable restraint of marriage, see short *note* in 1 Va. Law Reg. 550.

†__Same—Same—No Bequest Over.__—See principal case cited in Phillips v. Ferguson, 85 Va. 513, 8 S. E. Rep. 241; Fifield v. Van Wyck, 94 Va. 563, 27 S. E. Rep. 446.

against the policy of the law of Virginia, and therefore void.

3. **Same—Same.**—QUÆRE: If the condition be a condition precedent, the legatee can take the legacy free from the condition, or if the legacy lapse: And it seems that the legatee will take a legacy of personal property; though a devise of land would fail.

This was a suit in equity in the Circuit court of Hanover county, by Wilson Maddox and Martha Jane Maddox against William G. Maddox, as administrator de bonis non with the will annexed of John Maddox, and others, claiming as residuary legatees of John Maddox deceased. The plaintiffs claimed that the defendants, who were also legatees of John Maddox, had forfeited their interest in his estate by violating the condition upon which the legacies were given. The facts are stated by Judge Lee in his opinion. The decree below was in favor of the defendants. Whereupon
805 *the plaintiffs applied to this court for an appeal, which was allowed.

Lyons, for the appellants.
Griswold and Claiborne, for the appellees.

LEE, J. The testator, who was a member of the Society of Friends, departed this life in the year 1834. By a codicil to his will, dated on the 7th of June 1834, after certain specific bequests, he directs the proceeds of his estate, which was to be converted into money, to be divided into three equal parts, and to be disposed of as follows: One-third for the benefit of his father during his natural life; one other third to be applied to the payment of a bond due his brother Thomas Maddox, or whatever sum might be due upon such bond; and the interest of the remaining third to go to his brother William G. Maddox during his natural life. At the death of his father, the third set apart for him to be returned to his estate, and disposed of according to his will. At the death of his brother William, the third "loaned" to him to be given to his daughter Ann Maria Maddox, "during her single life, and forever, if her conduct should be orderly, and she remain a member of Friends Society." The codicil concluded with the following clause: "Furthermore, at the closing of all the above things, I wish to give and bequeath all the remaining part of my estate to my nearest relations that may be then living, and that shall be at that time members of the Society of Friends."

After the death of the testator, and during the life time of her father, Ann Maria Maddox married the appellee Thomas Tiller, who was not a member of the Society of Friends, and thereby, according to the rules and discipline of the society, forfeited her right to membership. The appellee William Garland Maddox also left the society, but the time at which he did so is nowhere disclosed by the record.

806 *As Mrs. Tiller is claiming the benefit of the bequest in remainder to her after the death of her father, and as both she and Garland Maddox are claiming as two of the next of kin of the testator to participate in the residuum, we are called upon in this state of the case, to pass on the validity and effect of the two bequests in this codicil.

As by the rules of the Society of Friends, a member who married out of the society thereby forfeited his membership, the effect of the bequest of the third in remainder to Ann Maria Maddox, was to restrict her to marriage with a member of the society. Upon her marriage, the estate given to her "during her single life," would, according to the terms of the codicil, be determined; and if she married a person who was not a member of the society, she herself ceased to be a member, and was thus excluded from further enjoyment of the estate. The question then, as it respects the bequest of the third in remainder to Ann Maria Maddox, is as to the validity of such a restraint upon marriage under the circumstances disclosed in this case.

It will not be questioned that marriages of a suitable and proper character, founded on the mutual affection of the parties, and made upon free choice, are of the greatest importance to the best interests of society, and should be by all proper means promoted and encouraged. The purity of the marriage relation and the happiness of the parties will, to a great extent, depend upon their suitableness the one for the other, and the entire freedom of choice which has led to their union; and upon these, in their turn, in a great degree must depend the successful rearing of their children, and the proper formation and development of their character and principles. Hence not only should all positive prohibitions of marriage be rendered nugatory, but all
807 unjust and improper restrictions *upon it should be removed, and all undue influences in determining the choice of the parties should be carefully suppressed. Accordingly, in the civil law all conditions annexed to gifts and legacies which went to restrain marriages generally, were deemed inconsistent with public policy, and held void. Poth. Pand. lib. 35, title 1, n. 35; Dig. xxxv, tit. 1, l. 22, 64, 72. This doctrine has been introduced into the English law with certain modifications, suggested by a disposition to preserve to parents a just control and influence with their children, and the means of protecting youthful persons against the said consequences of hasty, unsuitable or ill assorted marriages. Conditions, therefore, in restraint of marriage, annexed to gifts and legacies, are allowed when they are reasonable in themselves, and do not unduly restrict a just and proper freedom of choice. But where a condition is in restraint of marriage generally, it is deemed to be contrary to public policy, at war with sound morality, and directly violative of the true economy of social and domestic life. Hence, such a condition will be held utterly void. 1 Fonbl. Eq. lib. 1, ch. 4, § 10, n. q. 255; Godolph. on Leg. part 1, ch. 15, § 1, p. 45; Harvey v. Aston, 1 Atk. R. 361; Scott v. Tyler, 2

Bro. C. C. 431, 487; S. C. 2 Dick. 712, 721; 2 Lomax Ex. 80; Keily v. Monck, 3 Ridgw. Parl. R. 205; Hoopes v. Dundas, 10 Pen. R. 75; 1 Eq. Cas. Ab. 110; Rishton v. Cobb, 9 Sim. R. 615, 16 Eng. Ch. R. 616; 2 White and Tudor's Lead. Cas. in Eq. part 1, p. 280, n.

In Elizabeth Castle's Case, Law Jurist, December 1846, the vice chancellor declared, in general terms, that "limitations in restriction of marriage, were objectionable:" and in Long v. Dennis, 4 Burr. R. 2052, Lord Mansfield said, "Conditions in restraint of marriage are odious, and are therefore held to the utmost rigor and strictness. They are contrary to sound policy."

And accordingly, even in those cases
808 in which *restraints of a partial character may be imposed on marriage, as in respect of time, place or person, they must be such only as are just, fair and reasonable. Where they are of so rigid a character, or made so dependent on peculiar circumstances, as to operate a virtual though not a positive restraint on marriage, or unreasonably restrict the party in the choice of marriage, they will be ineffectual and utterly disregarded. Thus, a condition in restraint of marriage excluding men of a particular profession, has been held void. 1 Equ. Ca. Ab. 100. So a contract not to marry within six years is void because it tends to discourage marriage. Hartley v. Rice, 10 East's R. 22. So a covenant with a woman not to marry any other person, has been held not to be binding. Love v. Peers, 4 Burr. R. 2225. So a condition annexed to a legacy to a daughter, forbidding her to marry any man who had not a clear unincumbered estate in fee or freehold perpetual, of the yearly value of five hundred pounds, was declared by the lord chancellor to be worthy of condemnation in every court of justice: and it was held void as leading to a probable prohibition of marriage. And Judge Story lays it down, that restraints in respect of time, place or person, may be so framed as to operate a virtual prohibition upon marriage, or at least upon its most important and valuable objects; and he illustrates by a condition that a child should not marry till fifty years of age; or should not marry any person inhabiting in the same town, county or state; or should not marry any person that was a clergyman, a physician, or a lawyer, or any person except of a particular trade or employment; all of which, he tells us, would be deemed mere evasions of the law. 1 Story's Eq. Jur. § 283. In these he seems to be borne out by the opinion of Lord Chancellor Clare, in Keily v. Monck, ubi supra.

Following these principles and the
809 cases I have *cited for my guide, and looking to the facts in proof in the cause, I cannot avoid coming to the conclusion, that the condition imposed by the bequest of the third in remainder to Ann Maria Maddox, which in effect forbade her to marry any other than a member of the Society of Friends, was an undue and unreasonable restraint upon the choice of marriage, and ought to be disregarded. It is in proof, that when she became marriageable, the number of Quakers in the county of Hanover, in which she resided, and the vicinity, was small, and that it had been since diminishing. There were not within the circle of her association, more than five or six marriageable male members of the society, according to one of the witnesses, or three or four, according to another; and the probability is, as stated by one of the witnesses, the restriction imposed by the condition would have operated a virtual prohibition of her marrying. To say there were members of the society residing in other counties, is no answer to the objection. She certainly could not be expected, if she had the means, which it seems she had not, to go abroad in search of a helpmate; and to subject her to the doubtful chance of being sought in marriage by a stranger, would operate a restraint upon it far more stringent than those which are repudiated in the cases and illustrations which I have already cited.

The case of Haughton v. Haughton, 1 Molloy 612, 12 Cond. Eng. Ch. R. 295, has been cited in support of the restriction in this case. But that case and the case of Perrin v. Lyon, 9 East's R. 170, where the condition was not to marry a Scotchman, which is relied on by the lord chancellor as decisive, were cases of devises of realty; and there is a well settled distinction between them and bequests of personalty, such as is the present case. The former are governed by the rules of the common law, and the rules of the ecclesiastical courts which control bequests of per-
810 sonalty, *are regarded as inapplicable. 2 Pow. on Dev. 282; 1 Jarm. on Wills 836; Harvey v. Aston, 1 Atk. R. 361; Reynish v. Martin, 3 Atk. R. 330; Stackpole v. Beaumont, 3 Ves. R. 89; 1 Fonbl. Eq. ch. iv, § 10, n. q, p. 258. Moreover, it may well be questioned how far a decision upon such a question in a country already overstocked with inhabitants, is applicable to a country like ours, with an unbounded extent of territory, a large portion of which is yet unsettled, and in which increase of population is one of the main elements of national prosperity. Nowhere can the policy of repudiating all unnecessary restraints upon freedom of choice in marriage apply with more force than among a free people, with institutions like ours, and in the circumstances by which we are surrounded. For this reason, and for another that will be presently adverted to, I should not feel disposed to follow the decision referred to, if it were even more strictly applicable to this case.

But treating the condition annexed to the bequest in remainder to Ann Maria Maddox, as a partial restraint upon marriage, by requiring her to marry (if she married at all) a member of the society, on pain of forfeiting her membership and the benefit of the bequest, if she married one who was

not, there is another and distinct ground upon which it will be disregarded. There is no bequest over of the third thus given to her in case of her breach of the condition; and the condition therefore will be treated as in terrorem merely, and the legacy becomes pure and absolute. 1 Roper Leg. ch. 13, § 1, p. 654; Garret v. Pritty, 2 Vern. R. 293; Wheeler v. Bingham, 3 Atk. R. 364; Lloyd v. Branton, 3 Meriv. R. 108, 117. Nor will the residuary clause be regarded as equivalent to a bequest over. To render the condition effectual, there must be an express bequest over on breach of the condition, or a special direction that the forfeited legacy shall fall
811 *into the residuum. 1 Jarm. on Wills 841; Scott v. Tyler, 2 Dick. R. 723; Wheeler v. Bingham, 3 Atk. R. 364; Keily v. Monck, 3 Ridgw. P. C., 205, 252; Lloyd v. Branton, 3 Meriv. R. 108; McIlvaine v. Gethen, 3 Whart. R. 584.

There is yet another view, which is also equally applicable to the bequest of the residuum, in which the restriction imposed on the bequest of the third in remainder to Ann Maria Maddox, should be held to be void and ineffectual. And the case must be considered in this aspect, because upon the results to which we are brought upon such consideration, must depend the claim both of Mrs. Tiller and Garland Maddox to participate in the residuum. It is insisted by the counsel, it is true, that there is no proof of disorderly conduct on the part of Mrs. Tiller, nor that she has ever been actually disowned as a member; or if she have been, that she might still be reinstated; and as she has applied for and done all in her power to gain such readmission, but has been refused by the society whose action she could not control, she should be regarded as having complied with the condition prescribed, cy pres, and should now be exempt from the disability which it creates. And as to Garland Maddox, it is urged that there is no proof he is not a member, and as he once was a member, it should be presumed that he still remains such until proof be given to the contrary. But the pretensions of these parties cannot be sustained on these grounds. Mrs. Tiller's conduct was disorderly in the sense intended by the testator, in marrying one who was not a member of the society, contrary to its rules and discipline. In their answer, she and her husband say distinctly that she had left the society; and the fact of her applying for reinstatement sufficiently implies that she had been disowned and excluded. Her application for readmission, however, was not successful, but
812 was rejected *because the "Monthly Meeting" distrusted the motives by which it was prompted. She is not, therefore, and has not been a member of the society since she was disowned upon her marriage, which took place some time, probably several years, before the death of her father. And as to Garland Maddox, the bill charges that he was not a member of the society, and on that account was not entitled to participate in the residuum under the clause of the codicil by which it is disposed of. Garland Maddox in his answer does not pretend that he is a member, nor does he make any claim to participate as such. He rests his claim upon the ground that he is one of the next of kin, and that the restriction of the benefits of the bequest to such of them only as should be members of the "Society of Friends," a body unknown to the law, is illegal and void. And he swears to his answer in the usual mode, instead of making a solemn affirmation, which it is understood is the universal usage with the members of the Society of Friends.

It will not be denied that one of the most marked and distinctive features of our civil institutions, is the perfect, absolute and unqualified freedom of opinion in matters of religion which they secure to all who dwell under them. Unjust encroachment upon the rights of conscience, in no inconsiderable degree, gave impulse to the early immigration from the European continent to this, in the hope that upon this new and virgin soil might be enjoyed that full and unquestioned freedom of opinion in matters of religion which was seemed a part of the natural rights of man, but which was denied to him in the old world. It was the spirit of resistance to such encroachment which filled the sails of the May Flower, and wafted her, with the Pilgrim Fathers upon her decks, to their landing on Plymouth rock. It was the same spirit which brought Huguenots to Virginia and to South Carolina,
813 Catholics *to Maryland, Quakers to Pennsylvania, and Presbyterians to several of the colonies. Hence, nothing was more natural or more certain than that when the separation took place from the British crown, and the state of colonial dependence was replaced by a separate and independent government, the rights of conscience and freedom of opinion in matters of religion, should have a prominent and well assured place in the new institutions. Thus we see the sixth article of the constitution of the United States provides that no religious test shall ever be required as a qualification to any office or public trust under the United States. And the first article of the amendments to the constitution declares, that congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. So the sixteenth section of the bill of rights of Virginia, passed unanimously in convention on the 12th of June 1776, adopted by the convention of 1829–30, and again by that of 1850–51, declares "that religion or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love and charity towards each other." And again: By the act for establishing religious

freedom, passed in 1785, the natural rights of mankind upon this subject are set forth and asserted to their fullest extent, and in their widest comprehension, and provision made to hold them sacred, and to give to them their fullest effect. Again: By the amended constitution of 1830, article 3, § 11, and also by that of 1851, article 4, § 15, it is declared that "no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall any man be enforced,
814 restrained, molested *or burthened, in his body or goods, or otherwise suffer on account of his religious opinions or belief: but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise affect, diminish or enlarge their civil capacities. And the general assembly shall not prescribe any religious test whatsoever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society or the people of any district within this commonwealth to levy on themselves or others any tax for the erection or repair of any house for public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instructor and to make for his support such private contract as he shall please." And to guard the legislation of the state against any clerical or sectarian influence, by both of these constitutions, all ministers of the gospel and priests of any religious denomination are declared to be incapable of being elected members of either house of assembly. Constitution 1830, article 3, § 7; constitution 1851, article 4, § 7. Other provisions of our law might be cited, all showing the studied purpose on the part of our law givers to guard carefully the rights of conscience, and to hold them sacred and inviolate.

I take it, then, that upon no subject is the policy of our law more firmly settled, or more plain, clear and unmistakable than upon this, and that all contracts and all conditions to the same or to gifts or legacies the effect of which is to thwart and violate this policy, should be held to be utterly void and ineffectual. And I regard a restriction imposed by the terms of a bequest, requiring as the condition of its enjoyment, that the legatee should be a member of any religious sect or denomination, as directly violative of this policy, and pregnant with evil conse-
815 quences. It holds out a *premium to fraud, meanness and hypocrisy; it tends to corrupt the pure principles of religion, by holding out a bribe for external profession and conformity to a particular sect; and however pure and honest the motives of the beneficiary may be, he is yet rendered an object of distrust and suspicion; and we see in this case that although no other "disorderly" conduct than marrying out of the society was imputed to Mrs. Tiller, yet her application to be reinstated was rejected, because, in consequence of the condtion annexed to the bequest in her favor, the meeting took up the impression that it was prompted by unworthy and mercenary motives; it hampers the conscience, holds out inducements to stifle its voice and to resist the force of reason and honest conviction; it tends to destroy true religion, and to replace it with what is false and counterfeit; and, in short, it tends to promote all or most of the evils so forcibly denounced in the preamble to the act already cited. See the opinion of Lord Eldon upon a similar subject, in Kircudbright v. Kircudbright, 8 Ves. R. 51.

In England, as we know, the established church constitutes an element, and a material element, in the government; and different ideas and a different sentiment prevail. With these the judges in that country must necessarily be deeply imbued. Of this we have an illustration in the case of Haughton v. Haughton. The lord chancellor thought the restriction good, but had some hesitation about it, which induced him to offer to send the case to a court of law on the point. The doubt was not whether the condition did not impose an unreasonable restraint or an improper restriction upon freedom of choice in marriage, but whether it was not void because it in effect forbade marriage with a member of the established church. And if there be other cases which, like that just referred to, appear to favor the validity of such
816 a restriction, I do *not feel disposed to follow them as authority; and however it may be in England, I think such restriction here is contrary to the genius of our institution, to the spirit of our government and to the policy of our laws, and as such is utterly nugatory, and should be held for nought.

It may be said, however, that as the restriction in the residuary clause is in the nature of a condition precedent, no estate can vest, if it be not complied with, whether it be valid or void. This is undoubtedly true in reference to devises of real estate with a precedent condition in restraint of marriage; for though void, yet if it be not complied with, no estate rises in the devisee. If it be a legacy of personal estate, however, under like circumstances, the legacy will be held good and absolute as if no condition whatsoever had been annexed to it. 1 Story's Eq. Jur. § 289. And there would be every reason for applying the same doctrine to a restriction like that in this case. But the question is wholly immaterial here; because, if the restriction be held void, it is of no consequence whether the bequest fail or take effect, for either way the residuum goes to precisely the same parties and in the same proportions, the only difference being that in the one case they take as distributees, in the other as legatees.

There are other difficulties attending the restriction annexed to this residuary clause, which render it questionable, if it do not involve so much of ambiguity and uncertainty as to the subject and the time of dis-

tribution, and the objects of the gift, as may render it void for that cause. If indeed we may discard the idea of time in construing the expressions, "at the closing of all the above things," "that may be then living, and that shall be at that time members of the Society of Friends," and yielding to the disposition in favor of vesting estates, can refer the time at which
817 *the gift is to take effect to the death of the testator, then no difficulty could occur: for at that time Mrs. Tiller was still a member of the Friends Society; and in the absence of proof we might also infer, that Garland Maddox was also still a member: and so no question could arise. But I think this cannot be done, because the testator seems plainly to have contemplated some period after his death at which the bequest was to take effect. What, then, was the period intended by him? The balance of the third not needed to pay the debt to Thomas Maddox, might be ready for distribution many years before the third given to the father for life would fall in upon his death. Would the former be distributed when it was ready, or would it be held up till the death of the father, and one distribution be made of the whole at that time? If the former, and the third given to the father for life, were to be the subject of a separate division upon his death, then a different class might come in at the first division from those who would be entitled at the second, because some of those embraced by the bounty, who were members of the society when the first division should take place, might cease to be so before the period arrived for the second. If one distribution of the whole is to be made, then the part remaining of the third, after paying the debt to Thomas Maddox, must be held up till the death of the father, that it may be ascertained which of the next of kin were members of the society at that time. And how is the court to determine the question of membership? Religious societies, we know, are subject to schisms leading to a complete separation, and the formation of new and distinct societies. They have occurred in the Society of Friends. A schism in the society in England in 1801, which led to the formation of a new society called New Lights by the old society. So stated in Haughton v.
818 Haughton, ubi sup. *In this country a separation took place some years since, between those who were called Hicksites, after the mover of the secession, Elias Hicks, and those who called themselves the Orthodox Quakers. Both societies claimed to be the true orthodox sect, and each repudiated the claims of the other. If the court were called on in case of such a division to say which was the true orthodox society, how would it determine between the conflicting claimants?

I shall not enter upon these enquiries, because, for the reasons I have already given, I think the Circuit court did right in treating the restrictions in the codicil as inoperative and void: and I am therefore of opinion to affirm the decree.

The other judges concurred in the opinion of Lee, J.

Decree affirmed.

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819 *Commonwealth v. Head.

July Term, 1854, Lewisburg.

1. **Sale of Liquor—Indictment—Allegation of Place.***—An indictment for selling by retail, without a license, ardent spirits, to be drunk where sold, must set out the place in the county where the sale is made. It is not sufficient to state the sale in the county.

The grand jury for the county of Scott, at the April term 1851 of the Circuit court for that county, indicted Anthony Head of said county, for that he did on the 26th of April of that year, at the county aforesaid, sell by retail rum, brandy, &c., without having a license to authorize him to do so, to be then drunk where sold, contrary to the act of assembly, &c.

Head appeared and demurred to the indictment; and the Circuit court sustained the demurrer, and gave a judgment for the defendant. Whereupon upon the application of the attorney general, this court granted a writ of error.

The Attorney General, for the commonwealth.

There was no counsel for the appellee.

SAMUELS, J. An indictment or presentment should always allege the offence with so much fullness and precision of description, that the defendant may know for what he is prosecuted, and thereby be enabled to prepare his defence; and further, that the conviction or acquittal may be pleaded in bar of any future prosecution for the same offence.

If we try the presentment before us by this standard, it will be found defective. The grand jury intended to present an of-
820 fence against the latter clause *of the statute, ch. 38, § 18, p. 209 of the Code. This offence is local in its nature; place is of its essence, and yet no place is alleged but the whole county. A sale of ardent spirits by an unlicensed dealer, not to be drunk at the place of sale, would fall

*Sale of Liquor—Indictment—Allegation of Place.—See principal case cited in Arrington v. Com., 87 Va. 97, 12 S. E. Rep. 224; Morgan v. Com., 90 Va. 81, 21 S. E. Rep. 826; State v. Cain, 9 W. Va. 663; State v. Cottrill, 31 W. Va. 163, 6 S. E. Rep. 428. The principal case was distinguished in State v. Boggess, 36 W. Va. 720, 15 S. E. Rep. 426; Savage v. Com., 84 Va. 621, 5 S. E. Rep. 565. For further information on this subject, see monographic *note* on "Intoxicating Liquors" appended to Thon v. Com., 31 Gratt. 887; monographic *note* on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

within the first clause of the section above cited. The identity of the place at which the spirits were to be drunk, with the place at which they were sold, enters into and forms part of the offence under the latter clause of the statute. If this be so, the defendant should be apprised of the place alleged, so that he may be prepared with proof, if any he have, to show that the place of sale and that of drinking are not the same.

The lawful traffic in ardent spirits is had under a license for the purpose, designating a place; the offence of unlawful traffic is committed by a sale at a place without license to sell at such place. A presentment for such unlawful traffic should on familiar principles, set out the offence with such certainty as to give notice of the offence charged, and to distinguish it from other offences of the same or kindred nature. This is the right of the defendant: he may have defences which he can make to the specific offence alleged, only by knowing what that offence is in all its essential parts. He may be licensed to sell at one place within the county; and relying on his license, and the consciousness of having sold at no other place, would go confidently into trial; yet upon the trial, under the general charge of selling in the county, proof may be offered to show a sale at any place within the county. This proof the defendant could not anticipate; yet if he had known it, he might have prepared himself to repel it by testimony.

It may readily be alleged in every case, at what place the sale was made; and this allegation may be most material to the rights of the defendant. No case
821 *can be found among the many decisions of the General court on the subject, in which such allegation was held immaterial. I see no reason to depart from the forms therefore approved and acted on, and am of opinion to affirm the judgment.

The other judges concurred in the opinion of Samuels, J.

Judgment affirmed.

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822 *Powell v. The Commonwealth.

October Term, 1854, Richmond.

1. **Amendment of Record—In Vacation—Statute.**—QUÆRE: If the act, Code, ch. 181, § 5, p. 681, in relation to amendments of a record by a judge in vacation, applies to records in cases of felony.
2. **Same—Upon What Based—For What Purpose.***—The amendments authorized by the act, are to be based upon something in the record, and not upon the recollection of the judge who presided at the trial, or evidence *aliunde;* and the amendments authorized are amendments to support the judgment, not amendments to give ground for reversing it.
3. **Forgery—Statute—Construction—Indictment.**†—The words "to the prejudice or another's right," in the Code, ch. 193, § 5, p. 733, in relation to forgeries, are descriptive not of the offence, but of the writings of which forgery may be committed; and it is not therefore necessary that they shall be inserted in the indictment in describing the offence charged.
4. **Same—What Constitutes the Offence.**—The maker of a negotiable instrument passes it to the payee, with the name of a third person endorsed upon it, which name he forged: The forging of the name endorsed upon the paper, constitutes the offence of forgery.
5. **Same—Indictment—Case at Bar.**‡—The description of the writing in the indictment, as the endorsement of the person whose name is forged, will not vitiate the indictment, though the simulated liability might not be that of technical endorser, but of a different character.

William A. Powell was indicted for forgery, and for uttering a forged paper, in the Circuit court of the city of Richmond. The indictment charged that Powell, having in his possession a certain writing, which is set out, and is in form a negotiable instrument, made by himself and payable to Roach & McGuire, did feloniously forge on the back thereof the endorsement of the name of the firm of John & George Gibson, with intent to defraud. But the indictment did not charge that it was to the prejudice of another's right. There was another count charging him with uttering the forged paper, in all other respects like the first.
823 *On the trial the prisoner was found guilty, and the jury fixed the term of his imprisonment in the penitentiary at two years. He thereupon moved the court for a new trial, on the ground that the verdict was contrary to the evidence: But the court overruled the motion; and he excepted, and spread the facts upon the record.

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*__Amendment of Record.__—Upon the question of the amendment of the record, see *foot-note* to Price v. Com., 33 Gratt. 819, where the principal case is cited along with a large number of other cases. In addition to those there collected, see Bell v. List, 6 W. Va. 474; McClain v. Davis, 37 W. Va. 334, 16 S. E. Rep. 630; State v. Hudkins, 35 W. Va. 253, 13 S. E. Rep. 369; Miller v. Zeigler, 44 W. Va. 489, 29 S. E. Rep. 983, all citing the principal case.

†__Forgery—Statute—Construction.__—In State v. Tingler, 32 W. Va. 551, 9 S. E. Rep. 937, it is said: "In assigning errors, the prisoner's counsel points out as a defect in the indictment that it does not allege that the act was to the prejudice of any one's right. *Powell's Case, 11 Gratt. 822,* is a full answer to this point. There it was held that the words 'to the prejudice of another's right,' found in the statute against forgery, need not be used in the indictment, because they are descriptive, not of the offence, but of the instrument." See also, Terry v. Com., 87 Va. 673, 13 S. E. Rep. 104.

‡__Same—Indictment.__—The principal case is cited in Sprouse v. Com., 81 Va. 375. See monographic *notes* on "Forgery and Counterfeiting" appended to Coleman v. Com., 25 Gratt. 865; "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674. The principal case is also cited in Quarrier v. Quarrier, 36 W. Va. 314, 15 S. E. Rep. 155; Long v. Campbell, 37 W. Va. 674, 17 S. E. Rep. 199.

It appeared in proof that the prisoner purchased a bill of goods of Roach & McGuire, and gave them in payment a negotiable note signed with his own name, and made payable to them or their order, with the name of John & George Gibson endorsed on the back thereof; and that the endorsement was a forgery.

After the end of the term of the court at which the prisoner was convicted, he applied to the judge in vacation to amend the record; and the judge made an order directing that the record should be amended so as to show that upon the arraignment of the prisoner for the offence aforesaid, he by his counsel moved the court to quash the indictment and each count thereof, which motion was overruled, but was omitted to be entered on the record.

Upon the application of the prisoner, this court granted him a writ of error to the judgment.

August, for the prisoner.

The Attorney General, for the commonwealth.

LEE, J. Waiving the question whether the provision in the Code, ch. 181, § 5, p. 681, authorizing amendments in judgments or decrees of a court in certain cases by the judge in vacation after the adjournment of the term, can apply to a case of felony, in which all the proceedings should regularly be had in presence of the accused, or to any criminal case, I am yet of opinion, that no such amendment of the record as that attempted to be made in this case,
824 by *the action of the judge in vacation, on the 11th of May 1854, is within the scope of that provision. It was intended to authorize amendments in support of a judgment, in cases in which there was something in the record by which they could safely be made. It could not have been intended to authorize an amendment to be made upon the individual recollection of the judge, or upon proofs aliunde. Nor was the application in this case to amend the judgment, nor was it designed to aid the judgment when made. It was an application to introduce something into the record as part thereof, not before found therein, depending on the recollection of the judge, or upon proofs to be submitted to him; and its object was to provide a means of reversing the judgment, not of sustaining it.

The construction given by the English courts to the statutes of amendment, required that there should be something to amend by. Tidd's Prac. 246, 247; Commonwealth v. Winstons, 5 Rand. 546, opinion of Judge Green. And such is, I think, the plain meaning of the provision in question in our statute. And if no amendment can be made in the record of a judgment after the term, except under the statute, or in the few cases allowed by the common law, of which this is not one, the amendment attempted to be made in this case must be disregarded; and no objection to the indictment can now be considered, if the offence be charged therein with sufficient certainty for judgment to be given thereon according to the very right of the case. Code, p. 770, § 12.

But it is urged that the omission of the averment "to the prejudice of another's right," is a defect so material that it may be taken advantage of after verdict; and that it cannot be aided by what is found charged in the indictment. It is said that these terms import a part of the de-
825 scription of the offence denounced *in the statute; and that according to well settled rules of pleading, they cannot be omitted. I think these words are not intended to be descriptive of the offence, but of the writings of which forgery may be committed. The first and third sections of the act specify various writings by name or general description, the forgery of which is made felony; and the fifth section makes the forgery of any writing, other than those mentioned in the first and third sections, "to the prejudice of another's right," in like manner felony: thus discriminating between those writings which might affect the rights of others whereof forgery might be committed, and other writings by which, whether false or genuine, the pecuniary interests of others could not be affected. This discrimination has not been introduced, but only preserved, by the statute; being found to exist at the common law, which predicates the offence of forgery only of such writings as are to the prejudice of another's right, or, as it is sometimes expressed, by which another may be defrauded. 3 Chitty Cr. L. 1021; 2 Russ. on Crimes 318. That these words "to the prejudice of another's right," refer to the writings contemplated by the statute, and not to the act of the party is, I think, sufficiently established by Hendrick's Case, 5 Leigh 707, and Murry's Case, Ibid. 720; in neither of which did the indictment contain that particular expression, though it is found in the act of 1819 on which those prosecutions were founded.

But although the employment of these terms is not indispensable in an indictment under the fifth section, it must sufficiently appear, from the description given of the writing alleged to have been forged, that it was writing to the prejudice of another's right. If it be not such, it is not
826 within the statute, and the forgery *of it cannot be punished as felony. It is insisted, that the writing described in the indictment is not embraced by the statute. It is argued that to be such, the instrument must appear on its face to be valid and effectual to answer the purpose intended, and calculated by its appearance of genuineness to defraud; and that as the plaintiff was the maker of the note, and Roach & McGuire the payees, the endorsement of the names of John & George Gibson, if genuine, could only have been intended to bind them as second endorsers, and created no liability on their part to Roach & McGuire, the payees; and as parties must be held to know the law, that Roach & Mc-

Guire were bound to take notice of this, and so could not be defrauded.

If this proposition be correct as stated, it might perhaps be a sufficient answer to it to say that where a third party puts his name on the back of a negotiable note made by a first to a second party as payee, while still in the hands of the maker, it may be inferred from the fact of his so doing, that he intended to give the maker credit; and this inference is not to be repelled, because his liability as endorser cannot be made operative in favor of a subsequent holder, without first obtaining the name of the payee to the paper: and if the payee, after taking the note, were to endorse his name upon it and put it in circulation, a subsequent holder for value, who should take it on faith of the genuineness of the names so endorsed, would then be defrauded. And the general intent to defraud charged in the indictment, would apply to a subsequent holder who might thus be defrauded, as well as to Roach & McGuire; for a party who under such circumstances forges the name of an endorser upon a note made by himself, payable to another, and passes it to the payee for value, may properly
827 *be held to have intended to defraud any one who might be defrauded in consequence of his act.

But I do not concur in the proposition as stated by the counsel. It does not follow because a party stands in the position of first endorser upon a note, that he can never hold a second or subsequent endorser responsible to him. The circumstances may be such that he may well recover against a subsequent endorser. This is conceded by Judge Spencer in Herrick v. Carman, 12 John. R. 159, cited by the counsel, and impliedly admitted by Lord Kenyon in Bishop v. Hayward, 4 T. R. 470.

The cases which have been decided in the courts of this country, involving the liability of an endorser in blank of a note to which he is no party, are numerous, and perhaps not without serious conflict. Where the note is not negotiable, they would seem to maintain, with little diversity, that such an endorsement in blank, made at the time of the note, will make the endorser liable as an original promiser or maker of the note; and the payee may write a promise to pay the amount of the note, expressing it to be for value received, over the blank signature. Josselyn v. Ames, 3 Mass. R. 274; Moies v. Bird, 11 Mass. R. 436; Doan v. Hall, 17 Wend. R. 214; Nelson v. Dubois, 13 John. R. 175; Herrick v. Carman, 12 John. R. 159; Campbell v. Butler, 14 John. R. 349; Hall v. Newcomb, 3 Hill's N. Y. R. 233; Sylvester v. Downer, 20 Verm. R. 355. Where the note is a negotiable instrument, however, a distinction has been taken in some of the cases; and it has been held that a party endorsing a note in blank to which he is no party, cannot be treated either as an original maker or as a guarantor, but in the absence of controlling proofs to the contrary, must be regarded as having intended to bind himself only as a second endorser. Herrick v. Carman,
828 *12 John. R. 159; Seabury v. Hungerford, 2 Hill's N. Y. R. 80; Hough v. Gray, 19 Wend. R. 202; Spies v. Gilmore, 1 Comst. R. 321.

I think, however, the authority of the cases maintaining this distinction, is overweighed by that of those in which it has been disregarded, and which treat the liability of an endorser in blank of a negotiable note to which he is no party, as the same as that of an endorser under similar circumstances, of a note not negotiable. Baker v. Briggs, 8 Pick. R. 122; Ulen v. Kittredge, 7 Mass. R. 233; Moies v. Bird, 11 Mass. R. 436; Austin v. Boyd, 24 Pick. R. 64; Tenney v. Prince, 4 Pick. R. 385; Sylvester v. Downer, 20 Verm. R. 355; Martin v. Boyd, 11 N. Hamp. R. 385; Beckwith v. Angell, 6 Conn. R. 315; McGuire v. Bosworth, 1 Louisian. R. 248. From these and other cases to the same effect, I deduce that if a third party put his name in blank upon the back of a negotiable promissory note made payable to another party, and to which he is a stranger, while the same remains in the hands of the maker, he will be presumed, in the absence of controlling proof to the contrary, to have intended to give the note credit and currency; and if the endorsement was at the time of the making of the note, he may be treated by the payee as an original promiser or joint maker of the note. If the endorsement were after the date of the note, however long, the payee may treat him as a guarantor, and may write over the signature a guaranty consistent with the nature of the case. And the fair and reasonable, if not necessary inference from cases which have occurred in this court, will bring us to the same result. See Douglass v. Scott, 8 Leigh 43; Watson v. Hurt, 6 Gratt. 633; Orrick v. Colston, 7 Gratt. 189.

Thus then, when the plaintiff produced the note to Roach & McGuire, with
829 the names of John & George *Gibson endorsed, Roach & McGuire had a right to presume that it had been endorsed by the Gibsons for the purpose of giving it credit and currency, and that if they took it, they would be entitled to treat the Gibsons as responsible to them, whether as original makers or as guarantors, is immaterial; for we are not at all concerned here with the enquiry what would be the nature of the liability of the Gibsons to Roach & McGuire, if the endorsement had been genuine, the effect being the same, either way, for the purposes of this case; and if the endorsement were forged, the very fraud would be committed which it was the design of the statute to punish as a felony.

Nor is the view which I have taken unsupported by authority in criminal jurisprudence. Wicks' Case, Russ. & Ry. Cr. Cas. Res. p. 149, is strongly in point. There the prisoner having in his possession what purported to be a bill of exchange for fifty pounds, drawn by Rimmington & Co. payable to their own order, but not endorsed in their name, offered the same for discount

at the banking house of Stephens, and the same was discounted, and the proceeds, less the discount, paid over to him. At the time of the discount of the bill he endorsed it, but not in his own name. It was urged that as there was no endorsement by the payees, the instrument was not valid as a negotiable bill of exchange, and could not be available in the hands of the party to whom it was uttered, even if it were a genuine bill. The argument, however, did not prevail, and the prisoner was convicted. And the case having been reserved, at a meeting of the judges, all who were present, being nine in number, agreed that the conviction was right. In Winterbottom's Case, 1 Denison 41, 5 British Cr. Cas. Res. 42, the prisoner was indicted on stat. 11 Geo. iv, and 1 Wm. iv, for the forgery of an endorsement on a bill of exchange. The bill was payable to four persons named, who were
830 *styled executrixes of one John Isherwood deceased. The forgery charged was of the name of one of those persons. The prisoner was convicted, but the case was reserved. At the hearing before the Court for crown cases reserved, it was urged that the endorsement being of one of the payees only, would not be valid even if genuine; for it would not transfer the property in the bill, and so could not defraud. The court, however, after taking time to consider, held the conviction right.

The only plausible objection to the views above presented, is one suggested by the language of the indictment. The writing is described as purporting to be the "endorsement" of John & George Gibson; and it may be said, that as the simulated liability of the Gibsons was thus that of "endorsers," we are not at liberty to give effect to the allegation, by resorting to a liability of a different character, which would result from their names being found upon the note if the signatures were genuine. I think, however, the objection would be more specious than sound. There is no reason for restricting the term "endorsement" to the technical sense applied to it in the lex mercatoria. The primitive and popular sense of something written on the outside or back of a paper on the opposite side of which something else had been previously written, should be given to the word whenever the context shows it to be proper, or it is necessary to give effect to the pleading or other instrument in which it may occur. And such is the sense in which it should be understood in this indictment; for the technical sense would not give effect to the simulated liability on the part of the Gibsons which it must be intended, was designed to be averred. Upon this point also, Winterbottom's Case, above referred to, may be cited as strongly favoring this mode of construction.

The motion for a new trial upon the
831 facts proved in *the case, involves no other question than that which I have attempted to discuss on the objection to the indictment. What I have already said, therefore, renders a separate consideration of this motion unnecessary.

I am of opinion to affirm the judgment.

The other judges concurred in the opinion of Lee, J.

Judgment affirmed.

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ABSENT DEBTORS.

1. The act of April 3d, 1852, Sess. Acts of 1852, ch. 95, § 1, p. 78, gives a remedy in a court of equity against an absent debtor, where the debtor has estate or debts due to him in the county or corporation in which the suit is brought.
O'Brien & als. *v.* Stevens & als., 610

2. The affidavit required by the statutes to authorize a creditor to sue out an attachment against the effects of an absent debtor, may be made either before or after the bill is filed. Idem, 610

3. Where the court has properly taken jurisdiction of a cause against an absent debtor, it must proceed to give relief according to the principles of equity.
Idem, 610

4. If an absent debtor does not appear in the cause, there cannot be a personal decree against him; but the attached effects can be alone subjected. But if he does appear, there may be a personal decree only against him; or there may be both a personal decree and a decree subjecting the attached effects.
Idem, 610

5. If the absent debtor appears, and the attachment has not been sued out or levied, there may still be a personal decree against him. Or the plaintiff may, after the debtor's appearance, make the affidavit, sue out an attachment, and have it levied on the effects of the debtor, and have them subjected. Idem, 610

6. A demurrer to a bill against an absent debtor will not lie for the failure to aver that an attachment had issued; because the statute in terms provides, that this process may issue after the institution of the suit.
Idem, 610

7. The statute, 1 Rev. Code, p. 475–6, § 4, which provides that a decree against an absent defendant shall, after seven years, stand absolutely confirmed against him, does not protect a decree procured by fraud after the death of the absent defendant, without suggesting his death, or reviving the suit against his representative or heirs.
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See Absent Debtors, No. 3, 4, 5, 7, and
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1. What actions cannot be maintained against an executor or administrator as such. See Executors and Administrators, No. 1, 2, 3, and
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3. When an action is misconceived, so that it will not be cured by the statute of jeofails, 1 Rev. Code of 1819, ch. 28, § 103, p. 511. See Jeofails, passim, and
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4. When sheriff may maintain an action for property which an insolvent debtor had fraudulently disposed of before taking the oath of insolvency. See Insolvent Debtors, No. 2, 3, and
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ADVANCEMENTS.

Bonds of a legatee given to him by his testator after the making of the will, as a donatio mortis causa, with the intention that the legatee shall not account for them, are not an advancement in satisfaction of his legacy.
Lee's ex'or *v.* Book, 182

ADVERSARY POSSESSION.

1. In a writ of right, the tenant, to
834 *defend his possession under the statute of limitations, may show a possession anterior to his patent; and to show color of title, may introduce the entry and survey upon which his patent issued. But as there cannot be an adversary possession against the commonwealth, he cannot show possession further back than the senior grant.
Koiner *v.* Rankin's heirs, 420

2. The effect of a patent issued upon an inclusive survey, and the right of a tenant claiming under it, to show possession under color of title, is the same as in other grants. He may give in evidence the entries for the different tracts embraced in the inclusive survey, the order of court authorizing the survey, and the survey made in pursuance of the order: But he cannot show possession further back than the senior grant.
Idem, 420

3. To protect himself under the statute of limitations, the tenant must show continued adversary possession, for the time of limitation, of some part of the land in controversy. Actual possession of a part of his land outside the boundaries of the demandant's elder patent, is not sufficient.
Idem, 420

4. When patented lands remain uncleared or in a state of nature, they are not susceptible of adversary possession against the elder patent, unless by acts of ownership effecting a change in their condition.
Idem, 420

5. Senior patentee holds and cultivates his land outside of an interlock. Junior patentee afterwards takes possession, and clears and cultivates his land outside of the interlock, and clears and encloses a part of the interlock, and exercises such acts of ownership over the whole as constitutes adversary possession; and after five years dies. The possession of the heirs is not limited to their enclosure: And the entry of the senior patentee upon the heirs is tolled; and he cannot recover by a warrant of unlawful detainer.
Kincheloe *v.* Tracewells, 587

6. An entry upon land in the possession of another, in order to constitute an ouster and give adversary possession to the party entering, must be with claim of title: But the claim of title need not be under a deed or other writing; or if it is under a deed, it is not necessary that his possession shall be restricted to what shall prove to be within the precise boundaries of his deed.
Idem, 587

7. If possession be taken under a mistake as to the true boundary, the fact is immaterial in a proceeding for an unlawful entry and detainer. Idem, 587

8. One of several heirs of his father took possession of land, claiming that it was devised to him for life, remainder to his sons, by his father, by a will that was lost; and he held it for his life, and his sons and those claiming under them, held it after his death, claiming under this title. This taking and holding possession was adverse to the other heirs; and the statute of limitations commenced to run from the time of such taking possession.
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1. Quære: If the act, Code ch. 181, § 5, p. 681, in relation to amendments of a record by a judge in vacation, applies to records in cases of felony. Powell's Case, 822

2. The amendments authorized by the act, are to be based upon something in the record, and not upon the recollection of the judge who presided at the trial or evidence aliunde: And the amendments authorized, are amendments to support the judgment, not amendments to give ground for reversing it. Idem, 822

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1. An instruction given by the court, which upon the statement of the evidence given by the party excepting, could not be injurious to him, is no ground for reversing the judgment.
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2. An exception to an opinion of the court refusing an instruction asked for, does not state the facts of the case so as to show its relevancy. The appellate court will not undertake to decide whether the court below did right or wrong in refusing the instruction.
Fitzhugh's ex'or *v.* G. Fitzhugh, 300

3. Though the court should err in deciding upon a proposition submitted to it, yet if it can be seen from the bill of exceptions, that the decision did not and could not affect the merits of the case, it is not ground for reversing the judgment.
Kincheloe *v.* Tracewells, 587

4. A scire facias to revive a judgment stated that it had been suspended by an injunction, which had been dissolved.
835 A *plea, that the injunction had not been dissolved, is bad; and an issue made up upon it, is immaterial. Therefore, though improper evidence upon it is admitted, it is no cause for reversing the judgment.
Richardson's adm'r *v.* Prince George justices, 190
Poindexter's adm'r *v.* The Same, 190

5. The protest of a negotiable instrument being sufficient to bind the endorser, if parol evidence in aid of it is inadmissible, yet its admission is no ground for reversing the judgment.
Stainback *v.* The Bank of Virginia, 260

6. Where an issue is directed in a chancery cause, and a verdict is found, to which no exception is taken, and a decree is rendered thereon, the facts found in the verdict must be regarded in the appellate court, as the established facts of the case.
Lee's ex'or *v.* Boak, 182

7. A demurrer to a declaration having been overruled in the court below, and there being a judgment for the plaintiff; upon appeal the judgment is reversed, and the demurrer sustained. The cause will be sent back, with leave to the plaintiff to amend his declaration.
Fitzhugh's ex'or *v.* G. Fitzhugh, 300

8. See Free Negroes, No. 4, and Morris, Ex parte, 292

ARBITRATION.

1. An executor has authority to submit a matter to arbitration; but he is responsible as for a devastavit, if by the award the estate is injured.
Nelson's adm'r *v.* Cornwell, 724

2. See Executors and Administrators, No. 13, and Idem, 724

ARDENT SPIRITS.

An indictment for selling ardent spirits by retail, to be drunk at the place where sold, must set out the place in the county where the sale was made: It is not sufficient to state the sale to have been made in the county. Head's Case, 819

ASSIGNOR AND ASSIGNEE.

1. W, administrator of G, assigns the bond of T to the executors of H, in discharge of a debt due from G to H. The executors sue T and recover a judgment; and he enjoins it on the ground that G

owed him for a legacy left him by R, of whom G was executor; and the injunction is perpetuated. The executors of H are entitled to be substituted to the rights of T against G's estate; and are not confined to their remedy on the assignment of W.

Braxton, adm'r, &c. *v.* Harrison's ex'ors, 30

2. Though the injunction was improperly perpetuated, yet as G's administrator was a party to the suit and consented to the decree, and all the parties acted in good faith, the executors of H are not thereby deprived of their remedy over against G's estate in the hands of a subsequent representative of G. Idem, 30

3. See Executors and Administrators, No. 22, 24, and Idem, 30

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1. See Absent Debtors, passim, and
O'Brien & als. *v.* Stephens & als., 610
Evans & als. *v.* Spurgin & als., 615

2. A party contracts a debt in the state, and soon thereafter removes out of the state; and after seven years dies. To a proceeding by foreign attachment to recover the debt, the statute of limitations is a bar.

Markle's adm'r & als. *v.* Burch's adm'r, 26

AUTHENTICATION OF PAPERS.

1. A certificate of the secretary of state of Ohio, under the great seal of the state, that a statute certified, is correctly copied from the original rolls on file in his office, is a due authentication of the statute under the act of congress.

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2. A deposition purporting in the caption, to have been taken in the state and county designated in the commission and notice, and certified by a person who adds to his name the letters J P, is duly authenticated.

Hobbs *v.* Shumates, 516

BONDS.

1. A bond may be the subject of a donatio mortis causa, whether it be the bond of a stranger or the grantee.

Lee's ex'or *v.* Boak, 182

2. Upon a trial at law the defendant introduces in evidence a bond on which a receipt is endorsed, which is attested by a witness. The receipt is evidence for the plaintiff without his calling the witness to prove it.

B. Staton *v.* Pittman, sheriff, 99
Pittman, sheriff, *v.* R. Staton, 99

3. Though an executor may have assented to a specific legacy, he does not thereby dispense with a refunding bond.

Nelson's adm'r *v.* Cornwall, 724

4. See Guardian and Ward, No. 1, and Hunter *v.* Lawrence's adm'r & al., 111

836 *BOUNDARIES.

1. Virginia by statute, cedes to the United States two hundred and fifty acres of land at Old Point Comfort, and directs the governor to convey it. He directs a survey of the land, and upon the report of the surveyor executes a deed to the United States, and takes the courses and distances from the report; but does not refer to it in terms. In determining the boundaries of the land ceded to the United States, the statute, the report and the deed, are all to be looked to in order to ascertain what boundary was intended.

French *v.* Bankhead, 136

2. Looking to the statute, the report and the deed, the intention was to convey by the high water mark, and that is the boundary of the conveyance: And under the act, 1 Rev. Code of 1819, ch. 87, p. 341, the conveyance to the high water mark boundary passed to the United States the soil and jurisdiction to the low water mark.

Idem, 136

CARRIERS.

1. Carriers of passengers by stages are liable for injuries resulting from the slightest negligence on the part of the driver or proprietor of the coach; and they are bound to use the utmost care and diligence of cautious persons, to prevent injury to the passengers.

Farish & Co. *v.* Reigle, 697

2. Where a passenger is injured by the upsetting of the coach, the presumption is, that it occurred by the negligence of the driver; and the burden of proof is on the proprietor of the coach, to show that there was no negligence whatever.

Idem, 697

3. Though the proprietors of the coach may show that it was reasonably strong, with suitable harness, trappings and equipments of sufficient strength and properly made, and that the driver was careful, of reasonable skill and good habits, with steady horses not likely to endanger the safety of the passengers; yet if the upsetting of the coach was caused by the running off of the horses, and such running off of the horses might have been avoided if the utmost care and diligence of very cautious persons had been exercised, the proprietors of the coach will be liable for the injuries sustained by a passenger.

Idem, 697

4. If the coach was upset by the running off of the horses, and if they ran off, not because they were accidentally frightened, but because the blocks were out of the brake, causing the coach to run upon them; and if the running off of the horses might have been prevented if they had been properly harnessed, or if the utmost care and diligence of a cautious person had been used to secure the blocks in the brake, the proprietors are liable. Idem, 697

5. Carriers of passengers by stages are bound to provide not only good coaches, harness and equipments of the kind used on their line, but they are bound to provide such as will best secure the safety of the passengers. Idem, 697

6. If the coach is upset in consequence of having too much baggage on the top, the proprietors are liable for any injury sustained by a passenger by such upsetting of the coach. Idem, 697

7. In actions by passengers against carriers for injuries sustained, the judgment of the jury as to the amount of damages, must govern, unless the damages allowed are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case. Idem, 697

CAVEATS.

1. In a caveat, where the objects called for in the entry are not of such public notoriety as that the courts will take notice of them, a special verdict must find that the objects called for have a real existence, and are such as is required to make a valid entry; and a finding defective in these respects, will not be remedied by finding that the survey was made in conformity with the entry.
McNeel *v.* Herold, 309

2. A party who files a caveat must show a title to the warrant under which his own entry and survey was made; and if he fails to do so, his caveat will be dismissed. Idem, 309

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1. Where the equities between the defendants do not arise out of the pleadings and proofs between the plaintiff and the defendants, there can be no decree between codefendants.
M. Blair *v.* Thompson & als., 441

2. Where an injunction to a judgment upon an assigned bond is perpetuated
837 *upon a ground of equity against the assignor, in a suit in which both the assignor and assignee are parties, there may be a decree over in favor of the assignee against the assignor.
Braxton, adm'r, &c. *v.* Harrison's ex'ors, 30

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Maddox & al. *v.* Maddox's adm'r & als., 804

2. A condition of a religious qualification attached to a legacy, is against the policy of the law of Virginia, and void. Idem, 804

3. As to precedent conditions attached to legacies. See Legacies and Legatees, No. 15, and Idem, 804

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What is a sufficient consideration for the undertaking by an administrator to pay a debt of his intestate out of the assets in his hands. See Executors and Administrators, No. 24, and
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CONSTRUCTION—Rules of.

1. In construing the Code of 1849, the rule of construction is, that the old law was not intended to be altered unless such intention plainly appears.
Parramore *v.* Taylor, 220

2. If parties in making a contract, use words of definite legal signification, they must be understood as using such words in their definite legal sense.
Findley's ex'ors *v.* Findley, 434

3. In construing a provision in a will, the whole instrument is to be looked to to ascertain the intention of the testator.
Cheshire *v.* Purcell, 771

4. In construing a will, if the language be popular and ordinary, its meaning is to be construed according to its usual acceptation; if technical legal terms be used, they are to be construed in the sense which the law affixes to them.
Robinsons *v.* Allen & others, 785

5. The word "survivor," if the will does not indicate another intent, is to be construed as referring to the death of the testator.
Martin's adm'r, &c. *v.* Kirby, adm'r, &c. & als., 67

6. The word "endorsement," construed in its popular sense in an indictment for forgery. Powell's Case, 822

7. The word "may" in the act, Code ch. 96, § 3, p. 443, in relation to granting a license to keep a tavern, construed as not being imperative.
Yeager, Ex parte, 655

CONTRACTS.

1. If parties in making a contract, use words of definite legal signification, they must be understood as using such words in their definite legal sense.
Findley's ex'ors *v.* Findley, 434

2. By an agreement in contemplation of marriage, the intended husband binds his estate to pay the intended wife certain sums of money, if she survived him; which were to be in bar and in full compensation for her dower. This agreement bars her of dower in her husband's real estate; but does not deprive her of her distributable share of his personal estate. Idem, 434

3. Whenever the party originally bound by a contract, continues bound to pay, the promise of a third party to pay, is a collateral promise; and is not binding unless in writing.
Noyes' ex'x *v.* Humphreys, 636

4. Where the promise is to pay for the

whole work done, as well that done before as that done after the promise, even if the promise would have been valid as to the work to be done, yet being collateral as to that which had been executed, and being an entire promise, it is void as to the whole unless it is in writing. Idem, 636

5. A contractor for the construction of a bridge on a railroad, having received the monthly estimates based on a particular construction of his contract, without objection, will be held to have acquiesced in that construction of the contract, and to be bound by it.
Kidwell *v.* The Baltimore & Ohio Railroad Co., 676

6. The contract providing that the final estimate of the engineer shall be conclusive upon the parties to the contract, that is a valid contract; and the estimate of the engineer, in the absence of fraud or mistake, is conclusive. Idem, 676

7. If the contractor might have refused to abide by the final estimate of
838 *the engineer, yet having submitted his charges for the work done, to the engineer, and not having objected to his proceeding to make up the final estimate, the contractor is concluded by the action of the engineer. Idem, 676

8. The engineer having the right, under the contract, to stop the work, if the means for carrying it on should fail, and having informed the contractor that the work must be stopped unless he would receive his monthly payments in orders which were at a discount, and the contractor having consented to receive them, he is not entitled to recover for the amount of the depreciation of said orders. Idem, 676

9. Though it is generally true, that an administrator cannot create a new cause of action against the estate, yet he may make a valid contract to pay a debt not barred by the statute of limitations, out of the assets of the estate, upon which a suit may be maintained.
Braxton, adm'r, &c. *v.* Harrison's ex'ors, 30

10. What will be a sufficient consideration for such a promise. See Executors and Administrators, No. 24, and Idem, 30

11. See Vendors and Purchasers, No. 1, 2, 5, and
Jarrett *v.* Johnson, 327
Bailey *v.* James, 468

CONVEYANCES.

1. Virginia, by statute, cedes to the United States two hundred and fifty acres of land at Old Point Comfort, and directs the governor to convey it. He directs a survey of the land; and upon the report of the surveyor, executes a deed to the United States, and takes the courses and distances from the report; but does not refer to it in terms. In determining the boundaries of the land ceded to the United States, the statute, the report and the deed are to be looked to to ascertain what boundary was intended.
French *v.* Bankhead, 136

2. Looking to the statute, the report and the deed, the intention was to convey by the high water mark, and that is the boundary of the conveyance: And under the act, 1 Rev. Code of 1819, ch. 87, p. 341, the conveyance by the high water mark boundary, passed to the United States the soil and jurisdiction to low water mark. Idem, 136

3. A deed conveying land then, and continuing to be, in the actual adversary possession of another, cannot operate to pass the title to the grantee.
Kincheloe *v.* Tracewells, 587

4. A conveyance of land and slaves upon trust to permit the slaves to live upon the land, and take the profits of the land and their own labor to their own use, they still continuing slaves, is null and void, and passes nothing to the grantee of the slaves.
Smith's adm'r *v.* Betty & others, 752
Same *v.* Thurman & others, 752

5. A conveyance of land forfeited to the commonwealth for nonpayment of taxes, by the commissioner of delinquent lands, passes the title vested in the commonwealth by the forfeiture, though the land is in the adversary possession of a third party.
Levasser *v.* Washburn, 572

CONVEYANCES—Fraudulent.

1. A deed admitted to record upon proof by the subscribing witnesses, one of whom was the husband of the grantee, is null and void as to creditors; not having been duly recorded.
Johnston & Wife *v.* Slater & al., 321

2. A deed of trust which, among other things, conveys growing crops of wheat, rye, and oats, and which is not to be enforced for two years from its date, is not fraudulent per se as to creditors.
Cochran *v.* Paris & als., 348
Dance & als. *v.* Seaman & als., 778

3. Though the deed be executed without the knowledge of the creditors secured by it, yet if when informed of its execution they assent to it, it is valid. Idem, 348, 778

4. A deed which provides in the first place, amply for all the then existing debts of the grantor; and then settles the balance of the property on the grantor's family, in the absence of actual fraud, is a valid deed.
Johnston *v.* Zane's trustees & als., 552

5. What provisions in a deed will not avoid it. Idem, 552

6. To avoid a deed at the suit of a subsequent creditor, actual fraud must be shown. Idem, 552

7. Quære: If a subsequent creditor can file a bill to set aside a deed on the ground that it is voluntary, and therefore void as to prior creditors; no prior creditors complaining of it. Idem, 552

COSTS.

It was not improper before the act, Code, p. 706, § 9, to render a judgment
839 *for costs in favor of a defendant,

against the person for whose benefit the suit was brought, when the defendant succeeded in the case.
Pates *v.* St. Clair, 22

COUNTY COURTS.

See Courts.

COURTS.

1. If a case of unlawful detainer has been pending in the County court for more than twelve months without a final decision, it may be removed on motion, to the Circuit court.
Harrison *v.* Middleton, 527
Kincheloe *v.* Tracewells, 587

2. All civil causes of which the Circuit court has either original or appellate jurisdiction, may be removed from the County to the Circuit court, upon motion, after they have been pending in the County court for one year. Idem, 527, 587

3. The year is to be counted from the organization of the court summoned to try the unlawful detainer. Idem, 527

4. An unlawful detainer case removed to the Circuit court is properly placed on the docket at the head of the civil causes in the court. Idem, 527

5. The act, Code, ch. 96, § 3, p. 443, vests in the County courts a discretion to grant or refuse a license to keep a tavern; in the exercise of which discretion they cannot be controlled by the Circuit courts either by mandamus, writ of error or certiorari.
Yeager, Ex parte, 655

6. Though the applicant for a license to keep a tavern may bring himself fully with in and up to all that the statute requires, so that the County court may properly grant him the license if they think fit, he does not thereby acquire any such right to a license as that the County court may be coerced to grant it. Idem, 655

7. It seems that the County court is bound to act upon every application for a license which is made to it; and if it refuses to act, the Circuit court will coerce it by mandamus: But when the County court does act, its judgment and discretion are not to be controlled. Idem, 655

CREDITOR AND DEBTOR.

1. A settlement which gives to the grantor a bare maintenance with his wife for his life, and provides that the property shall not be subject to his debts thereafter contracted, does not vest him with such an interest in the property as can be subjected to satisfy such after contracted debts.
Johnston *v.* Zane's trustees & als., 552

2. See Practice in Chancery, No. 8, and Williams *v.* Williams, 95

3. See Conveyances, Fraudulent, passim.

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. Quære: If the act, Code, ch. 181, § 5, p. 681, in relation to amendments of a record by a judge in vacation, applies to records in cases of felony.
Powell's Case, 822

2. The amendments authorized by the act, are to be based upon something in the record, and not upon the recollection of the judge who presided at the trial, or evidence aliunde; and the amendments authorized, are amendments to support the judgment, not amendments to give a ground for reversing it. Idem, 822

3. If a justice of the peace convicts a free negro of returning to the commonwealth, this is a misdemeanor; and the free negro is entitled to an appeal if he asks it: And if the justice refuses to allow the appeal, the Circuit court will coerce him by mandamus to allow it.
Morris, Ex parte, 292

DAMAGES.

In actions by passengers against carriers for injuries sustained, the judgment of the jury as to the amount of damages must govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case.
Farish & Co. *v.* Reigle, 697

DECLARATIONS.

See Evidence, No. 11, 12, 13, 14, and
Smith's adm'r *v.* Betty & others, 752
Same *v.* Thurman & others, 752

DECREES.

1. A decree of a court of equity set aside for fraud, upon a bill against the heirs at law of the party procuring the decree.
Evans & als. *v.* Spurgin & als., 615

840 *2. A decree obtained against an absent defendant by fraud, is not protected after seven years, by the act, 1 Rev. Code 1819, p. 475–6, § 4.
Idem, 615

3. See Absent Debtors, passim, and
Idem, 615
O'Brien & als. *v.* Stephens & als., 610

DEEDS.

1. A husband is not a competent subscribing witness to a deed executed during the marriage, by which real estate is conveyed to his wife, either for the purpose of proving the due execution of the deed when called in question, or for the purpose of having it admitted to record.
Johnston & wife *v.* Slater & al., 321

2. A deed admitted to record upon proof by subscribing witnesses, one of whom was the husband of the grantee, is null and void as to creditors, not having been duly recorded. Idem, 321

3. A party claiming title under a deed from a deputy sheriff, for land sold for nonpayment of taxes, under the act of February 9th, 1814, must show that the person described as high sheriff, was such,

and that the grantor in the deed was his deputy.
Hobbs *v.* Shumates, 516

4. Though such deed recites an insufficient advertisement of the property conveyed, it is not thereby vitiated; but is valid to convey such title as by law the sheriff was authorized to convey.
Idem, 516

5. If a deed is correctly read to the grantor, his misunderstanding of it cannot affect its validity as a deed.
Harrison *v.* Middleton, 527

6. A deed conveying land then, and continuing to be, in the actual adversary possession of another, cannot operate to pass title to the grantor.
Kincheloe *v.* Tracewells, 587

7. See Conveyances, Fraudulent, passim.

8. If a deed of a defendant is introduced collaterally upon a trial, as evidence, he may show that it is not his deed without making oath to the fact.
Harrison *v.* Middleton, 527

9. As to declarations of a grantor in a deed and of an agent in procuring the deed for the grantee. See Evidence, No. 12, 13, 14, and
Smith's adm'r *v.* Betty & others, 752
Same *v.* Thurman & others, 752

DELINQUENT AND FORFEITED LAND.

1. Though an adversary possession of lands had commenced to run against the true owner, yet upon the forfeiture of the land to the commonwealth, under the delinquent land laws, the possession, until the land is sold by the commonwealth, is no longer adversary against her, or her grantee claiming under a conveyance from a commissioner of delinquent lands.
Levasser *v.* Washburn, 572

2. The forfeiture of land for the failure to enter it upon the commissioner's books and pay the taxes and damages upon it, was effected by the statute; and required no judicial proceeding to complete it. The forfeiture was therefore complete at the time fixed by the statute. Idem, 572

3. The act of March 18th, 1841, Sess. Acts, p. 31, relinquishing the commonwealth's right to forfeited lands to a junior patentee in possession, only applies to those whose patents bear date prior to the 1st of April 1841. Idem, 572

4. A patent for land that had been previously granted by the commonwealth, and had been forfeited under the delinquent laws, passes nothing to the patentee; and a conveyance of the land forfeited, by the commissioner of delinquent land, passes the title vested in the commonwealth by the forfeiture. Idem, 572

5. See Tax Sales, No. 1, 2, and
Hobbs *v.* Shumates, 516

DEMURRER.

A demurrer to a declaration overruled, and judgment for plaintiff, which upon appeal is reversed and demurrer sustained; the cause will be sent back with leave to the plaintiff to amend his declaration.
Fitzhugh's ex'or *v.* G. Fitzhugh, 300

DEPOSITIONS.

A deposition purporting in the caption to have been taken in the state and county designated in the commission and notice, and certified by a person who adds to his name the letters J P, is duly authenticated.
Hobbs *v.* Shumates, 516

DETINUE.

The fact that slaves are on the premises of a person who makes no claim to
841 *them, his infant daughter who claims them, living with him, will not sustain an action of detinue against him for the slaves, by a party entitled to them.
B. Staton *v.* Pittman, sheriff, 99
Pittman, sheriff, *v.* R. Staton, 99

DEVISEES.

1. Testator by his will gave his wife a plantation, slaves, stock, &c., for life: And he then added, it is understood that my wife is to keep my children and raise them, and give them sufficient schooling: *held*:

1st. The widow takes the bequest cum onere, and is bound to provide for the support and education of the children, in a manner suitable to her circumstances.
Crawford's ex'or *v.* Patterson, 364

2nd. But if one of the children goes to live with a married aunt, the widow being willing to keep the child and provide for her, the widow is not bound for the expenses of the child for board, clothing and education. Idem, 364

2. It seems that a void condition precedent annexed to a devise of land, will prevent the vesting of the devise in the devisee.
Maddox & al. *v.* Maddox's adm'r & als., 804

DONATIO MORTIS CAUSA.

A bond may be the subject of a donatio mortis causa, whether it be the bond of a stranger or of the donee.
Lee's ex'or *v.* Boak, 182

DOWER.

1. By an agreement in contemplation of marriage, the intended husband bound his estate to pay the intended wife certain sums of money, if she should survive him, which were to be in bar of and in full compensation for her dower. This agreement barred her of dower in her husband's real estate.
Findley's ex'ors *v.* Findley, 434

2. Purchaser of land gives bond with security for the purchase money; and eighteen months afterwards gives a deed of trust on the land as a further security; and the land is afterwards sold. The widow of the purchaser is entitled to dower in the land.
M. Blair *v.* Thompson & als., 441

3. In a bill by a widow for dower in land sold in the life time of her husband, and coming to the present owner through several intermediate conveyances, the present owner is the only necessary party defendant. Idem, 441

4. There cannot be a decree for a specific sum in lieu of dower, without the assent of all the parties interested. Idem, 441

EJECTMENT.

1. A party in peaceable possession is entered upon and ousted by one not having title to or authority to enter upon the land. The party ousted may recover the premises, in ejectment, upon his possession merely; and his right to recover cannot be resisted by showing that there is or may be an outstanding title in another; but only by showing that the defendant himself has title or authority to enter under the title.
Tapscott *v.* Cobbs & als., 172

2. Where an ancestor dies in possession of land, the presumption of law is, that the heir is in possession after the death of the ancestor; and in the absence of all evidence on the point, the heir may maintain ejectment upon the strength of his possession, against any one who has entered upon the land without title or authority to enter under the outstanding title in another.
Idem, 172

3. In ejectment the jury set out the wills of a grand father and father; and if the son who is dead, took under the father's will, they find for the plaintiff; if he took under the grand father's will, they find for the defendants. The verdict is sufficiently certain, and submits the single question upon the construction of the wills to the court.
Callis & als. *v.* Kemp & als., 78

4. Though in ejectment, the plaintiffs in their declaration claim the whole tract of land, the jury may find for them for an undivided interest in it. Idem, 78

5. Though where less land is recovered than is demanded, the boundaries of the land recovered should be designated, yet where an undivided interest in it is recovered, it is impossible to set out the boundaries; but the interest being certain, that is sufficient. Idem, 78

ENDORSEMENTS.

The word "endorsement," construed in a popular sense, in an indictment for forgery.
Powell's Case, 822

ENTRY OF LAND.

1. An entry of waste and unappro-
842 priated *land, to be valid, must call for objects which possess that notoriety in themselves, or they must be so particularly described, that other persons, by using due care and reasonable diligence, may readily find them.
McNeel *v.* Herold, 309

2. What certainty there must be in the general and particular calls of an entry.
Idem, 309

3. The objects called for are sometimes so connected with the general history or geography of the country, or its legislation, that the courts will take notice of them; and they will be deemed of general notoriety, and sufficiently identified without further proof. Idem, 309

4. When the objects called for possess but a local notoriety, the party affirming the validity of the entry, must prove the identity of the land intended to be appropriated; and that the calls of the entry are such that a subsequent locator, in the exercise of proper judgment and reasonable diligence, would be enabled to distinguish it from the surrounding lands, so as to appropriate for himself the adjacent residuum. Idem, 309

EQUITABLE JURISDICTION AND RELIEF.

1. Quære: Whether a party may set up in a second suit, pretensions inconsistent with the allegations of his bill and his pretensions in his first suit.
Frazer's adm'r *v.* Bevill & als., 9

2. Under the circumstances, a person who had qualified as administrator of an estate in Mississippi, held to account for his administration in Virginia.
Powell *v.* Stratton & als., 792

3. See Executors and Administrators, No. 22, 24, and
Braxton, adm'r, &c. *v.* Harrison's ex'ors, 30

4. Courts of equity have jurisdiction in all cases, to compel an executor to deliver a specific legacy.
Nelson's adm'r *v.* Cornwell, 724

5. See Legacies & Legatees, No. 9, and
Frazer's adm'r *v.* Bevill & als., 9

6. Money lent by a bachelor uncle to his nephew, to secure which a deed of trust was executed, was held under the circumstances, to have been given and released by the uncle to the nephew, so that a court of equity would refuse to enforce the trust at the suit of the executors of the uncle.
Fitzhugh's ex'ors *v.* Fitzhugh, 210

7. A court of equity will not, in general, assume the exercise of a discretionary power vested in a trustee, nor interfere to control a trustee acting bona fide in the exercise of his discretion: Nor will a suit be entertained to compel a trustee to exercise his power.
Cochran *v.* Paris & als., 348

8. Testator gives his estate to his executors for the benefit of his son, and if they should judge that it would be prudent to invest him with it, to turn it over to him. The executors having declared their judgment that the son may be entrusted with the estate, equity will compel them to turn it over to him. Idem, 348

9. Under the circumstances, equity set aside a sale made by a trustee, on a bill by the grantor in the deed of trust against the purchaser, who was the principal creditor secured by the deed.
Rossett *v.* Fisher & al., 492

10. As to the court which has jurisdiction in an injunction case.
Beckley *v.* Palmer & al., 625

11. When a court has not jurisdiction to enjoin an execution. See Injunctions, No. 3, and Idem, 625

EVIDENCE.

1. How witness may refresh his memory. See Witness, No. 4, 5, 6, and
Harrison *v.* Middleton, 527

2. Parol evidence that the clerk of a drawee of a bill of exchange was authorized to refuse acceptance of the bill, is admissible in an action by the holder against the endorser.
Stainback *v.* The Bank of Virginia, 260

3. In the case of a joint purchase of land by two, parol evidence is not admissible to prove an agreement between them for an unequal division of the land.
Jarrett *v.* Johnson, 327

4. A certificate of the secretary of state of Ohio under the great seal of the state, that a statute certified, is correctly copied from the original rolls on file in his office, is a due authentication of the statute, according to the act of congress.
Wilson *v.* Lazier & als., 477

5. Upon a trial, the defendant introduces a bond on which a receipt is endorsed, which receipt is attested by a witness. The receipt is evidence for the plaintiff without his calling the witness to prove it.
B. Staton *v.* Pittman, sheriff, 99
Pittman, sheriff, *v.* R. Staton, 99

6. In debt on a bond for money loaned, upon the plea of non est factum, defendant relies on the fact that the obligee did not have the means to lend the money;
843 *and to rebut this the plaintiff introduces evidence to show he had money as executor. The defendant may introduce the settlements made by the plaintiff of his accounts as executor, to show he did not have the money from that source.
McDowell's ex'or *v.* Crawford, 377

7. In such a case a note from the defendant to the plaintiff, delivered some days before the trial, authorizing the plaintiff to introduce his books as evidence, if he will allow them to be examined by defendant's counsel previous to the trial, is not admissible evidence for the defendant for any purpose. Idem, 377

8. Proof that a deed when read, was understood in a very material respect, as different from what it is, may tend to show that it was misread; and therefore is competent evidence. But if the deed was correctly read, the misunderstanding of it by a party cannot affect its validity as a deed.
Harrison *v.* Middleton, 527

9. A cause is brought on to be heard upon the bill, answer, exhibits and award; quære, if the depositions and commissioner's report are a part of the record, and evidence as such in a case in which the record is evidence.
Nelson's adm'r *v.* Cornwell, 724

10. Quære: If the record of a suit by parties claiming the estate against the executor, is evidence against a specific legatee who was not a party. Idem, 724

11. Declarations of a person who had been the agent in procuring a deed for another, made either before the negotiation for the deed commenced, or after the execution of the deed was completed, are incompetent evidence against the grantee in the deed, to show that provisions which were intended to be inserted in the deed, had been fraudulently omitted.
Smith's adm'r *v.* Betty & others, 752
Same *v.* Thurman & others, 752

12. But acts and declarations of such person done or made whilst the negotiation was pending, or the deed was in process of execution, are competent evidence against the grantee to show fraud. Idem, 752

13. The declarations of a grantor in a voluntary deed, made after its execution, are not competent evidence against the grantee, to show that provisions which were intended to be inserted have been fraudulently omitted. Idem, 752

14. Nor are the declarations of the grantor made before the execution of the deed, competent evidence against the grantee, in favor of the grantor's heirs and next of kin, to show that the deed was fraudulently procured. Idem, 752

15. In a writ of right or ejectment, the tenant may show the entry and survey on which his patent is founded, in order to show adversary possession under claim of title.
Koiner *v.* Rankin's heirs, 420

EXCEPTIONS—Bill of.

1. An exception to an opinion of the court refusing an instruction asked, does not state the facts of the case so as to show its relevancy. The appellate court will not undertake to decide whether the court below did right or wrong in refusing the instruction.
Fitzhugh's ex'or *v.* G. Fitzhugh, 300

2. An exception to the refusal of the court to grant a new trial, only states the evidence, which is parol. The court will only consider the evidence of the appellee.
Farish & Co. *v.* Reigle, 697
Noyes' ex'x *v.* Humphreys, 636

EXECUTORS AND ADMINISTRATORS.

1. An action on the case for fraud, in selling to the plaintiff an unsound slave, which he was induced to purchase by means of a false and fraudulent warranty of soundness, or by the fraudulent concealment of the unsoundness of the slave, cannot be maintained against the personal representative of the vendor.
Boyles' adm'r *v.* Overby, 202

2. A personal representative cannot be sued as such, for services or goods, furnished to his testator's or intestate's estate since his death.
Fitzhugh's ex'or *v.* G. Fitzhugh, 300

3. It seems that an action will not lie against the personal representative as such, for the funeral expenses of his testator or intestate. Idem, 300

4. In some cases where money has been paid for a deceased person, an action for money paid will lie against the personal representative as such: As where money has been paid as a joint surety. Idem, 300

5. Where the demand in all the counts of the declaration are such that an action cannot in any case, be maintained upon them against the personal representative as such, then the description of him as such, may be treated as surplusage, and the judgment may be against him personally. Idem, 300

844 *6. But if the demand set out in one of the counts may possibly be maintained against the personal representative as such, then the description of him as such cannot be treated as surplusage, and if the action cannot be maintained against him in his representative character, it must fail. Idem, 300

7. If an executor has assented to a legacy, and waived a refunding bond, the legatee may maintain an action at common law against the executor for its recovery: But the intention to dispense with a refunding bond must be very clear.
Nelson's adm'r *v.* Cornwell, 724

8. In a proceeding to recover damages against the Upper Appomattox Company under the 9th section of the act of 23d of February 1835, Sess. Acts, p. 82, the jury having returned their report ascertaining the damages, and the company having excepted to it, and obtained a continuance, the plaintiff dies. The proceeding may be revived by the administrator; but not by the heirs.
Upper Appomattox Co. *v.* Hardings, 1

9. Executors or administrators with the will annexed, who are legatees of slaves under the will, agree upon a division of the slaves, and each takes possession of those allotted to him. This is an assent to the legacy by the executors or administrators.
Frazer's adm'r *v.* Bevill & als., 9

10. The legacy to one is for life, with remainder over upon his dying without issue. The assent to the legacy in favor of the first taker is an assent in favor of the contingent legatee over. Idem, 9

11. Though an executor assents to a specific legacy, he does not thereby dispense with a refunding bond.
Nelson's adm'r *v.* Cornwell, 724

12. An executor, though he has authority to submit a matter to arbitration, yet is responsible as for a devastavit, if by the award his testator's estate is injured. Idem, 724

13. An executor making an improvident submission to award, as to a part of his testator's estate which has been specifically bequeathed, and the result of the submission being, that the property is left in his hands as his own property, and he is compelled to pay for it, the legatee is not precluded by the award from recovering the specific property. Idem, 724

14. An administrator in Mississippi having purchased for the estate land sold for the payment of a debt due to the estate, held under the circumstances, not bound to keep the land and account for the price; but the land is to be treated as the property of the estate.
Powell *v.* Stratton & als., 792

15. Under the circumstances, the administrator not held responsible for money which became worthless in his hands by the insolvency of the bank. Idem, 792

16. Under the circumstances, a person who had qualified as administrator upon an estate in Mississippi, held to account for his administration in Virginia. Idem, 792

17. Courts of equity have jurisdiction in all cases, to compel the delivery of a specific legacy by an executor.
Nelson's adm'r *v.* Cornwell, 724

18. The statute of limitations cannot bar the legatee's claim to his specific legacy whilst it is held as such by the executor, though he has long before assented to the legacy. Idem, 724

19. A delay of seventeen years by a specific legatee to sue for his legacy, held under the circumstances, not to bar his claim. Idem, 724

20. In a suit by a legatee claiming upon the death of the legatee for life without heirs, against said legatee and a purchaser of one of the slaves so bequeathed, under an execution against him, another executor, who is also a legatee, is a competent witness for the contingent legatee, to prove the division of the slaves and the assent to the legacy.
Frazer's adm'r *v.* Bevill & als., 9

21. W, administrator of G, assigns the bond of T to the executors of H, in discharge of a debt due from G to H. The executors sue T and recover a judgment, and he enjoins it on the ground that G owed him for a legacy left him by R, of whom G was the executor; and the injunction is perpetuated. The executors of H are entitled to be substituted to the rights of T against G's estate; and are not confined to their remedy upon the assignment of W.
Braxton, adm'r, &c. *v.* Harrison's ex'ors, 30

22. In this injunction suit the executors of H and W and the administrator de bonis non of G are parties, and the decree perpetuating the injunction is by consent; and they also consent to a decree directing an account of G's estate by his administrator: *held*:

1st. It is a case in which there may be a decree between codefendants in favor of the executors of H against G's estate. Idem, 30

2nd. That to ascertain whether
845 there *were assets of G's estate to pay the debt, the account might be directed. Idem, 30

3rd. If the decree against G's estate was more doubtful, the consent of the representatives of W and G clearly authorized it. Idem, 30

23. Though it was improper to perpetuate the injunction, yet as the administrator of G consented to the decree, and all the parties acted in good faith, the executors of H are not thereby deprived of their remedy over against G's estate in the hands of a subsequent administrator de bonis non of G. Idem, 30

24. Ten years after the decree, the second administrator de bonis non of G entered into a contract under seal, to pay the debt out of the assets when received; and the executors of H agreed to wait one year, to release their costs in the suit, and dismiss it as to them. But the administrator was not to be bound personally; and the executors were at liberty, if the money was not paid in the year, to cancel the agreement, and proceed to enforce any of their existing remedies. The administrator did not collect assets within the year, and the executors sued in equity upon the agreement: *held*:

1st. Though the right of the executors of H to proceed against G's estate accrued when the injunction was perpetuated, yet the pendency of that suit carried on for their benefit, prevented the running of the statute of limitations against them. Idem, 30

2nd. Though it is generally true, that an executor or administrator cannot create a new cause of action against the estate, yet he may make a valid promise to pay a debt not barred by the statute of limitations, out of the assets of the estate, on which a suit may be maintained. Idem, 30

3rd. That there was a sufficient consideration to sustain the agreement, and a suit could be maintained on it by the executors of H against the administrator, for payment out of the assets. Idem, 30

4th. That it was proper to sue in equity to have an account of, or for marshaling the assets; and this especially as the agreement being under seal, it is doubtful whether an action at law could be maintained upon it. Idem, 30

25. How an administrator who is a creditor of the estate, and has exhausted the personal assets in the payment of debts, may subject the real estate. See Practice in Chancery, No. 8, and
Williams *v.* Williams & als., 95

26. When there shall be a judgment for an administrator notwithstanding a verdict against him. See Jeofails, No. 1, 2, and
Boyles' adm'r *v.* Overby, 202

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

1. If a case of unlawful detainer has been pending in the County court for more than twelve months, without a final decision, it may be removed on motion, to the Circuit court.
Harrison *v.* Middleton, 527
Kincheloe *v.* Tracewells, 587

2. The year is to be estimated from the organization of the court summoned to try the unlawful detainer.
Kincheloe *v.* Tracewells, 587

3. An unlawful detainer case removed to the Circuit court, is properly placed on the docket at the head of the civil causes in the court.
Harrison *v.* Middleton, 527

4. A landlord sells land in possession of his tenant, by agreement under seal, and the tenant refuses to deliver possession; the landlord is the proper party to institute a proceeding of unlawful detainer to obtain possession. Idem, 527

5. To entitle the plaintiff to recover possession upon a warrant of unlawful detainer, he must prove that the defendant withheld the possession at the date of
846 *the warrant. But if the warrant does not state the withholding possession by the defendant, that may be aided by the complaint which states the fact.
Kincheloe *v.* Tracewells, 587

6. When senior patentee cannot recover by an unlawful detainer. See Adversary Possession, No. 5, 6, and Idem, 587

FORFEITURES.

See Delinquent and Forfeited Land, No. 2, and
Levasser *v.* Washburn, 572

FORGERY.

1. The words "to the prejudice of another's right," in the Code, ch. 193, § 5, p. 733, in relation to forgeries, are descriptive, not of the offence, but of the writings of which forgery may be committed; and it is not, therefore, necessary that they shall be inserted in the indictment in describing the offence. Powell's Case, 822

2. The maker of a negotiable note passes it to the payee, with the name of a third person endorsed upon it; which name he forged. The forging of the name endorsed upon the paper constitutes the offence of forgery. Idem, 822

3. The description of the writing in the indictment, as the endorsement of the person whose name is forged, will not vitiate the indictment; though the simulated liability may not be that of a technical endorser, but of a different character. Idem, 822

FORTHCOMING BONDS.

1. An award of execution on a forfeited forthcoming bond cannot be successfully resisted on account of the invalidity of the original judgment, unless such judgment is null and void.
Pates *v.* St. Clair, 22

2. For the rights and remedies of sureties in forthcoming bonds, see Sureties, No. 2, 3, 4, and
Hill *v.* Manser & al., 522

FRAUD.

1. What provisions in a deed of trust are not fraudulent. See Conveyances, Fraudulent, passim.

2. A decree of a court of equity set aside on the ground of fraud, upon a bill against the heirs of the party procuring the decree.
Evans & als. *v.* Spurgin & als., 615

3. What arrangement as to property by a debtor, is fraudulent as to his creditors, so that the property will vest in the sheriff upon the debtor's taking the oath for the relief of insolvent debtors.
B. Staton *v.* Pittman, sheriff, 99
Pittman, sheriff, *v.* R. Staton, 99

4. See Insolvent Debtors, No. 2, 3, 4, and
Idem, 99

5. See Guardian and Ward, No. 5, 6, and
Hunter *v.* Lawrence's adm'r & al., 111

FRAUDS—Statute of.

1. Wherever a party originally bound by a contract continues bound to pay, the promise of a third person to pay is a collateral promise, and is not binding unless in writing.
Noyes' ex'x *v.* Humphreys, 636

2. Where the promise declared on is an entire promise to pay for the whole work done, as well that done before as that done after the promise made, even if the promise would have been valid as to the work to be done; yet being collateral as to that which had been executed, and being an entire promise, it is void as to the whole unless in writing. Idem, 636

FREE NEGROES.

1. The offence of a free negro in coming into the state and remaining therein, in violation of the 28th and 29th sections of ch. 198 of the Code of Virginia, is a misdemeanor, for which he is liable to be prosecuted and punished in the manner provided in the 28th section.
Morris, Ex parte, 292

2. Upon conviction of such a misdemeanor, the party is entitled as of right, under § 15, of ch. 213, of the Code, to an appeal from the decision of the justice to the court of the county or corporation in which his conviction was had; and it is the duty of the justice to allow the appeal, if duly applied for. Idem, 292

3. If in such case the appeal is duly applied for and refused by the justice, the party may have relief by mandamus from the Circuit court. Idem, 292

4. If the Circuit court refuses to issue a mandamus in such a case, the party may apply to the Supreme court of appeals for a supersedeas or writ of error; and have the action of the Circuit court reversed.
Idem, 292

GUARDIAN AND WARD.

1. A bond executed to an executor is transferred by him to a guardian, as part of his ward's estate. Whatever interest the ward has in the bond, is subject to the control of the guardian, who may receive the money if voluntarily paid; may sue for it in a common law court in the name of the executor, for his own use as guardian, and cannot be prevented by the executor, or he may sell and transfer the bond.
Hunter *v.* Lawrence's adm'r & al., 111

2. As a general rule, the guardian has the legal title of the ward's personal estate; and has the power and authority to sell it.
Idem, 111

3. A guardian violates his trust when he sells or transfers the property of his ward to pay his own debt. Idem, 111

4. The fraud of a guardian in disposing of the property of his ward, is not sufficient of itself, under all circumstances, to invalidate his transactions with innocent parties. Idem, 111

847 *5. The same person is guardian of two wards, and he transfers a bond belonging to one of his wards, to the husband of the other, in payment of his wife's estate, the husband not knowing, or having any reason to suspect, that it belongs to the other ward; and the guardian and his sureties being then wealthy: Afterwards the guardian fails. The husband who received the bond is not responsible to the ward whose property the bond was, for the amount thereof. Idem, 111

6. The principle upon which a party dealing with a fiduciary is held responsible, is, that he has co-operated in the fraud of the fiduciary. Idem, 111

7. What laches of sureties of a guardian will debar them of redress against a party dealing with the guardian. See Sureties, No. 1, and Idem, 111

HEIRS.

1. When heirs not the proper party to revive a proceeding. See Executors and Administrators, No. 8, and
Upper Appomattox Co. *v.* Hardings, 1

2. Where an ancestor dies in possession of land, the presumption of law is that the heir is in possession after the death of the ancestor; and in the absence of all evidence on the point, the heir may maintain ejectment upon the strength of his possession, against any one who has entered upon the land without title, or authority to enter under a title outstanding in another.
Tapscott *v.* Cobbs & als., 172

3. When the statute of limitations as to remedies for recovery of land runs against femes covert and infant heirs. See Limitations, Statutes of, No. 10, 11, and
Caperton & al. *v.* Gregory & als. lessee, 505

HUSBAND AND WIFE.

1. A husband is not a competent subscribing witness to a deed executed during the

marriage, by which real estate is conveyed to his wife, either for the purpose of proving due execution of the deed when called in question, or for the purpose of having it admitted to record.
Johnston & wife *v.* Slater & al., 321

2. By an agreement in contemplation of marriage, the intended husband bound his estate to pay the intended wife certain sums of money, if she survived him; which were to be in bar of and in full compensation for her dower. This agreement barred her of dower in her husband's real estate; but does not deprive her of her distributable share of his personal estate.
Findley's ex'ors *v.* Findley, 434

3. The widow having renounced the will, is not entitled to take under it the property bequeathed to her: But it is to be applied to compensate the legatees who are disappointed by her taking her distributable share of the personal estate.
Idem, 434

4. The widow having received from the executors two bonds of her son by a former marriage, which he had executed to her husband, in part satisfaction of what was due to her under the marriage agreement, and having given to them a receipt for the amount, it is a valid payment to her to that extent. Idem, 434

5. See Legacies and Legatees, No. 16, and
Crawford's ex'or *v.* Patterson, 364

6. When statute of limitations will run against femes covert and their husbands.
Caperton & al. *v.* Gregory & als. lessee, 505

INDICTMENTS.

1. An indictment for selling by retail ardent spirits, to be drunk where sold, must set out the place in the county where the sale is made: It is not sufficient to state the sale to have been made in the county.
Commonwealth *v.* Head, 819

2. See Forgery, No. 1, 3, and
Powell's Case, 822

INFANTS.

1. Though the defendant was an infant when an action was brought against her, yet if she did not set up her infancy to defeat the action, and it may be reasonably inferred from the evidence, that she was of full age when the cause was tried, and she appeared and defended herself by counsel, she is bound by the judgment.
B. Staton *v.* Pittman, sheriff, 99
Pittman, sheriff, *v.* R. Staton, 99

2. How infants are affected by the statute of limitations applying to remedies for the recovery of land. See Limitations, Statute of, No. 11, and
Caperton & al. *v.* Gregory & als. lessee, 505

INJUNCTIONS.

1. A defendant in an execution files a bill to enjoin it, on the ground that a previous execution sued out on the same judgment, had been levied by the sheriff on the property of another defendant in
848 *the execution, sufficient to discharge it. In such a case the bill must be filed in the county where the judgment was recovered; and the circuit court of another county has no jurisdiction.
Beckley *v.* Palmer & al., 625

2. In such a case it is not necessary that the objection to the jurisdiction shall be taken by demurrer or plea; but it may be taken at the hearing of the cause.
Idem, 625

3. If in such case the plaintiff insists that the sheriff has misapplied the proceeds of the property levied on, or that a payment has been made to him which has not been credited on the execution, if he had an opportunity to apply to the court of law from which the execution issued, for redress, he has no right to come into a court of equity for relief. Idem, 625

4. The pendency of an injunction to a judgment at law will not prevent the revival of the judgment upon the death of either plaintiff or defendant; and the injunction operates upon the judgment on the scire facias to restrain the issue of an execution thereon.
Richardson's adm'r *v.* Prince George justices, 190
Poindexter's adm'r *v.* Same, 190

INSOLVENT DEBTORS.

1. What arrangement of property by a debtor is fraudulent as to his creditors, so as to vest it in the sheriff upon the debtor's taking the oath for the relief of insolvent debtors.
B. Staton *v.* Pittman, sheriff, 99
Pittman, sheriff, *v.* R. Staton, 99

2. Though the insolvent debtor never had possession of the property, but it was transferred by a fraudulent arrangement to a third person, the sheriff may recover the property from this third person.
Idem, 99

3. Though the property which consisted of slaves, was sent to the premises of B, the father of the person to whom the property was transferred, and who was an infant and lived with B, and she claimed it and B did not, B is not liable for it.
Idem, 99

4. When property given in trust by a testator for his son, will be subject to the son's debts, and vest in the sheriff upon the son's taking the oath for the relief of insolvent debtors. See Trusts and Trustees, No. 2, and
Cochran *v.* Paris & als., 348

INSTRUCTIONS.

1. An instruction given by the court, which upon the statement of the evidence given by the party excepting, could not be injurious to him, is no ground for reversing the judgment.
Colvin *v.* Menefee, 87

2. The court may refuse to give an instruction because it is so obscurely expressed as to leave in doubt the meaning intended.
Levasser *v.* Washburn, 572

3. Upon a motion by plaintiff to instruct the jury to disregard all the documentary evidence introduced by the defendant, of which some part is legal and other illegal, the court may properly overrule the motion, without undertaking to state to the jury which is and which is not legal.
Kincheloe *v.* Tracewells, 587

4. The court should refuse to give an instruction where it is obscure and calculated to mislead the jury; or where it asks the court to decide upon a fact in issue in the cause; or where it is irrelevant or not applicable to the evidence. Idem, 587

5. But if there is any evidence in the cause though slight, to which the instruction is applicable, and it propounds the law correctly, it is to be given.
Farish & Co. *v.* Reigle, 697

6. See Appellate Court, No. 2, and
Fitzhugh's ex'or *v.* G. Fitzhugh, 300

INTEREST.

1. Under the act of March 2, 1827, a landlord is entifled to interest on rent in arrear from the time it was due.
Brooks *v.* Wilcox, 411

2. When purchaser bound to pay interest. See Vendor and Purchaser, No. 7, and
Bailey *v.* James, 468

3. On what payments surety is entitled to have interest.
Hill *v.* Manser & al., 522

ISSUES OUT OF CHANCERY.

1. Upon an issue directed out of chancery, the verdict of the jury is conclusive when there is no exception spreading the facts upon the record.
Fitzhugh's ex'ors *v.* Fitzhugh, 210
Lee's ex'or *v.* Boak, 182

2. In a chancery cause, if upon the state of the proofs at the time an issue is directed, the bill should be dismissed, it is error to direct it: And although the issue is found for the plaintiff, the bill
849 *should, notwithstanding, be dismissed at the hearing.
Smith's adm'r *v.* Betty & others, 752
Same *v.* Thurman & others, 752

3. When the allegations of the bill are positively denied by the answer, and the plaintiff has failed to furnish two witnesses, or one witness and corroborating circumstances, in support of the bill, it is error to direct an issue. The onus must be shifted, and the case rendered doubtful by the conflicting evidence of the opposing parties before an issue should be ordered.
Idem, 752

JEOFAILS.

1. An action on the case against the personal representative of a vendor, for fraud in the sale of an unsound slave, to the plaintiff, which he was induced to purchase by means of a false and fraudulent warranty, or the fraudulent concealment of unsoundness, cannot be maintained; and though there is a judgment for the plaintiff the error is not cured by the statute of jeofails, 1 Rev. Code 1819, ch. 28, § 103, p. 511.
Boyles' adm'r *v.* Overby, 202

2. In such a case, though there is a verdict for the plaintiff, judgment should be rendered for the defendant.
Idem, 202

3. An action is misconceived in the sense of the statute, only in a case wherein, upon the trial, the proofs show a cause of action fit to be asserted in a form different from that adopted. The defendant is held liable upon proofs showing a liability; and if no objection is made to the form of the action until after the verdict, the defect is cured.
Idem, 202

4. To hold a defendant liable upon a cause of action not asserted, is going to the utmost verge of the law, even where such cause of action is proved. But to hold him liable for such cause when not proved, or proved by evidence not admissible if the action had been brought for that cause, is going beyond the letter and spirit of the law. Idem, 202

5. The statute, though it will aid defects, whether of form or substance in pleading, where a portion of the matter is appropriate, does not apply to cases to which the matter pleaded is in all its parts merely nugatory, setting forth no cause of action or no ground of defense. Idem, 202

JUDGMENTS.

1. It was not improper before the act, Code, p. 706, § 9, to render a judgment for costs in favor of a defendant, against a person for whose benefit a suit was brought, when the defendant succeeded in the case.
Pates *v.* St. Clair, 22

2. A judgment being rendered by consent of parties, by their attorneys, is by consent of the party for whose benefit the suit was brought. Idem, 22

3. The pendency of an injunction to a judgment at law will not prevent the revival of the judgment upon the death of either plaintiff or defendant; and the injunction operates upon the revived judgment to restrain the issue of an execution thereon.
Richardson's adm'r *v.* Prince George justices, 190
Poindexter's adm'r *v.* Same, 190

4. A surety in a forthcoming bond is a surety for the debt; and when he pays it as such surety, he is entitled to all the rights of the creditor against the original debtor, subsisting at the time he became bound for the debt. And the judgment, for the benefit of the surety so paying, is not extinguished, but transferred with all its obligatory force against the principal; and constitutes a legal lien upon his real estate owned at the date of the judgment or afterwards acquired.
Hill *v.* Manser & al., 522

5. What court has jurisdiction of an injunction to a judgment. See Injunctions, No. 1, and
Beckley *v.* Palmer & al., 625

LACHES AND LAPSE OF TIME.

1. Under the circumstances, the delay in the prosecution of a pending suit for twenty-three years, held to bar further proceedings in it.
Crawford's ex'or *v.* Patterson, 364

2. Lapse of time is justly of great weight in controversies about transactions long since past. But this weight is thrown in favor of the party who insists that the state of things existing during the lapse of time shall not be disturbed: It cannot be relied on by parties seeking to change that state of things.
Evans & als. *v.* Spurgin & als., 615

3. A delay of seventeen years by a specific legatee, to sue for his legacy, held under the circumstances, not to bar his claim.
Nelson's adm'r *v.* Cornwell, 724

LANDLORD AND TENANT.

1. For proceedings upon a distress for *rent reserved in other thing than money. See Rents, passim, and 850
Brooks *v.* Wilcox, 411

2. An agreement under seal by a tenant, that he will surrender possession whenever a purchaser from the landlord requires it, constitutes him a tenant at will or on sufferance; and he is not entitled to six months' notice to quit.
Harrison *v.* Middleton, 527

3. If a tenant claims to hold adversely to his landlord, he is not entitled to notice to quit. Idem, 527

4. A landlord sells land in possession of his tenant, by agreement under seal; and the tenant refuses to deliver possession. The landlord is the proper party to institute a proceeding of unlawful detainer to obtain possession. Idem, 527

LEGACIES AND LEGATEES.

1. What is an assent to a legacy by an executor. See Executors and Administrators, No. 9, 10, and
Frazer's adm'r *v.* Bevill & als., 9

2. An executor though he assents to a legacy, does not thereby dispense with a refunding bond.
Nelson's adm'r *v.* Cornwell, 724

3. When specific legatee may sue at law for his legacy. See Executors and Administrators, No. 7, and Idem, 724

4. Courts of equity have jurisdiction in all cases to compel the delivery of a specific legacy by the executor. Idem, 724

5. The statute of limitations cannot bar the legatee's claim to his specific legacy whilst it is held as such by the executor, though he has long since assented to the legacy. Idem, 724

6. A delay of seventeen years by a specific legatee, to sue for his legacy, held under the circumstances, not to bar his claim. Idem, 724

7. When specific legatee entitled to recover his legacy, though executor has accounted for it to other parties under an award. See Executors and Administrators, No. 13, and Idem, 724

8. When an assent to a legacy may be proved by one executor at the suit of the legatee, against the other executor and a purchaser under him. See Executors and Administrators, No. 20, and
Frazer's adm'r *v.* Bevill & als., 9

9. When a contingent legatee of a remainder, may sue the legatee for life and a purchaser under him to have the legacy forthcoming upon the happening of the contingency. Idem, 9

10. Bonds of a legatee are given to him by the testator as a donatio mortis causa, with the intention that the legatee shall not account for them. They are not an advancement in satisfaction of his legacy.
Lee's ex'or *v.* Boak, 182

11. Widow having renounced the will, and taken her distributable share of the personal estate, the property bequeathed to her is to be applied to compensate the legatees who are disappointed by her taking her distributable share of the personal estate.
Findley's ex'ors *v.* Findley, 434

12. A legacy of a remainder in property, on condition that the legatee, a female, shall remain a member of the Society of Friends; there being but five or six single men, members of the society, in the neighborhood of the legatee when she is of a marriageable age, is an unreasonable restraint upon marriage, and void.
Maddox & al. *v.* Maddox's adm'r & als., 804

13. There being no bequest over, and no specific direction that upon breach of the condition, the legacy shall fall into the residuum of the estate, the condition is in terrorem merely, and does not defeat the legacy. Idem, 804

14. The bequest of a legacy upon a condition requiring a religious qualification, the condition is against the policy of the law of Virginia, and therefore void. Idem, 804

15. Quære: If the condition be a condition precedent, the legatee can take the legacy free from the condition; or if the legacy lapses: And it seems the legatee will take the legacy of personal property; and a devise of land would fail. Idem, 804

16. Testator by his will gave his wife a plantation, slaves, stock, &c., for life: And he then added, It is understood that my wife is to keep my children, and raise them, and give them sufficient schooling: *held*:
1st. The widow takes the bequest cum onere; and is bound to provide for the support and education of the children in a manner suited to her circumstances.
Crawford's ex'or *v.* Patterson, 364

2nd. But if one of the children goes to live with a married aunt, the widow being willing to keep the child and provide for her, the widow is not liable for the expenses of the child, for board, clothing and education. Idem, 364

3rd. Executors pay the account out of the estate of the child in their hands, and on her marriage, her husband gives them a receipt for the payment. The
851 widow *is not liable to the husband and wife for the amount.
Idem, 364

LIMITATION OF ESTATES.

1. On a devise or bequest over to survivors at the death of a devisee or legatee for life, in the absence of any expression of a particular intention on the part of the testator, the survivorship has relation to the death of the testator.

Martin's adm'r, &c. *v.* Kirby, adm'r, &c. & als., 67

2. The testator gives all his estate real and personal to his wife for and during her widowhood: And he directs that at her death all his estate shall be sold and equally divided between all his surviving children and their heirs. The children living at the death of the testator took a vested interest in the estate. Idem, 67

3. In 1799 testator lends to his son B a tract of land during his life; and if he should die without lawful issue, testator gives the land to his grand son H, to him and his heirs forever. But should my son B leave lawful issue, my will is that he may dispose of said land to such of his issue as he may think fit. B took an estate tail in the land, which by the statute was converted into a fee.

Callis & als. *v.* Kemp & als., 78

4. Testator devises the whole residue of his real and personal estate to B and L, in trust, that his niece Ann shall have the whole profits during her life, for the support of herself and her son J. At her death the trust to cease, and the estate to go to J and his heirs, if he survived his mother; if he died before her, to his children, if he left any. If J dies before his mother without children, and she have other children and die, they to take the same estate which J would have taken if he had survived her. But if Ann and J die without children to inherit the estate, then the estate to go to L and his heirs. Testator authorizes Ann to sell the land and slaves, if necessary for her comfort, with the approbation of B and L, and purchase other property, which is to be in the same situation, and descend in the same way, as that left to Ann and her son J in the event of their death. Upon J's surviving his mother, he took the absolute fee; and there is no further limitation of the estate in that event.

Cheshire *v.* Purcell, 771

5. Testatrix gives to her husband a life estate in real and personal estate, to be used as he pleases in every respect. At his death, or before if he chooses to relinquish his rights, she gives all the property to one or more of the children of R, as he may designate; or should it be necessary, he may make such other disposition of the same as he may deem proper, having full confidence in him that he will do what is right. R is the daughter of her husband by a former wife. The husband died in her life time: *held*:

1st. The provision in favor of the children of R is void for uncertainty.

Robinsons *v.* Allen & als., 785

2nd. The testatrix did not dispose of the remainder in the property, after the life estate given to the husband; and he having died in her life time, the property was not disposed of by her will, but passed to her heirs and next of kin.
Idem, 785

LIMITATIONS—Statute of.

1. See Adversary Possession, passim.

2. No time runs against the commonwealth. Levasser *v.* Washburn, 572

3. Though the statute had commenced to run against the true owner of land, yet upon a forfeiture under the delinquent land laws, it ceased to run until it was sold by the commissioner of delinquent lands.
Idem, 572

4. The statute cannot bar a legatee's claim to a specific legacy whilst it is held as such by the executor, though he had long since assented to the legacy.

Nelson's adm'r *v.* Cornwell, 724

5. A decree obtained against an absent defendant by fraud is not protected after seven years, by the act, 1 Rev. Code 1819, p. 475, § 4.

Evans & als. *v.* Spurgin & als., 615

6. See Executors and Administrators, No. 24, and

Braxton, adm'r, &c. *v.* Harrison's ex'ors, 30

7. The statute applies to a debt by parol contracted by a party then living in Virginia, but who soon thereafter removed from the state, and remained out of it until his death.

Markle's adm'r & als. *v.* Burch's adm'r, 26

8. Trust deed to secure a debt provides that the grantor shall retain the property until a certain time. Before that day he agrees to sell it at a certain price, and if the money and interest is not returned within twelve months, the agreement to stand as a bill of sale; and he delivers the property. Within five years from the time when the trustee might take the property, and from the end of the twelve months, but not from the date of the agreement, the trustee, who had no notice of the sale,
852 takes possession *of it and sells it to pay the debt. The title of the purchaser was not perfected by the lapse of time; and the trustee was entitled to take possession and sell under the trust deed.

Colvin *v.* Menefee, 87

9. A party takes possession of land claiming it under a lost will; and he files a bill to set up the will, which is afterwards dismissed for want of security for costs. The statute having commenced to run, the pendency of this suit did not stop it.
Caperton & al. *v.* Gregory & als. lessee, 505

10. The statute runs against femes covert and their husbands, so as to bar a recovery during coverture. Idem, 505

11. The infant children of a female heir who died a feme covert, are barred after three years from the death of their mother, though they may continue infants all the time. Idem, 505

12. Upon a bill by the other heirs for partition, against the party in possession, they are required to establish their title at law. If there was any equitable ground to repel the bar of the statute, the court in directing them to establish their title at law, should have given effect to it in its order: But this not having been done, the statute must have its legal effect on the trial at law. Idem, 505

13. In 1831 and until the act of March 20th, 1837, no possession short of fifteen years, unaided by a descent cast, would bar an entry of one having title to land.
Kincheloe *v.* Tracewells, 587

MANDAMUS.

1. See Free Negroes, No. 3, and
Morris, Ex parte, 292

2. It seems that the County court will be compelled by mandamus to act upon an application for a license to keep a tavern; but will not be compelled to grant it.
Yeager, Ex parte, 655

MARRIAGE.

When a condition in restraint of marriage annexed to a legacy is void. See Legacies and Legatees, No. 12, 13, and
Maddox & al. *v.* Maddox's adm'r & als., 804

MISDEMEANOR.

1. The offence of a free negro in returning to the state is a misdemeanor.
Morris, Ex parte, 292

2. A free negro convicted of a misdemeanor, is entitled to an appeal as of right. Idem, 292

NEW TRIALS.

A comment of the judge upon the weight of the evidence in the cause, when excluding other evidence offered, being calculated to mislead the jury, the verdict should be set aside, and a new trial awarded.
McDowell's ex'or *v.* Crawford, 377

NOTICE.

1. What is a sufficient notice to the endorser, of the refusal of a drawee to accept a bill drawn in Virginia upon a merchant in London.
Stainback *v.* The Bank of Virginia, 260

2. When a tenant is not entitled to notice to quit. See Landlord and Tenant, No. 2, 3, and
Harrison *v.* Middleton, 527

OLD POINT COMFORT.

1. How the conveyance by the state of Virginia to the United States, of the land at Old Point Comfort, is to be construed. See Conveyances, No. 1, 2, and
French *v.* Bankhead, 136

2. The land at Old Point Comfort had been appropriated by legislative enactments to the public use; and it was not, therefore, subject to be appropriated by individuals as waste and unappropriated lands, by entry and patent. Idem, 136

ORDINARIES.

1. The act, Code, ch. 96, § 3, p. 443, vests in the County courts a discretion to grant or refuse a license to keep a tavern; in the exercise of which discretion they cannot be controlled by the Circuit courts, either by mandmus, writ of error or certiorari.
Yeager, Ex parte, 655

2. Though the applicant for a license to keep a tavern, may bring himself fully within and up to all that the statute requires, so that the County court may properly grant him the license if they think fit, he does not thereby acquire any such right to a license as that the County court may be coerced to grant it. Idem, 655

3. It seems that the County court is bound to act upon every application for a license that is made to it; and if it refuses to act, the Circuit court will coerce it by mandamus. But when the County court does act, its judgment and discretion are not to be controlled. Idem, 655

853 *PARCENERS.

One of two coparceners contracts to sell a small part of a tract of land, professing to act for both, though without authority; and the other parcener does not consent to the sale. Both coparceners afterwards convey the whole tract to a grantee having full knowledge of the agreement. The land sold is but a small part either in quantity or value of one moiety of the tract. The grantee will be compelled to perform the agreement.
McKee *v.* Barley, 340

PAROL EVIDENCE.

1. In a case of a joint purchase of land by two, parol evidence is not admissible to prove an agreement between them for an unequal division of the land.
Jarrett *v.* Johnson, 327

2. Parol evidence that the clerk of the drawee of a bill of exchange was authorized to refuse acceptance of the bill, is admissible in an action by the holder against the endorser.
Stainback *v.* The Bank of Virginia, 260

PARTIES.

1. The administrator is the proper party

to revive a proceeding against the Upper Appomattox Company to recover damages for injuries sustained, the jury having assessed the damages and returned their report to the court.
Upper Appomattox Co. *v.* Hardings, 1

2. Landlord who has made a contract under seal for the sale of land in the possession of his tenant, is the proper party to recover possession, if the tenant refuses to surrender it.
Harrison *v.* Middleton, 527

3. To a bill by widow for dower in land sold in husband's life time, the present owner is the only necessary defendant.
M. Blair *v.* Thompson & als., 441

PAYMENTS.

1. What payments in depreciated orders are good.
Kidwell *v.* The Baltimore & Ohio Railroad Co., 676

2. When payments in bonds good.
Findley's ex'ors *v.* Findley, 434

PLEADINGS.

1. A demurrer to a bill against an absent defendant, for the failure to aver that an attachment had issued, cannot be sustained; because the statute in terms, provides that this process may issue after the institution of the suit.
O'Brien & als. *v.* Stephens & als., 610

2. What pleas are bad in bar to a scire facias to revive a judgment. See Scire Facias, No. 4, 5, and
Richardson's adm'r *v.* Prince George justices, 190
Poindexter's adm'r *v.* Same, 190

POWERS.

Testator says, having implicit confidence in my wife F, and knowing that she will distribute to each of my children in as full and fair a manner as I could, I hereby invest my said wife F with the right and title of all my property both real and personal, to dispose of to each of my children in any way she may think right. By a subsequent clause it was provided that if F died without making a will, the children should have an equal share of his estate: *held*:

1st. That F has an unlimited discretion as to the time and manner of distributing the property among the testator's children. She may distribute it, or any part of it, in her life time or at her death, by any instrument adapted to pass property of the kind which she distributes; and she may distribute to either child such kind of property as she may choose to give him or her.
Steele *v.* Levisay & als., 454

2nd. That F may sell and convey the whole or any part of the property, and distribute the proceeds of the sale.
Idem, 454

3rd. That F having a discretion as to the time and manner of distribution, a purchaser of land from her is not bound to see to the application of the purchase money.
Idem, 454

4th. Quære: If each child is entitled to have ultimately an equal share of the estate.
Idem, 454

POWER OF ATTORNEY.

See Principal and Agent, passim.

PRACTICE AT COMMON LAW.

1. Whether a plaintiff shall be permitted to introduce further evidence after the defendant's evidence is introduced, is a matter within the discretion of the court trying the cause, and its exercise will rarely, if ever, be controlled by an appellate court: Clearly he has a right to introduce evidence to rebut that of the defendant.
Brooks *v.* Wilcox, 411

854 *2. Though the defendant has announced that he is through with his parol evidence, yet under circumstances, the court should permit him to recall a witness for the plaintiff who had referred to the plaintiff's books, and to have them produced.
McDowell's ex'or *v.* Crawford, 378

3. If a deed of the defendant is introduced collaterally upon a trial, as evidence, he may show that it is not his deed without making oath to the fact: And for this purpose he may introduce a subscribing witness to it, to prove that it was misread to the defendant.
Harrison *v.* Middleton, 527

4. The court may refuse to give an instruction, because it is so obscurely expressed as to leave in doubt the meaning intended.
Levasser *v.* Washburn, 572

5. The court should refuse to give an instruction where it is obscure and calculated to mislead the jury; or where it asks the court to decide upon a fact in issue in the cause; or where it is irrelevant or not applicable to the evidence.
Kincheloe *v.* Tracewells, 587

6. Upon a motion by the plaintiff to instruct the jury to disregard all the documentary evidence of the defendant, of which some parts are legal and other illegal, the court may properly overrule the motion, without undertaking to state to the jury which is legal and which is illegal.
Idem, 587

7. A comment of the judge upon the weight of the evidence in the cause, when excluding other evidence offered, being calculated to mislead the jury, is a ground for a new trial.
McDowell's ex'or *v.* Crawford, 378

8. It was not improper before the act, Code, p. 706, § 9, to render a judgment for costs in favor of a defendant against a person for whose benefit the suit was brought, when the defendant succeeded in the case.
Pates *v.* St. Clair, 22

9. A judgment being rendered by consent of parties, by their attorneys, is by the attorney of the party for whose benefit the suit was brought. Idem, 22

10. How a witness may be permitted to refresh his memory. See Witness, No. 4, 5, 6, and
Harrison *v.* Middleton, 527

11. How a witness's interest may be disproved. See Witness, No. 1, and
Idem, 527

12. What causes may be removed from a County to a Circuit court. See Courts, No. 1, 2, 3, and Idem, 527
Kincheloe *v.* Tracewells, 587

13. When judgment should be for the defendant, notwithstanding the verdict. See Jeofails, No. 1, 2, and
Boyles' adm'r *v.* Overby, 202

PRACTICE IN CHANCERY.

1. As to proceedings against absent debtors. See Absent Debtors, passim, and
O'Brien & als. *v.* Stephens & als., 610

2. An objection to the jurisdiction of the court in the case of an injunction to an execution, may be taken at the hearing of the cause.
Beckley *v.* Palmer & al., 625

3. Bill by a joint purchaser of land for partition, claiming the larger portion of the land; though plaintiff fails to make out this claim, yet the court may decree the partition according to the rights of the parties.
Jarrett *v.* Johnson, 327

4. Upon a bill against a trustee and cestui que trust in a deed, the trustee answers and puts the allegations of the bill in issue; but the bill is taken for confessed as to the cestui que trust. The answer of the trustee protects the cestui que trust, and the plaintiff must prove his case as to both.
Johnston *v.* Zane's trustees & als., 552

5. Bill by heirs against one of them in possession claiming title; and the court directs plaintiffs to establish their title at law. If there is any equitable grounds to repel the statute of limitations, it should be stated in the bill; and the court, in making the order for the trial of the title at law, should direct that the plaintiffs should have the benefit of this equity on the trial.
Caperton & al. *v.* Gregory & als. lessee, 505

6. When an issue should not be directed. See Issues out of Chancery, No. 2, 3, and
Smith's adm'r *v.* Betty & others, 752
Same *v.* Thurman & others, 752

7. If upon the proofs the bill should have been dismissed when the issue was directed, though there is a verdict for the plaintiff, the bill should notwithstanding, be dismissed at the hearing. Idem, 752

8. Creditor qualifies as administrator on his debtor's estate, and after exhausting the personal assets in payment of debts, is still a creditor. In a suit by the heirs in the county court the land is sold; and the administrator files a bill in the circuit court to enjoin the payment of the purchase money to the heirs, and asks to have it applied to his debt: *held*:

1st. He is entitled to have the pro-
855 ceeds *of the land applied to pay his debt.
Williams *v.* Williams & als., 95

2nd. The injunction should only go to restrain the payment of the purchase money to the heirs; and should not restrain the collection of it by the county court. Idem, 95

3rd. Though it would have been more regular for the administrator to connect himself by petition or bill, with the proceedings in the county court, in which the fund had been realized, yet there is no serious objection to the mode adopted by him. The county court, instead of directing the money to be paid to the heirs, may direct it to be paid to such person as the Circuit court may appoint to receive it; or one of the suits may be removed to the court in which the other is pending. Idem, 95

9. When there may be a decree for a specific performance without directing a conveyance.
Bailey *v.* James, 468

PRINCIPAL AND AGENT.

1. A power of attorney to draw, endorse and accept bills, and to make and endorse notes negotiable at a particular bank, in the name of the principal, in the absence of anything to show a different intention, must be construed as giving authority to act only in the separate, individual business of the principal: And an endorsement of a bill by the agent in the name of his principal, for the benefit of the agent, is beyond his authority, and does not bind the principal.
Stainback *v.* The Bank of Virginia, 269
Same *v.* Read & Co., 281

2. A party dealing with the agent with knowledge, or means of knowledge, that under such a power he is endorsing the name of his principal for his own benefit, is not entitled to recover from the principal. Idem, 269, 281

3. The facts that the attorney who was the drawer of a bill upon which he endorsed the name of his principal, held the bill at the time it was discounted by the holder, and that the proceeds were passed to his credit, are of themselves full proof that the attorney was acting for his own benefit, and not that of his principal.
Idem, 269

4. A power of attorney to draw, endorse and accept bills, and to make and endorse notes negotiable at a particular bank, in the name of the principal, does not authorize the attorney to draw a bill in the joint names of himself and his principal.
Stainback *v.* Read & Co., 281

5. Such a power does not authorize the attorney to draw a bill in the name of his principal for the benefit of the attorney; and a party dealing with the attorney, and having the means of knowing that the agent was exceeding his powers in thus drawing the bill for his benefit, cannot recover of the principal. Idem, 281

6. What declarations of an agent in procuring a deed are admissible, and what inadmissible, against his principal. See Evidence, No. 11, 12, and
Smith's adm'r *v.* Betty & others, 752
Same *v.* Thurman & others, 752

PROMISSORY NOTES AND BILLS OF EXCHANGE.

1. The notarial protest of a foreign bill of exchange states that the notary took the bill to the counting-house of the drawee, and there exhibited it to a clerk of the drawee and demanded acceptance thereof, and that the said clerk replied that the same could not be accepted. The protest is sufficient to bind the endorser.
Stainback *v.* The Bank of Virginia, 260

2. Parol evidence that the clerk was authorized to refuse acceptance of a bill, is admissible in an action by the holder against the endorser. Idem, 260

3. What is a sufficient notice of the refusal of the drawee to accept a bill drawn in Virginia upon a house in London.
Idem, 260

4. A note made in a particular country is to be deemed a note governed by the laws of that country, whether it is payable there, or it is payable generally, without naming any particular place.
Wilson *v.* Lazier & als., 477

5. The possession of a negotiable instrument is prima facie evidence that the holder took it for value, and that he came to it honestly. Idem, 477

6. A total failure of the consideration of a negotiable note does not impose on the innocent holder the onus of proving that he gave value for it. Idem, 477

7. If the evidence raises a suspicion of fraud in the procurement of the note, then the holder is bound to prove that he gave value for it. Idem, 477

8. There having been a total failure of consideration of a negotiable note, and the payee having endorsed it as a gift to a third person, who endorsed it for value; though the maker is compelled to pay it to the holder for value, he is entitled to recover from the payee; and if he is unable to pay it, from the endorser, the
856 *amount he received for it: And upon a bill against all the parties he will be relieved. Idem, 477

9. A note does not import a debt existing previous to the period of its execution; but its effect is to give the debt and the note a cotemporaneous origin.
Johnston *v.* Zane's trustees & als., 552

10. See Principal and Agent, passim.

PROTESTS.

When protest sufficient. See Promissory Notes and Bills of Exchange, No. 1, and
Stainback *v.* The Bank of Virginia, 260

PUBLIC WORKS.

See Contracts, No. 5, 6, 7, 8, and
Kidwell *v.* The Baltimore & Ohio Railroad Co., 676

RECEIPTS.

See Evidence, No. 5, and
B. Staton *v.* Pittman, sheriff, 99
Pittman, sheriff, *v.* R. Staton, 99

RECORDS.

See Evidence, No. 9, and
Nelson's adm'r *v.* Cornwell, 724

REGISTRY OF DEEDS.

1. A husband is not a competent subscribing witness to a deed executed during the marriage, by which real estate is conveyed to his wife, either for the purpose of proving the due execution of the deed when called in question, or for the purpose of having it admitted to record.
Johnston & wife *v.* Slater & al., 321

2. A deed admitted to record upon proof by subscribing witnesses, one of whom was the husband of the grantee, is null and void as to creditors, not having been duly recorded. Idem, 321

REMOVAL OF CAUSES.

What causes may be removed from the County to the Circuit courts, after being pending one year. See Courts, No. 1, 2, and
Harrison *v.* Middleton, 527
Kincheloe *v.* Tracewells, 587

RENTS.

1. A landlord having distrained for rent in arrear reserved in salt, has the affidavit and warrant of distress returned to the Circuit court; and the defendant appears there, and a jury is empaneled to ascertain the value of the rent in arrear, which not being able to agree, is discharged; and the landlord dismisses the case in that court. He may then apply to the County court to have the value of the rent ascertained, basing his application on the same affidavit and warrant of distress.
Brooks *v.* Wilcox, 411

2. If the officer levying the distress thinks that he has not taken sufficient effects, he may make a second levy. Idem, 411

3. The defendant having elected to have the value of the rent reserved ascertained by a jury, it is not error to swear them to ascertain the rent said to be due.
Idem, 411

4. The only object of the proceeding before a jury in the case of a distress for rent, is to ascertain the value in money of the rent in arrear. It is not necessary for the landlord to prove to the jury that a warrant

has been levied for rent reserved in something other than money, and that it is due and in arrear. Idem, 411

5. The jury having ascertained the value of the rent in arrear, the court made an order directing the officer to sell the property distrained as directed by law; and after satisfying the rent due, with interest and costs, to pay over the balance to the tenant. This is substantially in accordance with the statute. Idem, 411

6. Under the act of March 2nd, 1827, the landlord was entitled to interest on rent in arrear from the time it was due. Idem, 411

RESCISSION OF CONTRACTS.

1. See Vendor and Purchaser, No. 5, 6, and
Bailey *v.* James, 468

SCIRE FACIAS.

1. Judgment is recovered by justices for the benefit of the marshal of the W. chancery court. The defendant being dead, the scire facias to revive the judgment recites it correctly, and adds, which marshal was W. This is no variance.
Richardson's adm'r *v.* Prince George justices, 190
Poindexter's adm'r *v.* Same, 190

2. The marshal being dead, the scire facias recites that it was awarded at the instance of M his administrator. It was not necessary to recite at whose instance it was awarded; and the recital is
857 therefore *surplusage, and does not vitiate the scire facias. Idem, 190

3. It not appearing from the scire facias, the record, or the defendant's plea, that the foundation of the judgment was a bond requiring a relator in the action, it must be regarded as a common law liability, subject to be sued on in the name of the obligees without a relator; and whether W was marshal or M was his administrator, is a question in which the defendant has no interest; and it cannot be raised by him by plea in bar to the plaintiffs' claim. Idem, 190

4. The scire facias stated that the judgment had been suspended by injunction. This was unnecessary, and may be regarded as surplusage: And a plea in bar that the judgment had not been suspended by injunction, offered no bar to the scire facias. Idem, 190

5. The scire facias further stated that the injunction had been dissolved. A plea that it had not been dissolved, is bad; and an issue made up upon it is immaterial. Therefore, though improper evidence upon it is admitted, it is no cause for reversing the judgment. Idem, 190

6. The pendency of an injunction to a judgment at law will not prevent the revival of the judgment upon the death of either the plaintiff or defendant; and the injunction operates upon the revived judgment on the scire facias, to restrain and prohibit the issue of an execution thereon. Idem, 190

SETTLEMENTS.

See Trusts and Trustees, No. 5, 6, and
Johnston *v.* Zane's trustees & als., 552

SHERIFFS.

See Insolvent Debtors.

SLAVES.

1. The fact that slaves are on the premises of a person who makes no claim to them, his infant daughter who claims them, living with him, will not sustain an action of detinue against him for the slaves, by a party entitled to them.
B. Staton *v.* Pittman, sheriff, 99
Pittman, sheriff, *v.* R. Staton, 99

2. A conveyance of land and slaves, upon a trust to permit the slaves to live upon the land and take the profits of the land and their own labor to their own use, they still continuing to be slaves, is null and void, and passes nothing.
Smith's adm'r *v.* Betty & others, 752
Same *v.* Thurman & others, 752

SPECIFIC PERFORMANCE.

1. See Parceners.

2. A vendor having but an equitable title, and only selling his interest in the property, without warranty, and authorizing the vendee to proceed to get in the legal title; it is not error to decree a specific execution of the contract at the suit of the vendor, without directing a conveyance by him.
Bailey *v.* James, 468

STATUTES.

1. The act, Code, ch. 122, § 4, p. 516, in relation to the attestation of wills, construed in
Parramore *v.* Taylor, 220

2. The act, 1 Rev. Code 1819, ch. 128, § 103, p. 511, in relation to jeofails, construed in
Boyles' adm'r *v.* Overby, 202

3. The act, 1 Rev. Code 1819, ch. 113, § 13, p. 449, in relation to rents, construed in
Brooks *v.* Wilcox, 411

4. The act of March 2d, Sess. Acts of 1827, ch. 27, § 3, p. 26, in relation to interest on rents, construed in Idem, 411

5. The act of March 18th, 1841, Sess. Acts, p. 31, relinquishing commonwealth's right to forfeited lands, construed in
Levasser *v.* Washburn, 572

6. The act of March 28th, 1843, Sess. Acts, ch. 9, § 4, p. 17, in relation to the removal of causes, construed in
Harrison *v.* Middleton, 527
Kincheloe *v.* Tracewells, 587

7. The act of April 3rd, 1852, Sess. Acts, ch. 95, § 1, p. 78, in relation to remedies against absent debtors, construed in
O'Brien & als. *v.* Stephens & als., 610

8. The act, 1 Rev. Code 1819, p. 475-6, § 4, in relation to decrees against absent defendants, construed in
Evans & als. *v.* Spurgin & als., 615

9. The act, Code, ch. 96, § 3, p. 443, in relation to ordinaries, construed in
Yeager, Ex parte, 655

10. The act, Code, ch. 38, § 18, p. 209, in relation to selling ardent spirits, construed in Head's Case, 819

11. The act, Code, ch. 181, § 5, p. 681, in relation to amendments, construed in
Powell's Case, 822

12. The act, Code, ch. 193, § 5, p. 733, in relation to forgeries, construed in
Idem, 822

858 *SUBSTITUTION.

1. See Sureties, No. 2, 3, 4, and
Hill *v.* Manser & al., 522

2. See Executors and Administrators, No. 21, and
Braxton, adm'r, &c. *v.* Harrison's ex'ors, 30

SURETIES.

1. A guardian qualified in 1821. In 1825 he transfers a bond of his ward to a party wholly innocent of any participation in the guardian's fraud, in the payment of a debt. The ward comes of age in 1832, and takes no steps to obtain his estate from his guardian until 1840, when the guardian becomes insolvent. He then sues the sureties of the guardian, and recovers from them the amount due to him from his guardian. In all this time the sureties had done nothing to secure the faithful discharge of his duties by the guardian, or to compel him to pay over to the ward his estate on his coming of age. Even if the party who had received the bond from the guardian, could be held responsible to the ward, he is not responsible to the sureties.
Hunter *v.* Lawrence's adm'r & al., 111

2. A surety in a forthcoming bond is a surety for the debt; and when he pays it as such surety, he is entitled to all the rights of the creditor against the original debtor, existing at the time he became bound for the debt: And the judgment, for the benefit of the surety so paying, is not extinguished, but is transferred with all its obligatory force against the principal, and constitutes a legal lien upon his real estate owned at the date of the judgment or afterwards acquired.
Hill *v.* Manser & al., 522

3. The surety in a forthcoming bond pays to the creditor a sum certain, on the execution issued on the bond against the principal and himself, and takes a receipt as for money paid by him. The evidence of payment afforded by the receipt, will not be repelled by proof of loose declarations, that he had loaned the money to the principal debtor, who was his brother, so as to deprive him of the right to be substituted to the rights and remedies of the creditor.
Idem, 522

4. The creditor having taken a deed of trust from the principal debtor, to secure the debt, and the debtor having subsequently given another deed of trust upon the same and other property, to secure debts to a third party, one of which was for money loaned to pay a balance due on the judgment of which this third party had notice, the surety in the forthcoming bond is entitled to have the property embraced in the first deed applied to satisfy the amount he has paid, with interest on so much thereof as went to discharge the principal of the debt; and if that property does not discharge it, to have the land embraced in the second deed subjected to discharge the balance. Idem, 522

SURPLUSAGE.

1. What will be deemed surplusage. See Scire Facias, No. 2, 4, and
Richardson's adm'r *v.* Prince George justices, 190
Poindexter's adm'r *v.* Same, 190

2. When a description of a defendant as administrator may be deemed surplusage. See Executors and Administrators, No. 5, and
Fitzhugh's ex'or *v.* G. Fitzhugh, 300

SURVIVOR.

To what period the survivorship will relate. See Limitation of Estates, No. 1, and
Martin's adm'r, &c. *v.* Kirby, adm'r, &c. & als., 67

TAX SALES.

1. A party claiming title under a deed from a deputy sheriff, for land sold for nonpayment of taxes under the act of February 9th, 1814, must show that the person described as high sheriff, was such, and the grantor in the deed was his deputy.
Hobbs *v.* Shumates, 516

2. Though such deed recites an insufficient advertisement of the property conveyed, it is not thereby vitiated; but is valid to convey such title as by law the sheriff was authorized to convey.
Idem, 516

TRUSTS AND TRUSTEES.

1. A court of equity will not in general, assume the exercise of a discretionary power vested in a trustee, nor interfere to control a trustee acting bona fide in the exercise of his discretion: Nor will a suit be entertained to compel a trustee to exercise his power.
Cochran *v.* Paris & als., 348

2. Testator gives his estate to his executors, for the benefit of his son; and if and when they shall judge that it would be prudent to entrust him with it, to turn it over to him. The executors having
859 *declared their judgment that the son may be entrusted with the estate, equity will compel them to turn over the estate to him: And before it is done, the

son has such an interest in the estate, that it is subject to his debts. Idem, 348

3. Real estate is conveyed to secure debts. The grantor in the deed has at the time, but an equitable title, but is entitled to call for the legal title. It is an abuse of his power by the trustee, to sell the property before getting in the legal title.
Rossett *v.* Fisher & al., 492

4. The trustee having sold the property for one-fourth of its value, without getting in the legal title, and the principal creditor having become the purchaser, under the circumstances, equity will set aside the sale. Idem, 492

5. A settlement which gives to the grantor a bare maintenance with his wife for life, and provides that the property shall not be subject to his debts thereafter contracted, does not vest him with such an interest in the property, as can be subjected to satisfy such after contracted debts.
Johnston *v.* Zane's trustees & als., 552

6. Upon a bill against a trustee and cestui que trust in a deed, the trustee answers and puts the allegations of the bill in issue; but the bill is taken for confessed as to the cestui que trust. The answer of the trustee protects the cestui que trust; and the plaintiff must prove his case as to both.
Idem, 552

7. A conveyance of lands and slaves upon a trust to permit the slaves to live upon the land, and take the profits of the land and of their own labor to their own use, they continuing to be slaves, is null and void, and passes nothing to the grantee or the slaves.
Smith's adm'r *v.* Betty & others, 752
Same *v.* Thurman & others, 752

8. Money lent by a bachelor uncle to his nephew, to secure which a deed of trust was executed, was held under the circumstances, to have been given and released by the uncle to the nephew, so that a court of equity would refuse to enforce the trust at the suit of the executors of the uncle.
Fitzhugh's ex'ors *v.* Fitzhugh, 210

9. See Conveyances, Fraudulent.

UPPER APPOMATTOX COMPANY.

1. In a proceeding to recover damages against the company under § 9 of the act of February 23d, 1835, Sess. Acts, the jury having returned their report ascertaining the damages, and the company having excepted and obtained a continuance of the cause, the plaintiff dies. The proceeding may be revived by the administrator, but not by the heirs, of the plaintiff.
Upper Appomattox Co. *v.* Hardings, 1

VARIANCE.

What is not a variance. See Scire Facias, No. 1, and
Richardson's adm'r *v.* Prince George justices, 190
Poindexter's adm'r *v.* Same, 190

VENDOR AND PURCHASER.

1. Where there is a joint purchase of land by two, to whom it is conveyed, and who give their bond for the purchase money; in the absence of proof of any agreement to the contrary, they are entitled to the land in equal portions.
Jarrett *v.* Johnson, 327

2. One of the purchasers having previously made a conditional contract for the purchase of the land, agreed in writing with the other, that if the contract was completed, this other should have a specified part of the land; but the contract was not completed. This agreement between the purchasers was then at an end, and cannot affect their rights under their joint purchase. Idem, 327

3. In such a case of a joint purchase, parol evidence is not admissible to prove an agreement between them for an unequal division of the land. Idem, 327

4. In such a case the purchaser claiming to be entitled under an agreement between them to the largest portion of the land, files a bill for specific performance of the agreement, and for partition accordingly. Though he fails to prove the agreement, the court may go on to make partition according to the legal rights of the parties.
Idem, 327

5. Where the contract for the sale of land is entire for a specific sum of money, and the title to a part of the land fails from a cause of which both vendor and vendee were ignorant, it is ground for the rescission of the whole contract; but the purchaser cannot insist upon a partial rescission.
Bailey *v.* James, 468

6. In such a case, if the purchaser declines to rescind the contract, he must pay the whole purchase money. Idem, 468

7. Upon a bond to pay the purchase money of land, with a provision that upon
860 *the purchaser's failure to get the legal title from a third party, the contract of sale shall be void, the purchaser having been let into possession, and continuing to hold, and himself neglecting to get in the title, he shall pay interest.
Idem, 468

8. The vendor having but an equitable title, and only selling his interest in the property without warranty, and authorizing the purchaser to proceed to get in the legal title, it is not error to decree a specific execution of the contract at the suit of the vendor, without directing a conveyance by him. Idem, 468

9. When purchaser not bound to see to the application of the purchase money. See Powers, No. 1, and
Steel *v.* Levisay & als., 454

VERDICT.

1. In ejectment the jury set out the wills of a grand father and father; and if the son, who is dead, took under the father's will, they find for the plaintiffs: If he took under the will of the grand father, they find for the defendants. The verdict is

sufficiently certain; and submits the simple question upon the construction of the wills to the court.
Callis & als. *v.* Kemp & als., 78

2. See Ejectment, No. 4, 5, and
Idem, 78

WASTE AND UNAPPROPRIATED LANDS.

1. The land at Old Point Comfort had been appropriated to the public use, and was not waste and unappropriated lands which might be appropriated by entry and patent.
French *v.* Bankhead, 136

2. How an entry of waste and unappropriated land must be made. See Entry of Land, passim, and
McNeel *v.* Herold, 309

3. A patent for land forfeited to the commonwealth, passes nothing.
Levasser *v.* Washburn, 572

WILLS.

1. What does not constitute incapacity in a testator.
Parramore *v.* Taylor, 220

2. What is not an improper influence which will invalidate a will.
Idem, 220

3. The Code, ch. 122, § 4, p. 516, in relation to the attestation of wills, does not require that the witnesses shall subscribe their names in the presence of each other.
Idem, 220

4. T subscribes his name to his will in the presence of C, and requests C to attest it, who does so. B is then called into the room, and T again acknowledges the paper as his will, and requests B to attest it, who does so, C being present when T acknowledges the paper to B, but not subscribing it, and not recognizing his subscription at that time; the whole, however, being done within a few minutes. The will is duly attested. Idem, 220

5. In construing a provision in a will, the whole instrument is to be looked to, to ascertain the intention of the testator.
Cheshire *v.* Purcell, 771

6. In construing a will, if the language be popular and ordinary, its meaning is to be construed according to its usual acceptation; if technical legal terms are used, they are to be construed in the sense which the law affixes to them.
Robinsons *v.* Allen & others, 785

7. A will appearing upon its face to have been made by a married woman, if it has been regularly admitted to probat in the proper court, its validity cannot be questioned in a collateral suit. Idem, 785

8. See Limitation of Estates, passim.

WITNESS.

1. A witness is called who is objected to as being interested, and proof aliunde of his interest is introduced. He is then examined on his voir dire by the party calling him, to show that he has no interest, and this is objected to by the other party; but before he is sworn in chief, a deed is produced, which shows he has no interest. If it was error to examine him on his voir dire, it was cured by the proof of his want of interest before he was sworn in chief.
Harrison *v.* Middleton, 527

2. Slaves are bequeathed to one for life, and on his dying without heirs, over to another. In a controversy between the contingent legatee and a purchaser under the legatee for life, who was one of two executors, the other executor is a competent witness for the contingent legatee, to prove the assent of the executors to the legacy for life.
Frazer's adm'r *v.* Bevill & als., 9

3. A husband is not a competent subscribing witness to a deed executed during the marriage, by which real estate is conveyed to his wife, either for the purpose of proving the due execution of the
861 *deed when called in question, or for the purpose of having it admitted to record.
Johnston & wife *v.* Slater & al., 321

4. A witness may refresh his memory by reference to a paper, whether an original or a copy, and whether written by himself or another: But he must then speak from his own recollection thus refreshed.
Harrison *v.* Middleton, 527

5. But a surveyor who made a survey from a diagram handed him by the plaintiff, and which he has in court, may refer to the courses and distances on the diagram, though he may not be able to remember them independent of it: The diagram is itself evidence, and he may point out on it the lines he ran. Idem, 527

6. An extract or copy from his field notes, taken by a surveyor, is not evidence; and he can only use it to refresh his memory; and must then speak from his recollection.
Idem, 527

WRIT OF RIGHT.

1. See Adversary Possession, No. 1, 2, 3, 4, and
Koiner *v.* Rankin's heirs, 420

2. The quantity and boundaries of the land described in the count, and in the verdict, vary from each other; but the verdict finds that the land therein described is the tenement mentioned in the count. It is to be presumed that the description given in the count is a mistaken description, and that the land recovered is the land demanded.
Koiner *v.* Rankin's heirs, 420

REPORTS OF CASES

DECIDED IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA:

BY PEACHY R. GRATTAN.

VOLUME XII.

FROM JANUARY 1, TO OCTOBER 1, 1855.

JUDGES

OF THE

SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

JOHN J. ALLEN, PRESIDENT.

WILLIAM DANIEL, RICHARD C. L. MONCURE,

GEORGE H. LEE, GREEN B. SAMUELS.

Attorney General: WILLIS P. BOCOCK.

Entered according to Act of Congress, in the year one thousand eight hundred and fifty-six, for the

COMMONWEALTH OF VIRGINIA,

In the Clerk's Office of the Eastern District of Virginia.

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CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Young v. Thweatt & als.

January Term, 1855, Richmond.

(Absent LEE, J.)

Notes—Liability on—Case at Bar.*—An agreement is entered into in 1844 between T, a commission merchant in P, and Y, an inspector of tobacco at a ware-house in that city, by which T was to send all his tobacco to that ware-house, and Y was to endorse his notes to an amount not exceeding ten thousand dollars. At the same time three of the owners of the ware-house agree with Y that they will each bear a certain proportion of any loss he may sustain by his endorsements for T. This agreement with T is acted on until October 1847, when Y is removed from his place as inspector; and soon thereafter, T, with the consent of Y, ceases to send his tobacco to that ware-house. At this time Y is first endorser on a note of T, and two of the owners of the ware-house are also endorsers upon the note. It is afterwards renewed with Y, still the first endorser, and with two other endorsers, they being inspectors at another ware-house, where T was about to send his tobacco. In May 1848 T fails, and Y is compelled to pay the note.—Y is entitled to recover from each of the owners of the ware-house the proportion of the note which he had agreed to pay.

2 *In December 1844 James Young and Jordan Floyd were inspectors of tobacco at Oaks ware-house in the city of Petersburg; and Robert Leslie, Caroline Macfarland and D. B. Tennant or Ann Brydon were the owners of the ware-house. By deed bearing date the 20th of December 1844, Henry Thweatt, who was a commission merchant in Petersburg, reciting that he had entered into an agreement with Young to send all the tobacco which may be consigned to him or which he may in any otherwise have the control of, to Oaks ware-house for inspection, on condition that said Young shall endorse his the said Thweatt's paper, or make loans or advances to him, to the amount in all of ten thousand dollars, the said Thweatt agreeing at the same time to give a deed of trust to secure and indemnify the said Young upon certain property, debts, &c., as hereinafter more particularly described, conveyed to Robert Leslie all the books, debts or accounts, bonds, &c., tobacco or other produce then owned by Thweatt, and all which might become due or be owned by him pending the agreement or the continuance of the arrangement before mentioned. And the said Leslie was invested with full and irrevocable authority to recover the said debts and property, and grant receipts and discharges for the same; and to take possession of the said books and evidences of debt when required so to do for the purpose aforesaid, by the said Young; and to collect the debts and sell the property on such terms, in such manner and at such times and places as he should deem best for all parties; and out of the proceeds, after paying all proper charges, to pay off all such debts as should be due from Thweatt to Young or as Young should be bound for as endorser for said Thweatt. But it was agreed that the said Young should not require the said trustee to close the trust by taking possession, &c., as aforesaid
3 until after *the expiration of twelve months from the date of the deed, unless in case of the death of said Thweatt, or unless the said Young should consider himself in danger of losing by a further continuation of said business, and the said trustee should consider his fears well grounded; or unless the said Thweatt should fail to comply with his agreement to encourage the said ware-house by sending all tobacco consigned to or belonging to him, and designed for or which might stop in Petersburg, to the said ware-house, and using all honorable means to increase the inspection at the same. This was plaintiff's exhibit No. 1.

On the same day that this deed of trust was made, articles of agreement were entered into between James Young of the one part and Robert Leslie, Caroline Macfarland, Jordan Floyd and David B. Tennant of the other, by which, after reciting the agreement between Thweatt and Young, as expressed in the deed of trust aforesaid, they say, that the said Leslie and Macfarland and Ann Brydon, for whom the said Tennant undertakes, being all part owners of the said ware-house, and the said Floyd being an inspector at the same, all of whom will be benefited by the increase of the business and of the inspections of said ware-house, have agreed to bear a share of any loss which the said Young may sustain in consequence of such loans or advancements or endorsements, in certain proportions severally and respectively as follows, viz: Robert Leslie one-sixth, Jordan Floyd one-sixth, Caroline Macfarland two-sixths and David B. Tennant in place of Ann Brydon, one-sixth; so that the said Young

*See monographic *note* on "Bills, Notes and Checks."

will bear his one-sixth; each being bound separately, and neither bound to make good the share of the other, so that if either fail or refuse or be unable to pay his part, the said Young is not to look to the others to make up that part of his loss. It being understood that the said Young is not to advance
4 or loan *the said Thweatt money or endorse his paper at any one time to a greater amount than ten thousand dollars; and provided that the said Young shall use all due diligence to make the trust deed of the 20th of December 1844 from said Thweatt to Robert Leslie, available, and shall only call upon the said parties for their respective shares as aforesaid of any loss, after exhausting all legal and proper means of making the said trust fund available.

But as the said Young may be put to great inconvenience and suffer loss before the funds of the said trust may all be realized, it is agreed and understood, that the parties will, whenever the said Young shall be required to pay or take up an amount greater than a reasonable estimate of the probable avails of the trust fund, they will, at once, pay and advance to him (before the closing of the trust) their respective proportions of the sum which he may thus be required to pay or provide for, over and above the probable avails of the trust fund. This was plaintiff's exhibit No. 3.

On the 17th of June 1846 Thweatt executed another paper, by which he assigned to Leslie all debts due to him which were contracted since the execution of the previous deed, upon the trusts of that deed. This was plaintiff's exhibit No. 2.

Thweatt and Young proceeded to carry out the arrangement. Thweatt sent his tobacco to the Oaks ware-house, and Young endorsed his paper; and this was done until the fall of 1847. In October 1847 Young was removed from the office of inspector at Oaks ware-house; and soon after that by the advice, as the defendants insisted, of Young, Thweatt sent his tobacco to another ware-house. At this time Young was endorser on three notes of Thweatt; one of these was for fifteen hundred dollars. Thweatt had obtained a loan of two thousand dollars from the bank as early as February 17th, 1846, upon a note on
5 which *Young was first endorsed; and Leslie and Tennant were also endorsers. In March 1847 this note was reduced to fifteen hundred dollars, and was continued with the same endorser until November 9th, 1847, when it was renewed, with Young as first endorser, H. H. Lewis second endorser, and Leslie and Tennant as subsequent endorsers. In January 1848 it was again renewed, with Young, E. A. Wyatt and N. Blick as endorsers; and so continued to be renewed until June, when, Thweatt having failed in May, it was paid off by Young, who in December of that year, recovered a judgment upon it against Thweatt. It appears that Lewis was an inspector in a ware-house to which at the time of the endorsement Thweatt sent his tobacco; and that Wyatt and Blick were inspectors at Centre ware-house; and that some arrangement was made between them and Young, who was about to form a partnership with Thweatt, by which the partnership was to send their tobacco to Centre ware-house, and Wyatt and Blick were to endorse their paper.

The other two notes were for eight hundred and seventy-five dollars each, on which Young was the first endorser, and Leslie and Tennant were subsequent endorsers; and the notes were renewed from time to time with the same endorsers, until May 1848, when they were taken up by Tennant, who in December of that year recovered judgments upon them against Young the first endorser.

It appears that Young's endorsements for Thweatt amounted at one time to about eight thousand five hundred dollars, but were reduced in October 1847, as before stated, to three thousand two hundred and fifty dollars, having been reduced by the application of the trust funds to this object.

Thweatt having failed in May 1848, on the 3rd of June Young directed Leslie to
6 demand of him his *books, papers and accounts; and the application was made: But Thweatt declined to deliver them, saying he chose to settle them himself.

In January 1849 Young instituted a suit in equity in the Circuit court of Petersburg, against Thweatt, Leslie, and the other parties to the agreement of December the 20th, 1844, for the purpose of enforcing said agreement, and compelling the said parties to bear their proportion of the three notes before mentioned. In his bill he set out the deeds of Thweatt and the agreement with Leslie and the other parties, the endorsement of the notes, and by whom they had been paid, and the judgment recovered upon them. He stated that Floyd was insolvent, and admitted that he must therefore bear the loss of two-sixths of the debts. He averred that he had pursued the course in relation to the trust fund, that he thought best for all parties; and asked that a receiver might be appointed to collect the debts.

Tennant answered, and acquiesced in the plaintiff's pretensions. Leslie and Mrs. Macfarland insisted that that they were not responsible for any part of the debt of fifteen hundred dollars; and as to that, relied upon the facts that Thweatt had ceased to send his tobacco to their ware-house, as they insisted, with the consent and they believed by the advice of Young; and that after this the note had been renewed with other endorsers by an arrangement between Young and these new endorsers, who were inspectors at Centre ware-house, by which the liability of the defendants for that note was released.

In the progress of the cause a receiver was appointed to collect the trust fund, the net proceeds of which were one thousand and sixty-two dollars and fifty-six cents. And the cause came on to be finally heard on the 10th of May 1852, when the court held that the defendants Leslie, Macfarland
7 and Tennant *were not liable to contribute to the payment of the note of fifteen hundred dollars; and as to that dismissed the bill. And the court further held

that as to the two notes taken up by Tennant, the trust fund was to be applied in part satisfaction of them, and for the balance the parties to the agreement were liable according to its terms; and that Young must pay two-sixths thereof, he having admitted in his bill, that Floyd was insolvent: And the decree was accordingly. From this decree Young applied to this court for an appeal, which was allowed.

Patton, for the appellant.
Joynes, for the appellees.

DANIEL, J. It is stated in the bill and admitted in the answers, that the note for fifteen hundred dollars on which the suit is founded, was given for the purpose of taking up or retiring a note, for the same sum, drawn by Thweatt and endorsed by Young, for the accommodation of Thweatt, in pursuance of the agreement recited in the deed of trust filed as exhibit No. 1. And it is also admitted that the last mentioned note was made and given in strict conformity with the understanding and agreement of the parties set forth in the covenant of the 20th of December 1844, filed as exhibit No. 3. It is also further admitted that nothing had occurred, prior to October 1847, to relieve or exonerate Leslie, Floyd, Tennant or Mrs. Macfarland from the liability which they severally incurred, by virtue of said covenant, to contribute towards making good any loss which Young might sustain, in consequence of his endorsement of said note.

If that liability is gone, at what time did it cease to exist? By what act has it been lost or destroyed? It is not pretended that
8 the appellees have themselves *done any thing avowedly in discharge of it: And there is an entire absence of any proof or even allegation that Young has, ever, in express terms, released the parties from their covenant, or forgiven them their liability to indemnify him.

Let it be, that so soon as Thweatt withdrew his custom from Oaks ware-house, there ceased to be any obligation on the part of Young to make farther advances of money or endorsements of new paper for him, and that the other parties to the covenant were thenceforward discharged of all liability to indemnify Young for losses sustained on account of fresh loans of money or credit for the accommodation of Thweatt; still it is not perceived how this consideration can, in any manner, affect the duties and obligations of the parties, in respect to advances made, or liabilities, as endorser, incurred by Young before the happenings of that event. Nor is it perceived how even, by coupling this with the further concession that Thweatt transferred his custom from Oaks to another ware-house with the knowledge and even approbation of Young, any case is yet made discharging the other parties to the covenant from their duty of participating in any loss arising out of the endorsement by Young of the note of fifteen hundred dollars.

No limitation to the continuance of the social business relation between the parties, growing out of the contract between Thweatt and Young, and the covenant between Young and the other parties, is provided for in either of those agreements. Yet when we look to the nature of the understanding between the parties and the objects of their quasi partnership, I can perceive no ground for imputing a breach of contract or of good faith either to Thweatt in ceasing to send, or to Young in advising him to discontinue sending, his tobacco to Oaks ware-house, under the change of circumstances which had taken place.

9 *The understanding between the parties can hardly be interpreted, I apprehend, as meaning that the relation between them, established by force of the agreements just mentioned, was to continue during their lives, regardless of all changes of their respective conditions, and after all the motives, on which that relation was founded, had ceased to exist. The limits to the continuance of the reciprocal obligations of the parties to keep up such a connection must, from the very nature of the latter, be identical with those that bound the existence of the objects and motives in which the connection had its origin. By sending to Oaks ware-house the tobacco over which he had control, as a commission merchant, Thweatt would contribute directly to the advancement of the perquisites and emoluments of Young as an inspector. The motive which Young had, therefore, for entering into the contract, was plain. That motive continued to operate so long as he remained inspector at Oaks. Like motives influenced the proprietors of the ware-house in entering into the covenant. Their revenues as owners of the house depended on the number of hogsheads which might be sent to it. They had an obvious motive of interest in obtaining the custom of Thweatt. They had a lively concern in seeing that his credit as a commission merchant was sustained. On the other hand, Thweatt, by agreeing to send his tobacco to Oaks, induced Young to lend him the use of his means and credit. And as to Floyd, his objects were common with those of Young. The obligations of the parties to and among themselves, it is apparent, therefore, grew out of, and rested upon, a community or reciprocity of motives and interests. And whenever a state of things might arise which would render it impossible that the object, contemplated by either one of the parties to the understanding, could be any longer promoted by continuing the relation, obvious
10 *justice would seem to require that he, as well as the others, should be thenceforward absolved from the duty of continuing it. Let it be that no one of the parties had a right, ex mero motu, and without the consent of the others, abruptly to terminate the relation; yet I do not think that a party to such a contract would do any wrong to the other parties in retiring from the connection whenever, without fault on his part, any event might occur rendering it impossible that he could longer derive benefit from the existence of the partnership. Suppose that Thweatt, from permanent disease or other cause, had been rendered unable to

carry on his business as a commission merchant, what claim, in law or equity, would the other parties or either of them have had against him for damages arising out of his failure thereafter to send tobacco to Oaks ware-house? Or suppose that the inspection at said ware-house, without fault on the part of the proprietors, had been discontinued, what show of justice or propriety would there have been in Young's requiring that they should still aid him in sustaining the credit of Thweatt? Or suppose (as is the case) that Young has been superseded in his office of inspector at Oaks by the appointment of another person in his place, what right have the proprietors to impute legal blame to him for thereafter using his money, his credit and his influence for the purpose of increasing the inspections at any other ware-house in whose well doing he might take or feel an interest?

It seems to me that on the happening of either of the events just supposed, any one of the parties would have had a right, without accountability therefor to the others, to dissolve the connection. And when Young, under the cricumstances disclosed in the record, ceased to be an inspector at Oaks, he had a perfect right to transfer his influence to any other ware-house; and if, as is
11 alleged, he advised Thweatt to *pursue a similar course, he did nothing on which the proprietors can found any claim, in law or equity, against him. The defense to his demand, based on his conduct in this regard, is therefore, I think, wholly untenable. Nor do I think that the other grounds relied on furnish any better show of justice.

It is true, that by the terms of the covenant Young was charged with the duty of using all proper diligence to see that the trust deed of the 20th December 1844, executed by Thweatt for his indemnity, should be made available. There is, however, the entire absence of proof to show that he, in any respect, neglected that duty. No proof has been offered to show that, by pursuing a course different from that taken, the trust fund could have been made to yield a dollar more than the sum which has been realized from it. Besides, Leslie, one of the proprietors, was the trustee in the deed, and he, as well as the others, had an interest in seeing that the trust fund should be made as productive as possible; and if he or they saw any mismanagement or misapplication of it by Thweatt, duty as well as interest would have prompted them to complain of it. No such complaint appears to have been made, and it is but fair to infer that no ground for any existed. And it is shown that so soon as it became known that Thweatt had failed, Young suggested the only step that was taken towards securing the trust subject, by directing Leslie to demand of Thweatt his books, papers and accounts.

The idea that the last provision of the deed imparted any new or further force to the agreement between Young and Thweatt, by which the latter stipulated to send his tobacco to Oaks, is, I think, without any foundation. By that provision, Young is not to require the trustee to close the trust until the expiration of twelve months from the date of the deed, unless in case of the death of Thweatt;
12 or unless *Young shall consider himself in danger of losing by a further continuation of his business, and the trustee shall consider his fears well grounded; or unless Thweatt shall fail to comply with his agreement to encourage the ware-house by sending his tobacco, &c. It will be seen that this last provision has direct reference to the agreement between Thweatt and Young; and even if it could be treated as a covenant by Thweatt, its extent is, by the express terms of the provision, to be measured by that of the agreement. The agreement and the said supposed covenant have the same scope and force, and when the agreement was discharged or fulfilled (as we have endeavored to show it has been), the supposed covenant in the deed was also performed or ceased to be of any further obligatory force. And if under the circumstances Thweatt had a sufficient excuse for the failure to continue his custom to the ware-house, surely no blame attaches to Young for omitting to close the trust merely on the score of such failure.

Nor can I see how the rights and duties of the parties to the covenant of the 20th December 1844, have been in any manner affected by the consideration that the note of fifteen hundred dollars was, in its origin and at several renewals, endorsed by Leslie and Tennant, and that after Young was removed from his office of inspector and Thweatt ceased sending his tobacco to Oaks, Leslie and Tennant discontinued their endorsements; and that in the subsequent renewals of the note their names, as endorsers, were substituted by those of Blick and Wyatt. The endorsement of the note by Leslie and Tennant was not in conformity with any requirement of the covenant. Their undertaking in the covenant was not to endorse for Thweatt or for Young, but to pay their shares of any loss sustained by Young in consequence of his endorsement for
13 Thweatt. They had strong motives *of interest, as we have shown, in sustaining Thweatt as a commission merchant, but their endorsement of his notes was a matter wholly beside and out of their covenant with Young. Their endorsement of the note gave no new force to the covenant; and their declining to continue that favor or accommodation after the 1st of October 1847, detracted none from it. Their conduct in this regard has no legal import or effect whatever, bearing on their covenant. If they desired that Young should also forthwith decline to renew the note and close the trust, they should have notified him to that effect. The mere withdrawal of their names from the paper surely could not perform the office of such a notice.

If there was any proof that the substitution of the names of Leslie and Tennant by those of Blick and Wyatt was made in pursuance of any agreement on the part of the latter, to exonerate the parties to the covenant from their duty to indemnify Young, the case might be different. But there is no such proof; and in its absence, the only effect of that circumstance was to relieve

Leslie and Tennant from all liability as endorsers of the note, and to leave the covenant, as it stood before, in full force and virtue.

By the substitution of the new note for the old one, the evidence of the debt was changed; but the debt of Thweatt to the bank, the liability of Young, as the first endorser, for it, and the duty of Leslie, Tennant, Floyd, and Mrs. Macfarland to indemnify him against that liability, all remained the same.

I can see nothing in the case on which the appellees can rely to set off or discharge their undertaking, or which makes it inequitable or unconscientious in Young to insist on the indemnity for which he has contracted. In the view I have taken of the case, the note for fifteen hundred dollars, and the two notes for eight hundred
14 and seventy-five dollars each, all *stand on the same footing; and I think that the court, instead of rendering the decree complained of, should have held the several parties to the covenant liable for the aggregate of the three debts in the proportions provided for in said convenant, to wit: Leslie one-sixth, Floyd one-sixth, Tennant one-sixth, Young one-sixth, and Mrs. Macfarland two-sixths. And as Floyd is insolvent, and by the terms of the covenant Young is restricted in his recourse against the other parties to the amounts of their shares, of any loss, respectively; and as Young, in his character of first endorser of the notes paid by Tennant, is primarily liable, and he and Tennant are the only parties to the covenant who have paid more than their shares of the loss, in adjusting the liabilities of Young, Leslie, Tennant and Mrs. Macfarland, Young should account for Floyd's one-sixth, and the whole fund in the control of the court should be applied first to the reimbursement of Tennant for all that he has paid over and above his one-sixth of the whole loss.

I am for reversing the decree, with costs to the appellant, and remanding the cause for farther proceedings, and a final decree in conformity with the foregoing views.

The other judges concurred in the opinion of Daniel, J.

The decree was as follows:

It seems to the court, that nothing is shown in the pleadings or proofs which can impair the force of the covenant of the 20th December 1844, filed as exhibit No. 3, or make it inequitable or unconscientious in Young to insist that the other parties thereto shall contribute towards making good the loss sustained by him in consequence of his endorsement of the note of fifteen hundred dollars, in the proportions provided
15 for *in said covenant. It further seems to the court, that the ultimate liabilities of the parties to said covenant, in regard to the two notes of eight hundred and seventy-five dollars each, are the same with those which have attached to the said note of fifteen hundred dollars; and that the three notes should be treated as constituting one entire debt or liability, for any loss arising out of which the parties to the said covenant of the 20th December 1844 ought to be held liable in the following proportions, that is to say, Young one-sixth, Tennant one-sixth, Floyd one-sixth, Leslie one-sixth and Mrs. Macfarland two-sixths. And it appearing to the court that Floyd is insolvent, and that by the terms of the covenant aforesaid, Young has no right to recover, of the other parties thereto, anything more than the amounts of their respective shares or proportions of losses sustained by him in consequence of his endorsement for Thweatt, it seems to the court that in adjusting between the said Young, Tennant, Leslie and Macfarland their ultimate liabilities, Young should be held to account for the share or proportion of loss due by said Floyd. And it further appearing to the court that Tennant and Young are the only parties who have paid more than their shares of said loss, and Young, as a consequence of his being the first endorser on the two notes of eight hundred and seventy-five dollars each paid by Tennant, being liable to said Tennant therefor; and it also appearing that after applying the trust fund in the control of the court to the relief of Tennant, the balance paid by him will still be more than his share or proportion of the aggregate loss, it further seems to the court that said fund should be first applied towards the reimbursement of said Tennant for so much as he has paid exceeding his said share. It is proper also that there should be such decrees against
16 Floyd and Thweatt respectively *as will fix the ultimate liabilities of all the parties in accordance with their several undertakings.

It therefore seems to the court, that the decree of the 10th of June 1852 is erroneous, and ought to be reversed. And the court doth adjudge, &c., that the same be reversed, with costs to the appellant. And the cause is remanded for further proceedings and a final decree in accordance with the principles herein above declared.

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17 *Mayo, Mayor &c. v. James.

January Term, 1855, Richmond.

1. **Violation of City Ordinance—Jurisdiction of Mayor—Quære.**—The mayor of the city of Richmond has authority to try cases in which a party is prosecuted for the violation of a city ordinance. QUÆRE: Whether in such a case a prohibition will lie to his proceeding to try the case, on the ground that the ordinance is in conflict with an act of the general assembly. And it seems it will not.
2. **Writ of Prohibition—Procedure.***—For the mode of proceeding in a case of prohibition, see the opinion of MONCURE, J.
3. **Same—Rule to Show Cause.**—There must be a rule to show cause why the prohibition should not issue, before the writ is issued.

***Writ of Prohibition.**—Upon the question of the writ of prohibition, see the principal case cited in the following cases: Hogan v. Guigon, 29 Gratt. 713, and *note*; Burch v. Hardwicke, 23 Gratt. 56, 59; Culpeper v. Gorrell, 20 Gratt. 496, 520, and *note*; Jelly v. Dils, 27 W. Va. 283; Brazie v. Commissioners, 25 W. Va. 218; Wilkinson v. Hoke, 39 W. Va. 406, 19 S. E.

4. **Same—Same—Effect of.**—This rule to show cause operates as a prohibition, until the further action of the court.
5. **Cook-Shop—City Ordinance Prohibiting Free Negroes to Keep—Case at Bar.**—A statute requiring a license to keep a cook-shop, and laying a tax upon it, is not in conflict with, and does not avoid, an ordinance of the city of Richmond, passed in pursuance of its charter, prohibiting or restricting the keeping of cook-shops by free negroes within the city.
6. **Punishments—Infliction of Stripes.**—It is not illegal to affix the punishment of stripes to the violation of a city ordinance by a free negro.

This was an appeal, by the mayor of the city of Richmond, from a judgment of the Circuit court of the city of Richmond, in a case of prohibition. The facts are stated in the opinion of Judge Moncure.

R. T. Daniel, for the appellant.
Crump, for the appellees.

MONCURE, J. In September 1853 Clinton James, a free negro, presented a petition to the judge of the Circuit court for the city of Richmond, stating that he had been unlawfully prosecuted before the mayor of said city for a violation of an ordinance thereof, providing that "no negroes
18 shall keep a cook-shop *within said city," under the penalty of stripes, at the discretion of the mayor; and that he had been duly licensed to keep a cook-shop under the provisions of the act of assembly of April 17th, 1853, Sess. Acts, p. 20, § 4, insisting that the said ordinance is in conflict with the said act of assembly, and therefore void; and that the mayor, in attempting to enforce the said ordinance, was exceeding his jurisdiction; and praying for a writ of prohibition to restrain the said mayor from holding cognizance of any such prosecution. The writ was accordingly awarded by the judge in vacation, issued by the clerk, returnable to the first day of the next term of the court for the trial of civil causes, executed on the mayor, and returned. At the next term, the parties appeared by their attorneys, and the mayor moved the court to discharge the said writ; but the court overruled the motion, and gave judgment for costs against the city. To that order a supersedeas was awarded by this court.

The writ of prohibition has not very often been resorted to in this state; the present being the first case of the kind which has been before this court; though there have been three cases before the General court, viz: Miller v. Marshall, 1 Va. Cas. 158; Hutson v. Lowry, 2 Id. 42; and Jackson v. Maxwell, 5 Rand. 636. Until the enactment of the new Code, there appears to have been no provision in our statute law concerning the writ of prohibition. It has always, however, been regarded as an existing legal remedy in this state, as the cases just cited will show. In the Code, and in the new Constitution and the legislation under it, the remedy is fully recognized, and various provisions are made in regard to it. Code, p. 612, ch. 155, p. 620, § 4; 621, § 3; 622, § 8; 641, § 4; Constitution, art. vi, § 9 and 11; Act of June 5, 1852, ch. 61, § 2, 3, 9 and 12, Sess. Acts, p. 53-4. For the nature of the writ and method of pro-
19 ceeding under it, *see 3 Black. Com. 112; 8 Bac. Abr. 206, tit. Prohibition; 7 Comy. Dig. 135, same title; Home v. Earl Camden, 2 H. Bl. 533; Gould v. Gapper, 5 East's R. 345; 1 Saund. 136, and notes. Much information on the subject may also be derived from the case of Williams, ex parte, 4 Pike's R. 537; appended to which is a note giving the form used in the proceeding. See also, Arnold v. Shields, 5 Dana's R. 18.

In the petition for the supersedeas in this case, two errors are assigned in the proceeding and order complained of:

I. That even if the judgment of the mayor against James would be improper, or of questionable propriety, the writ of prohibition does not lie from the Circuit court to prevent the mayor from adjudging the question.

II. That the ordinance was not in conflict with the act of assembly; or if it was, the act and not the ordinance should be made to give way.

In support of the first ground of error, it was argued that the mayor has ample power conferred on him by the charter, (Sess. Acts 1852, p. 265, § 50,) to "take cognizance of such cases as may be brought before him under the laws of the state, and in all cases in which any ordinance or by-law of the city is alleged to have been violated;" that therefore he had power to decide whether the ordinance in question was valid or not, and it was no excess of jurisdiction to do so: And that the assumption that he would decide wrong when the case came under his judgment, was wholly unwarrantable, and can, in no view of the subject, furnish ground of prohibition. I incline to think that this argument is well founded. See the cases of Home v. Earl Camden and Arnold v. Shields, before cited. But in my view of this case, it is unnecessary to decide this question.

In regard to the second ground of
20 error, I am of *opinion that the ordinance was not in conflict with the act of assembly. The only object of the act was to aid in raising a revenue by laying a tax on the business of keeping a cook-shop. It was not the object, nor the effect of the act, to give to every person who paid the tax and obtained a license to keep a cook-shop, the right to do so, notwithstanding any police regulations which might otherwise lawfully be made for the good government of a city or town, much less to repeal or annul any such regulations in actual existence at the time of the passage

Rep. 521; *note* to N. & W. Ry. Co. v. Overton, 3 Va. Law Reg. 736.

See also, upon the same question, Warwick v. Mayo, 15 Gratt. 528, and *note*; West v. Ferguson, 16 Gratt. 270, and *note*; Ellyson, *Ex parte*, 20 Gratt. 10, and *note*; French v. Noel, 22 Gratt. 454, and *note*; Supervisors v. Wingfield, 27 Gratt. 329, and *note*.

of the act. If the ordinance would have been lawful, had there been no such act, it is lawful notwithstanding the act; for there is nothing in the act to render it unlawful. The business of keeping a cook-shop before the passage of the act, was a lawful business, which any man might pursue, subject only to such lawful public regulations as might be made in regard to its being carried on within the limits of a town. The effect of taxing it was to restrict, not to enlarge the right of pursuing it, nor to exempt it from such lawful police regulations. The Code, ch. 54, § 17, p. 285, after conferring a great many specific powers on the council or board of trustees of a town, gives them the general power to protect the property of the town and its inhabitants, and preserve peace and good order therein; and for carrying into effect these and their other powers, authorizes them to make ordinances and by-laws consistent with the laws of the state, and to prescribe fines or other punishment for violations thereof. These provisions, not being in conflict with any provision of the charter of the city of Richmond, nor inconsistent with the act passed March 30, 1852, revising and reducing into one act the provisions of the said charter, have been applicable to the said city and the council thereof ever since the enactment of the Code, (see Code, p. 287, § 26, Sess. Acts 1852, p. 259, §
21 1,) and authorized the *said council to make such an ordinance as that which is complained of in this case. Such authority was also conferred by § 33 of the said act of March 30, 1852, Sess. Acts, p. 263. The record does not show when the ordinance in question was made; though it is stated in the petition for the supersedeas to have been made March 21st, 1851, and of course since the Code went into effect. If the fact had been otherwise, and been deemed material by the party who applied for the writ of prohibition, he should have taken care to have had it stated in the record; especially as the writ was awarded on his ex parte motion and petition, without notice.

There is some difference between the terms of the ordinance, as stated in the petition for the said writ, and the petition for the supersedeas. In the former, it is stated as declaring, that "no negro shall keep a cook-shop within said city," under the penalty of stripes, at the discretion of the mayor. In the latter, as declaring in the 3d section, that "no negro shall keep a cook-shop or eating-house, unless he be licensed to keep an ordinary or house of entertainment;" and in the 7th section, that the violation of the 3d section is to be punished with stripes. The ordinance, as stated in the former, wholly interdicts a free negro from keeping a cook-shop; as stated in the latter, it merely imposes a restriction upon his right to do so by requiring him to obtain a license to keep an ordinary or house of entertainment. The violation of the ordinance is stated in each to be punishable with stripes. Whether the ordinance be in the one or the other of these two forms, is immaterial. The council had a right to make it in either, if in their opinion necessary "to preserve peace and good order," or "to suppress gaming and tippling-houses," or "to prevent disorderly conduct," in the city. Having a
22 right to make it for *that purpose, the presumption is that they did so make it, in the absence of evidence to the contrary.

Cook-shops kept by free negroes, "being in effect taverns," in the language of the petition for the supersedeas, "negro taverns of the lowest description, and" liable to become "sources of infinite disorder and corruption among the black population, slave as well as free," the propriety and necessity of regulating, restraining, or wholly interdicting them in the city of Richmond, must be apparent to all.

There is nothing in the nature of the punishment which can render the ordinance unlawful. A free negro, in common with a slave, is punishable alone with stripes for certain misdemeanors enumerated in the Code, ch. 200, § 8, p. 754, and may be punished with stripes or any other misdemeanor. Id. ch. 212, § 14, p. 788. Stripes being the ordinary punishment inflicted by law upon a free negro for a misdemeanor, may properly be inflicted upon him for the violation of an ordinance of city police. But no objection is made to the nature of the punishment in this case, the only objection being to the supposed conflict between the ordinance and act of assembly, which I have endeavored to show does not exist.

It was suggested, in the course of the argument, that the effect of the writ of prohibition, and of the order overruling the motion to discharge it, was to acquit Clinton James of a criminal offense, and therefore no writ of error lies to reverse the order, upon the principle that no writ of error lies for the commonwealth in a criminal case, except in some particular cases in which the writ is given by statute; of which this is not one. I think that a consideration of the peculiar nature of the remedy by writ of prohibition will remove this difficulty: It is not a part or continuation of the prohibited proceeding, by removing it from one court to another for the
23 purpose of *adjudication in the latter: But it is wholly collateral to that proceeding; and is intended to arrest it, and prevent its being further prosecuted in a court having no jurisdiction of the subject. It is, in effect, a proceeding between two courts—a superior and an inferior—and is the means whereby the superior exercises its due superintendence over the inferior, and keeps it within the limits and bounds of the jurisdiction prescribed to it by law. The writ "issues," says Bacon, "out of the superior courts of common law to restrain the inferior courts, upon a suggestion that the cognizance of the matter belongs not to such courts; and in case they exceed their jurisdiction, the officer who executes the sentence, and in some cases the judges

that gave it, are in such superior courts punishable, sometimes at the suit of the king, sometimes at the suit of the party, sometimes at the suit of both, according to the nature of the case." The object of it, "in general, is the preservation of the right of the king's crown and courts, and the ease and quiet of the subject. For it is the wisdom and policy of the law to suppose both best preserved when everything runs in its right channel, according to the original jurisdiction of every court; for by the same reason that one court might be allowed to encroach, another might; which could produce nothing but confusion and disorder in the administration of justice."

It seems that a prohibition may be issued at the instance of a mere stranger; 8 Bac. Abr. Prohibition C; 7 Comy. Dig Prohibition E; though it is generally, if not universally, issued at the instance of the party aggrieved. 3 Black. Com. 113; Home v. Earl Camden, 2 H. Bl. 533. It is directed to the judge before whom the plea complained of is pending, and to the party who prosecutes it, and commands the former not to hold, and the latter not to follow the plea. 3 Black. Com. 113. If the
24 party applying for the *writ be directed to declare in prohibition, as he may be, if the point be too nice and doubtful to be decided merely upon a motion, (Id.) and it seems will be, on the demand of the party against whom the application is made; 7 Comy. Dig. Prohibition I; Remington v. Dolby, 9 Q. B. 176, 58 Eng. C. L. R. 174, 178; Arnold v. Shields, supra; Withers v. Commissioners of Roads, 3 Brevard's R. 83; the proceeding then becomes an action, which, in its origin, was a qui tam action, founded on the fiction (which was not traversable,) that the defendant had proceeded in the suit after the writ had been obtained and delivered to him; no such writ having in fact been so obtained and delivered. The action, in the form of it, was to recover damages of the defendant for proceeding in contempt of the writ, and to the injury of the plaintiff; but in substance, it was a convenient mode of trying whether a prohibition ought to issue; and it was made practicable by considering all that related to the contempt, incurred by proceeding after the writ had actually issued, as mere form, and the damages nominal. Home v. Earl Camden, supra. By a provision in the Code, 612, ch. 155, (similar to stat. 1 Will. iv. ch. 21, § 1,) the action is stripped of its fictitious form, and only the substance of it now remains. It is thereby enacted that the declaration shall be expressed to be on behalf only of the party applying for the writ, and not on behalf of him and the commonwealth; and shall set forth so much only of the proceedings as may be necessary to show the ground of the application, without alleging the delivery of a writ or any contempt; and shall conclude by praying that a writ of prohibition may issue; to which declaration the defendant may demur or plead; and judgment shall be given that the writ do or do not issue, as justice may require; and the party in whose favor such judgment is given, whether on verdict or otherwise, shall recover his costs;
25 and *in case a verdict shall be given for the plaintiff, the jury may assess damages for which judgment shall also be given, but such assessment shall not be necessary to entitle the plaintiff to costs.

From the foregoing summary I think it must be manifest that the remedy by prohibition is distinct from and independent of, though collateral to, the proceeding sought to be prohibited; and that whether such proceeding be civil or criminal, (as it may be,) the nature, object and incidents of the remedy are the same; it being in ether case a civil remedy to recover damages for the exercise of an unlawful jurisdiction, and to prevent the further exercise thereof.

The right of appeal is given by law in all cases of prohibition, and cannot be denied in a case in which the proceeding complained of is a criminal proceeding. Whether it be civil or criminal, damages and costs may be recovered against the defendant in prohibition; and he should have the same right to reverse the judgment for error therein in the one case as in the other. It is true that where the proceeding is criminal, the effect of the writ of prohibition may be to prevent the further prosecution of an offense by subjecting the judge of the inferior court and the prosecutor to an attachment for proceeding after the delivery of the writ to them. But this mere consequence of the writ is not an acquittal of the offense (which has never in fact been tried); and a supersedeas to the order awarding the writ, or refusing to discharge it, cannot be considered as a writ of error for the commonwealth in a criminal case.

The writ of prohibition was awarded in this case without first ruling the defendant to show cause against it. All the authorities seem to show that such a rule is necessary. 7 Comy. Dig. 169, Prohibition (H 1); 8 Bac. Abr. 222, Prohibition (F); 1 Saund. 136, n. 1; Arnold v. Shields, 5 Dana's R. 18; Williams, ex parte,
26 *4 Pike's R. 542, 545. In the State v. Allen, 2 Ired. Law R. 183, Gaston, J., speaking of the writ, said, "Such an act of authority will not be exerted, unless a prima facie case, well verified, be first made out, showing an apparent necessity for this intervention; nor unless an opportunity be afforded to those sought to be prohibited, of showing cause against it. This we understand to be a well settled rule of practice."

No inconvenience can result from requiring the rule, as the service of it will have the effect of staying the proceeding complained of until further order discharging the rule; and it seems that the defendant or the judge of the inferior court would be subject to an attachment foregoing on with the proceeding after such service and before

such further order. 1 Saund. 136, n. 2; Williams, ex parte, 4 Pike's R. 543, 545.

The following would seem to be the proper course to be pursued on an application for a writ of prohibition to a Circuit court, or a judge thereof in vacation: The ground of the application should be set out in a proper suggestion, verified by affidavit, as to such material facts as do not appear on the record; or in affidavits instead of a suggestion, according to the Code, ch. 155, p. 612. If upon such suggestion or affidavits the court or judge be clearly of opinion that there is no good ground for a prohibition, it ought at once to be denied. But if otherwise, a rule should be made upon the adverse party to show cause why the writ should not be issued. The execution of the rule upon the party and the judge of the inferior court will have the effect of a prohibition quousque, or until the discharge of the rule.

Upon the return of the rule executed, the court or judge will make it absolute or discharge it, as may then seem to be proper; and in the former case, may direct the applicant to declare in prohibition before writ issued; and ought to do so, if the defendant require it. If such direction be given,
27 *the further proceedings in the case will of course be in pursuance of the Code, ch. 155, p. 612.

I am for reversing the order, and discharging the writ, with costs to the plaintiff in error, both in this court and the Circuit court.

The other judges concurred in the opinion of Moncure, J.

Judgment reversed.

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28 *Hamtramck v. Selden, Withers & Co.

January Term, 1855, Richmond.

(Absent DANIEL and LEE, Js.)

1. **Debt on Note*—Special Plea—Case at Bar.**—To an action of debt on a note alleged to have been made and discounted by the plaintiffs in Virginia, but made payable at a bank out of the state, a plea that the plaintiffs are an unchartered banking company, issuing and circulating their own paper notes or bills as currency, contrary to law and public policy; and that they as a banking company discounted the said note, contrary to law and public policy, sets up a good defense to the action.
2. **Same—Same—Same.**—So in such a case, a plea that the consideration of the note declared on was the bank paper of the plaintiffs unlawfully issued by them as currency, they being an unchartered banking company, presents a good defense to the action.
3. **Same—Same—Conclusion of.**—It is not necessary to conclude such pleas as against the form of the statute.
4. **Appellate Practice—Demurrer Sustained—Judgment Reversed.†**—Plaintiffs demur to pleas, and the demurrer is sustained; but upon appeal the judgment is reversed. The cause will be sent back with directions to permit the plaintiffs to withdraw the demurrer and reply, if they shall ask leave to do so.

This was an action of debt in the Circuit court of Jefferson county, brought by Selden, Withers & Co. against John F. Hamtramck as maker, and Alexander R. Boteler and others as endorsers, of a negotiable note for two thousand dollars. The declaration charged that on the 31st of December 1851, at Shepherdstown in the county of Jefferson, the note was made by the defendant Hamtramck, payable to Boteler at the Bank of the Metropolis in the city of Washington, District of Columbia; and that on the same day, at the county aforesaid, it was endorsed by the respective endorsers.

The defendants appeared, and filed two special pleas. The first alleged that the plaintiffs, at the time of the making
29 and delivery to them of the note *declared on, were an unchartered banking company, issuing and circulating their own paper notes or bills as currency, contrary to law and public policy; and that they as a banking company discounted the said note contrary to law and public policy.

The second plea alleged, that the consideration of the note declared on was the bank paper of the plaintiffs, unlawfully issued by them as currency, they being an unchartered banking company.

The plaintiffs demurred to the pleas, and the court sustained the demurrer, and rendered a judgment in their favor. Whereupon, Hamtramck applied to this court for a supersedeas, which was allowed.

Patton, for the appellant.
G. N. Johnson, for the appellees.

ALLEN, P. This is an action of debt against the maker and endorsers of a promissory note, dated at Shepherdstown, Virginia, on the 31st of December 1851, and negotiable and payable at the Bank of the Metropolis, Washington, D. C. The declaration is in the usual form, averring the making of the note and the endorsement to the plaintiffs below, at the county of Jefferson, Virginia.

On setting aside the office judgment, two special pleas were filed, which being received, the plaintiffs below demurred generally; and the demurrer being sustained, judgment was rendered against the defendants below for the debt. To this judgment a supersedeas has been awarded; and the sole question is, whether the pleas, or either of them, presented a substantial defense to the action.

The first plea avers that at the time of the making and delivery to them of the note in the declaration mentioned, the plaintiffs were an unchartered banking

*See monographic *note* on "Debt, The Action of" appended to Davis v. Mead, 13 Gratt. 118. monographic *note* on "Bills, Notes and Checks."

†**Appellate Practice — Demurrer — Judgment Reversed.** — See principal case cited in Cromer v. Cromer, 29 Gratt. 286, 287; Reid v. Field, 83 Va. 34, 1 S. E. Rep. 395. See also, *foot-note* to Fitzhugh v. Fitzhugh, 11 Gratt. 301; Creel v. Brown, 1 Rob. 265.

company, issuing and circulating their own paper notes or bills as currency, con-
30 trary to law and public *policy; and that they, as a banking company, discounted said note contrary to law and public policy.

The second plea avers that the consideration of the note in writing, in the declaration mentioned, was the bank paper of the plaintiffs, unlawfully issued by them as currency, they being an unchartered banking company.

The Code, p. 314, ch. 60, § 1, 2, provides that no association or company, other than a bank or banking company governed by the 58th chapter, shall issue, with intent that the same be circulated as currency, any note, bill, or other paper or thing, or otherwise deal, trade or carry on business as a bank of circulation. All contracts made for forming any such association shall be void. The 2nd section avoids all contracts and securities that may originate from, or be made or obtained in whole or in part by, means of any such dealing, trade or business.

The first plea avers that the plaintiffs were an unchartered banking company, issuing and circulating their own paper notes or bills as currency, contrary to law and public policy; and that as a banking company they discounted the note sued on. The plea pursues the terms of the law, and avers the plaintiffs were an unlawful association, doing what the law prohibited; and that as such unlawful association, they discounted the note sued on. The note made or obtained by means of such dealing, trade or business, is, by the 2nd section, declared to be void.

And so by the second plea, the consideration of the note sued on is averred to have been the bank paper of the plaintiffs, unlawfully issued by them as currency, they being an unchartered banking company; thus showing that the contract originated from, and the note was obtained by, means of bank paper issued by them against law.

It is argued that although the law of Virginia may avoid such a contract if the
31 transaction occurs within *the state, yet the pleas in this case were defective, and the demurrer was properly sustained, because it does not appear from any averment in the plea, that the plaintiffs were an association organized in Virginia, or organized elsewhere, and circulating unlawful currency in Virginia; and that for anything appearing on the face of the pleas, the transaction may have occurred in the District of Columbia and may have been authorized by the laws in force there.

The declaration avers the making of the note in Virginia, and that the endorsement by which the plaintiffs acquired title, was made in Virginia. And the title acquired by such making and endorsement is, by the second plea, averred to have been in consideration of their notes, unlawfully issued by them as currency. The promissory note is made payable and negotiable at the Bank of the Metropolis in the District of Columbia, but that circumstance does not justify the inference that the plaintiffs may not have had their place of business in Virginia, and dealt for the note in Virginia; or that having their place of business out of Virginia, this transaction could not have been performed by them or their agent in Virginia. If it occurred out of Virginia, it was incumbent on them to have shown it by replication. It was enough for the defendants to show by their pleas that the transaction, as set forth in the declaration, was void by the laws of the state, the tribunals of which were invoked to enforce it. If the transaction was to be controlled and governed by the law of another country where it was lawful, the matter should appear by replications to the pleas; or the parties by proper pleadings could have raised the question adverted to in the argument, whether the courts of Virginia would enforce the penal laws of another state in regard to such a transaction, supposing it to be controlled by the law of such state: Upon the pleadings in the record these questions do not arise.

32 *It is further maintained that the pleas are defective for not concluding against the form of the statute. That the defense in founded on a penal statute, and should be assimilated to a declaration in a qui tam action for a penalty, where it has been held that the declaration must contain such averment. However this may be at common law, the omission is rather one of form than substance. Certainly the averment omitted is not so essential to the defense that judgment according to law and the very right of the cause cannot be given. The pleas aver all the facts which by law constitute a full defense to the action; and the statute being a public statute, the court must judicially take notice of it. In qui tam actions the same technicality was required as in indictments founded on such statutes; and hence the necessity of averring the act to be against the form of the statute. But this is now no longer required in indictments. The Code, p. 770, ch. 207, § 11, provides that no indictment shall be quashed, or deemed invalid, for omitting to charge the offense to be against the form of the statute: showing that the averment even in indictments was merely formal. I think the court erred in sustaining the general demurrer to the pleas filed, and that the judgment should be reversed. And under the authority of Creel v. Brown, 1 Rob. R. 265, Strange v. Floyd, 9 Gratt. 474, and other cases in this court, the cause should be remanded with instructions to overrule the demurrer, and render judgment for the defendants below on their pleas, unless the plaintiffs below should ask leave to withdraw their demurrer and reply; which, if asked for, should be granted.

MONCURE and SAMUELS, Js., concurred in the opinion of Allen, P.

Judgment reversed, and cause remanded.

33 ***Knight & Wife v. Oliver & als.**

January Term, 1855, Richmond.

1. **Advancements—Hotchpot—Widow's Rights.‡**—Advancements to children are not brought into hotchpot for the benefit of the widow: She is only entitled to share in the estate of the intestate of which he died possessed.

2. **Same—Refusal to Come into Hotchpot—Division of Dower Interest.*‡**—The slaves allotted to the widow are not a part of the distributable surplus to be divided amongst the children at the death of the intestate; and a child refusing to bring his advancements into hotchpot upon the first division, is not thereby precluded from claiming to share in the division of the dower slaves.

3. **Same.‡**—QUÆRE: If this right to postpone his election whether or not he will take a share of the dower estate, exists as to any other estate than the slaves.

4. **Same—Refusal to Come into First Division†—Division of Dower Interest.‡**—A child having received advancements, and refusing to share in the first division, but claiming to share in the division of the dower slaves, is to be charged with interest on his advancements or their value, from the death of the intestate to the date of the division: And if the principal and interest of his advancements exceed the amount received by the other children, he is then to be charged with interest on such excess from that time to the period of the second division. But having elected not to come in on the first division, if his advancements with interest thereon were not equal to the shares of the other children on that division, he is not entitled to have the deficiency made up on the second division.

William Carter died in 1817 intestate, leaving a widow and ten children; and his son in law John H. Knight qualified as administrator upon his estate. In 1818 the widow and all the children, except Mrs. Knight, filed a bill in the County court of Nottoway for an allotment to the widow of her thirds of the estate, and a distribution of the residue among the children. In their bill they charge that John H. Knight had been advanced by their father a full proportion of the personal estate, and chose not to bring his advancements into
34 distribution; so that he was *not entitled to any share in the property. And they ask for a distribution excluding him.

Knight as administrator was the only defendant to the suit; and he answered in three lines, admitting the allegations of the bill to be correct, and consenting to the decree prayed for by the plaintiffs. The decree was accordingly made; and one-third of the slaves and other property was allotted to the widow, and the residue of the personal property was divided among the other nine children, excluding Knight and wife from the division.

Mrs. Carter lived until 1851; when the slaves which had been allotted to her on the division of the estate in 1818, amounted to thirty-three. In the mean time two of the children had died, unmarried and intestate. A suit was then instituted for the division of these slaves among the distributees of William Carter; and in this suit the question arose, whether Knight and wife were entitled to a distributable share of these slaves, or were concluded by Knight's election in 1818 not to bring his advancements into the distribution. Knight insisted that his election extended only to the property distributed among the children in 1818; and that in fact he had not received as much as the other children received on that division: And he filed a statement of what he had received, and introduced evidence to sustain it.

The commissioners divided the slaves into eight shares, one of which they allotted to Knight and wife; and they submitted to the court the question of the right of Knight and wife to participate in the distribution.

The cause came on to be finally heard in September 1852, when the court below held that Knight and wife were not entitled to a share of these slaves as distributees of William Carter, though they were entitled to share in the portions of the two
35 children *who had died unmarried and intestate: And a decree was made confirming the report as to the shares of the other parties; and directing the share allotted to Knight and wife to be sold; and that out of the proceeds of sale they should be paid their proportion of the shares of the two who had died; and the remainder of said proceeds of sale should be divided among the other distributees of William Carter. From this decree Knight and wife applied to this court for an appeal, which was awarded.

Patton, for the appellants.
Gholson, for the appellees.

DANIEL, J. At the time when the proceedings in reference to the first division of the estate of William Carter deceased were had in the County court of Nottoway, the distribution of intestates' estates was gov-

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***Advancements—Refusal to Come into Hotchpot—Right to Share in Division of Dower Interest.**—See principal case approved in Persinger v. Simmons, 25 Gratt. 241, 242, 244.

Same—Valuation of.—In Kyle v. Conrad, 25 W. Va. 780, it is said: "Unless under peculiar circumstances, as when perhaps the advancement is a remainder, the rule is established in Virginia as well as elsewhere, that all advancements are to be accounted for as of the value they bore when received, and that during the life of the intestate, rents, issues and profits should be charged against the heir or devisee. Beckwith v. Butler, 1 Wash. 224; Hudson v. Hudson's Executor, 3 Rand. 120; Williams v. Stonestreet, 3 Rand. 559; Christian v. Coleman, 3 Leigh 30; *Knight v. Oliver, 12 Gratt. 33;* Puryear v. Cabell, 24 Gratt. 260." See also, Puryear v. Cabell, 24 Gratt. 260, and *foot-note*; monographic *note* on "Advancements" appended to Watkins v. Young, 31 Gratt. 84.

†Same—Interest.—See principal case cited in Kyle v. Conrad, 25 W. Va. 784, 787.

‡See monographic *note* on "Advancements" appended to Watkins v. Young, 31 Gratt. 84.

erned by the act of 1785, which was re-enacted in 1792. The 27th section of the act provides, that "when any person shall die intestate as to his goods and chattels, or any part thereof, after funeral debts and just expenses paid, if there be no child, one moiety, or if there be a child or children, one-third, of the surplus shall go to the wife; but she shall have no more than the use, for her life, of such slaves as shall be in her share; and the residue of the surplus, and after the wife's death, the slaves in her share, or, if there be no wife, then the whole of such surplus shall be distributed in the same proportions and to the same persons as lands are directed to descend in and by an act of assembly entitled 'an act to reduce into one the several acts directing the course of descents.'"

And when any children of the intestate or their issue shall have received, from the intestate in his life time, any personal estate by way of advancement, and
36 *shall choose to come into the distribution with the other persons entitled, such advancements shall be brought into hotchpot with the distributable surplus.

In the bill filed by the widow Jane Carter, and the distributees, (other than John H. Knight and wife,) it is alleged that Knight, in the lifetime of the intestate William Carter, intermarried with Sally E. Carter, one of the daughters of the said William, and was by him advanced to a full proportion of the personal estate of the intestate, and chooses not to bring the same into distribution, so that he is not entitled to any share in the said property. And Knight, who in his character of administrator of the intestate, is the only defendant made to the bill, (his wife being no party), in his answer, (which is styled the answer of John H. Knight, administrator of William Carter deceased,) says, that "he admits the allegations of the bill are correct, and hath no objection to the decree therein prayed for." The controversy, it is obvious, turns mainly on the legal extent and effect of Knight's admission. And it is equally obvious, that the extent to which such admission ought to be construed as designed to bind him, and the legal effect of the admission on the rights of the parties in the controversy, must depend very much on the answer to be given to the question, What were the rights of the several parties in respect to Knight's advancements at the time of the first division?

And first, in respect to the widow of the decedent. I do not think that the admission of Knight had or could have had any manner of bearing or influence on her rights. His consent or refusal to collate his advancements could not have affected the estate or funds out of which her thirds were to be allotted. Her share must have been the same, whether he elected to come into hotchpot at the first division or not. The question whether the widow has any interest
37 in the *advancements which may be brought into the division, has never as yet, I believe, been decided by this court; but there is little doubt as to the propriety of an answer in the negative. The law which has been already cited, plainly marks out her share as being one-third of the surplus of the goods and chattels of the intestate, which shall be after funeral debts and just expenses paid: And in no legal sense can advancements, made by the decedent to his children in his lifetime, be said to constitute part of "his goods and chattels" as to which he died intestate. Such advancements are, to all intents, the property of the children to whom they have been made, and no longer the property of the parent who made them.

The propriety of this construction is, if possible, rendered still more manifest by a reference to previous legislation on the subject. The act for the distribution of intestates' estates, passed in 1748, 5 Hen. St. 444, provides that "one-third of the surplus of the personal estate (other than slaves) shall go to the wife," and that "all the residue shall be distributed in equal proportion to and among the children of the intestate; and in case any such child or children be then dead, to such persons as legally represent them, other than such child or children who have had any estate settlement or portion from the intestate in his lifetime, equal in value to the share, arising by such distribution, to each of the other children: But if such estate settlement or portion be of less value than such child or children shall be entitled to, so much of the surplus aforesaid as shall make his, her or their share or shares equal to the share of each of the other children as near as can be estimated; and the heirs at law, notwithstanding any land he may have by descent or otherwise from the intestate, shall nevertheless have an equal part in the distribution with the rest of the children, without any consideration of the value
38 of *the land." The language employed in the act of 1705, "for the distribution of intestates' estates," 3 Hen. St. 371, in reference to the particulars under consideration, is of like import: And it is, I think, very clear that the provisions in both of said last mentioned acts, (those of 1748 and 1705,) in reference to the advancements, were made without any design to affect the widow's share, and solely with the design of bringing about equality in the distributon of the surplus among the children of the intestate. And though the new provision in respect to the advancements, in the act of 1785, requiring the children who have been advanced to elect whether they will come into distribution, might, if read alone, create some doubt whether the advancements, when brought in, are not to form a part of the estate out of which the widow and children are all to take their shares, yet when we look to the preceding clause of the section under consideration, we find nothing there to denote a change of the policy observed in the previous laws, in respect to the widow's rights. On the contrary, her rights are there clearly defined, and a manifest purpose is shown

to leave them wholly unaffected by the new regulation adopted for the purpose of equalizing the shares of the children.

The terms "the distributable surplus," found in the last clause of the section, are, I think, identical in meaning with the terms "the residue of the surplus," used in the first clause, in case there be a wife, and with the terms "the whole of such surplus," if there be no wife, of the intestate; and the words "other persons entitled," employed in the last clause, serve to designate the same persons that are described in the first, by the terms "to the same persons that lands are directed to descend," &c., to wit: the children of the intestate, if any: and have no reference to the wife.

This rule, denying to the widow any
39 interest in the *property advanced to the children, prevails in England under the construction given to her statute of distributions; Kircudbright v. Kircudbright, 8 Ves. R. 51; and has been adopted in Massachusetts, Tennessee, Alabama, Georgia and South Carolina; and also, I believe, in other states of the Union. Stearns v. Stearns, 1 Pick. R. 157; Brunson v. Brunson, Meigs' R. 360; Logan v. Logan, 13 Alab. R. 653; 15 Id. 85; Beavers v. Winn, 9 Georgia R. 187; Ex parte Lawton, 3 Dess. R. 199.

The language employed in the South Carolina act is very similar to that used in our act of 1785; and the reasoning of the chancellor in the case last cited, bears with full force on the question under consideration. After reciting the act of his state, he says, "the effect of the provision is to equalize all the children of the testator by diminishing the quantity of property to be given to a child who has been advanced by the parent, exactly so much as has been given him in advance."—"The widow is to take a third of whatever estate the intestate is possessed of, interested in, or entitled to, at the time of his death, and no more or other estate; nor does the first recited clause, making provision for the case of children who had been advanced, have any relation to the widow: that was intended merely as a rule of equalization among the children. The widow is to take, in all events, a third of what is left, and the children the remaining two-thirds. The proportion in which the children take those two-thirds is of no importance to the widow; but it is of importance to natural justice, legitimated by our act of assembly, that the children should receive equal portions of the parents' property. Hence the necessity of a rule for the division of the two-thirds part of the intestate's estate, intended for the children, which should prevent those who have been advanced, receiving as much of the two-thirds as those who have not been
40 advanced: And the clause *of the act regulating this point and furnishing the rule, expressly confines its provisions to the children, and says nothing of the share of the widow which had been definitively fixed by the preceding clause."

The reasoning of the Supreme court of Georgia in the case of Beavers v. Winn & others, cited above, seems equally applicable to questions arising under our act. "The estate (says the court) subject to distribution is the property belonging to the decedent at his death. A gift of property to a child as effectually passes the title out of the parent as any other mode of alienation. An advance, that is, a transfer of property to a child, divests the parent and invests the child with the title. The property is no longer in the father. It is no part of his estate whilst he lives. He cannot revoke the title, if he would. The property belongs to the child, and is subject to his debt. The widow being entitled to share equally in the estate of the decedent only, by what right does she claim an interest in the advancement? As well might she claim an interest in the property of the advanced child, acquired by purchase. This view is strongly fortified by the fact, that under no law is the advanced child compellable to bring the portion given to him back into the common stock, even at the instance of children. Whatever he has got, whether less or more than his proportion of the estate, he can keep. It is his own. If less, of course he would bring it back, for by so doing only can he get his full share by the law of hotchpot. If he chooses though not to do so against his interest, he has the right so not to do." "It would seem that if the widow is entitled to share in advancements made to children, children ought to be entitled to share in settlements made upon the wife during coverture: The rights of the parties ought to be reciprocal. But settlements made upon the wife during the coverture are no part of the estate." And
for any apparent injustice done to
41 the widow by leaving *her no interest in the advancements, (the opinion proceeds to show,) compensation is made by allowing her to hold on to any settlements which may have been made in her favor.

These views of the rights of the widow of the intestate show that she had no manner of concern in Knight's choosing or declining to come into hotchpot in the division of 1818; and the allegations of the bill and admissions of the answer in respect to his advancements, and to his electing not to come into the division, were, consequently, so far as Mrs. Carter was concerned, wholly foreign to the object contemplated by the proceedings then had.

Let us next enquire whether or no the children had a right in such a bill as that filed in 1818, to insist that Knight should then make his election, in order to entitle him to an interest, or rather to preserve the interest which he then had in the remainder or reversion, after the life of the widow, in the slaves allotted to her share.

The statute plainly contemplates two allotments and distributions in such a case as we have here. The words of the statute, as before cited, are "the residue of the surplus, and after the wife's death, the slaves in her share, or if there be no wife, then

the whole of the surplus shall be distributed," &c.

If there be no wife, there is to be but one distribution, and that is of the whole of the surplus, after the payment of debts, &c. If there be a wife, the residue, after taking out her share, is to be distributed presently, and the slaves in her share are to be distributed after her death.

The persons entitled to distribution might, in a case of the kind, no doubt, by consent, settle and adjust all their interests in the property, present and prospective, by one proceeding—one allotment and division. They might fix, by estimate,
42 upon the present *value of the reversion in each slave in the widow's share, and agree each to hold in severalty a reversionary right in a particular slave or parcel of slaves, (and the increase if any,) and thus anticipate, and dispense with the necessity of any farther proceedings for a division at the death of the widow. But an allotment or division of this kind is not the "distribution" contemplated by the statute. Certainly no such allotment was sought by the parties or decreed by the court in the friendly suit of 1818. The parties sought, and the court decreed the allotment and distribution only of that portion of the surplus, the possession whereof might be then taken, and presently enjoyed, by the respective distributees, leaving the slaves in the widow's share for allotment and distribution, at her death, among those entitled.

It not unfrequently happens that the administrator, at the time of the division, is ready to close his administration; and in such cases he is allowed to hand over, for distribution, bonds, notes and other evidences of debt belonging to the estate, whether they are then payable or not; which are at once distributed; but I apprehend that no practice ever could have obtained, in such proceedings, of allotting among the children, in severalty, as part of their lots or shares, the reversionary right to the slaves in the widow's share, or of treating such right as a subject to be valued on for the purpose of producing equality in the distribution. That equality is brought about in a manner wholly different. If the subjects to be distributed are not so divisible as to be susceptible of severance into parcels exactly equal in value, the distributees, whose lots exceed in value their due proportions, pay over the excess to those whose lots fall short of that proportion.

To compel a child, then, whose advancements exceed his share in the property to be divided at the first distribution, but
43 do not equal his share in the *whole, including the slaves in the widow's share, to bring in such advancements at such distribution, as the condition of keeping alive his right to participate in the distribution of the slaves at the widow's death, is to force him to pay presently for an undivided interest in a subject, the distribution of which is postponed to an uncertain, and in all probability a distant day. Such a requirement would seem to be at war with the nature of that bringing together into hotchpot and distribution, of the estate of the intestate, advancements of the children, usually contemplated and effected by such proceedings as those had in the suit of 1818. The prominent idea suggested by a going into hotchpot, is that of a collation and division of subjects susceptible of immediate distribution among those entitled, and not that of an ascertainment or adjudication of the mere rights of the parties to property which does not then admit of such distribution. And an advance child, made a defendant to such a suit as that of 1818, might well suppose that the only effect of his declining to carry his advancements into the collation, would be to debar him of any participation in the distribution then to be had, and not to deprive him of a right thereafter to claim his interest in an estate which, from its very nature, was not then ready for distribution.

I do not wish to be understood as intimating that in no case can an advanced child be compelled to elect, in anticipation, whether or no he will carry in his advancements as the condition of acquiring or preserving an interest in a reversion. I can readily conceive how it might be of great importance to the other children, or some of them, to have the precise extent of their several interests in such a reversion ascertained and defined. Their wants or comforts might require that they should realize the value of their estate by a sale, which could not be judiciously made so long
44 as doubt *and uncertainty existed as to the number of persons entitled to the reversion. I do not mean to say that, in such a state of things, upon a bill filed containing the proper allegations and setting forth distinctly the objects of the suit, a court of equity might not compel an advanced child to elect whether he would hold on to his advancements, or bring them in, and claim his interest in the reversion. But in such a case the court, I presume, would not proceed to a decree without first taking the steps proper to be observed, and affording opportunity for the exhibition of the data proper to be considered, in making up an estimate of the probable value of the reversion, unless otherwise satisfied that the defendant was prepared to act understandingly and deliberately in making his election.

On the other hand, cases may be supposed in which it would seem to be manifestly harsh and unjust to the advanced child to constrain his election by proceedings however regular. As in the case of an intestate dying, leaving property of trifling value in possession, but a claim to a large estate in suit. Would a court of equity, in such a state of things, force upon a child, who had received an advancement in the lifetime of the intestate, more than equal to his proportion of the property at present to be distributed, the alternative either of paying down the excess as the price of an interest in a suit which may result in

nothing, or of abandoning such interest, and thereby losing what may turn out to be a fortune? I should think not. Sales of expectant and uncertain interests are watched with jealousy by courts of equity; and trifling circumstances, added to inadequacy of price, have, in many cases, been held sufficient to vacate them: And how, in principle and result, would the choice, by the advanced child, of the latter alternative, in the case just supposed, differ from such a sale? He might be giving
45 away a large *patrimony for the privilege of retaining an advantage or benefit comparatively insignificant in value. In forcing a child into such an election, a court of equity would (it seems to me) be departing from one of its wisest rules, and giving encouragement to a species of speculation which it has hitherto shown the greatest anxiety to discountenance and restrain.

The law of hotchpot, as I understand it, does not call for or sanction such a departure. It is founded in sentiments of natural justice and equity, and proposes for its end exact equality of benefit among those who stand in the same degrees of relationship to the persons over the distribution of whose estates it takes control. It prescribes the rules for equalizing the distribution of property susceptible of distribution, and does not (except in special cases) contemplate the valuation and adjustment of contingent, uncertain or expectant interests.

These views have led my mind to the conclusion that Knight and wife were not debarred by the division of 1818 from a right to participate in that of 1852. The allegations of the bill and the admissions of the answer in the suit of 1818 are sufficiently broad to embrace the interests of the parties in the whole personal estate of the intestate, as well that then ready for distribution as that allotted to the widow's share; but looking to the rights of the several parties and to the objects most probably contemplated by them, I think that their allegations and admissions in respect to Knight's advancements, and his choosing not to bring the same into distribution, ought to be construed as referring to the two-thirds of the surplus then to be distributed, and not as extending also to the slaves in the widow's share.

The question is one of the first impression. In England the institution of slavery does not exist, and there the share which the wife takes in the personal
46 *estate of her deceased husband, in case of his intestacy, is absolute. No precedent, therefore, for governing such a case as this can be derived from that source. The same may be said of many of our sister states; and in none of the slaveholding states, where laws, in relation to the subject, similar to our own, prevail, does the question appear to have been yet decided. In the absence of authority, I have felt free to adopt that rule which seemed to me to be the most likely to attain the equitable end proposed by our statute.

It was urged at the bar that such a construction of the law gives to an advanced child an undue advantage over the other children. That in all cases of the kind the advanced children, if their advancements exceeded their shares of the surplus to be distributed in the first division, would hold off and await the termination of the life estate. If the slaves had increased in the meantime so as to make it to their interest to bring in their advancements and claim a share, they would do so; if not, they would hold on to their advancements. That the advanced children would thus stand in a condition of perfect safety, whilst the others might sustain loss by a diminution in the value of the slaves. To this it was answered that the advanced children acquired this advantage by the gift of their parent in his lifetime, who had a right, if so disposed, to have given them his whole estate in exclusion of the other children; and that the like hardship (if hardship it be) may occur in any case of intestacy where there are advanced children, whether there be several distributions of the intestate's property, or only one. For if there be but one division, still till that division is had, the advanced children hold their advancements, no matter how long it may have been since they received them. If the residue of the property which the intestate kept in his hands, has swelled in the interval,
47 *into a large estate, they may carry in their advancements and claim their shares. If, on the other hand, it has dwindled away so as to be of little or no value, they may refuse to go into the division; and thus retain their advancements, without giving any just cause of complaint to the other children.

Cases may be supposed, where, from the very nature and condition of the estate left by the intestate, the advanced children might continue lawfully to hold this position of supposed advantage for a long period after the death of the intestate; as where the only property or right of property left by him is a suit, or where his whole estate consists of a remainder or reversion after the expiration of a particular estate which at his death had not determined. And I do not see how the argument founded on the supposed undue advantage in favor of the advanced children, applies with any greater force to the position which they occupy in respect to the slaves in the widow's share, than it does to that which they would hold, in the cases just put, in reference to the uncertain or expectant interests there mentioned.

And if considerations of possible hardship to the unadvanced children, growing out of the construction which I would give to the law, still present themselves as objections to its adoption, it seems to me they are greatly overweighed by views of the manifest injustice to the advanced child, which might be done, under the working of the opposite construction. Under the first mentioned construction, the unadvanced children could in no state of things be de-

prived of their equal shares in the estate left by the intestate undisposed of. In case the advanced children should elect not to go into hotchpot at the last division, the other children would get the whole estate left by the intestate. If the advanced children, on the other hand, should go into the division, then the other children
48 *would get their equal shares not only of the estate left, but also of that advanced in his lifetime, by the intestate. In no case are the unadvanced children exposed to the great hazards which must be encountered by the advanced children, and which may, in some cases, as we have shown, eventuate in the loss to them of interests of great value, if they are forced into speculative elections respecting uncertain, contingent or expectant estates.

A serious objection to forcing an advanced child into an election respecting such interests, is to be found in the consideration that his pecuniary condition might be such as to forbid his making a free, even if he could make an intelligent and well informed election in the matter. He might, from his straightened circumstances, be wholly unable to pay, presently, the excess of his advancement over and above his share of the property about to be distributed, and would thus be constrained, by necessity, and not by the election and choice of his judgment, to forego the acquisition or preservation of that which, if left free to choose, he would regard and elect to take as an interest of great prospective value.

Upon the whole, without any particular consideration of the question discussed at the bar, whether a married woman, who is no party to the proceedings, could be bound by the election of her husband in respect to her reversionary interest in the slaves in the widow's share, (the decision of that question being, in the view I take of the case, unnecessary,) I think that the court erred in its decree of September 1852, in excluding Knight and wife from a participation in the division of the slaves in Mrs. Carter's share; and in decreeing the proceeds of the slaves in the lot assigned to the appellants by the commissioners, to be distributed among the appellees. It also seems to me that Knight and wife
49 have, by *their answer to the bill in the suit of 1818, precluded themselves from any right to show that their advancements were not equal in value to the shares of the other children respectively in the surplus then distributed. And as testimony has been taken on both sides in respect to said advancements, and has not resulted, as it seems to me, in proving that they were of greater value than the shares of the other children in said surplus, the errors of the Circuit court would, in my view, be corrected simply by reversing so much of the decree of September 1852 as decrees the proceeds of the slaves allotted to the appellants by the commissioners to be distributed among the appellees, and decreeing the same to be paid to the appellants. But whilst a majority of the court concur with me in holding that Knight and wife ought not to be excluded from participating in the division of the slaves in Mrs. Carter's share, they are also of opinion that the other children are entitled (if any of them so desire) to have an account of Knight's advancements; and that the cause should be remanded, with liberty to the appellees to call for such an account, and to show, if they can, that Knight's advancements exceeded in value the shares distributed to the other children respectively in the division of 1818. That in stating the account, Knight should be charged with his advancements as of the date of the death of the intestate, and with interest thereon from said date to that of the division in 1818. And if the aggregate of said advancements and interest are found to exceed the value of the shares aforesaid respectively, such excess, together with interest thereon from the last mentioned date to the first of January 1852, the date of the decree for the division of the slaves in Mrs. Carter's share, should be charged to the appellants, as the advancement to be accounted for before receiving any share in the proceeds of
50 said slaves. But that *if on taking said account it should result in showing that Knight's advancements do not exceed in value the shares allotted to the other children in the division of 1818, or if no such account be called for, then the Circuit court should decree the proceeds of the slaves allotted to Knight and wife by the commissioners under the decree of January 1852 to be paid to them. And the decree which I have prepared is in accordance with the last mentioned opinion.

LEE, J., concurred in the results of the opinion of Judge Daniel; and also in the reasoning upon the question of postponing the election, as applied to slaves allotted to the widow.

MONCURE, J., concurred in the results of the opinion and in most of the reasoning, on the ground of the peculiar nature of slave property. He thought an advanced child might postpone his election until the division of the dower slaves. He was rather inclined to think that in the case stated by Judge Daniel by way of illustration, the advanced child would not be entitled to postpone his election.

ALLEN, P., concurred in the results of the opinion, and also in the reasoning, except the case stated as an illustration; and was rather inclined to think that correct.

SAMUELS, J., dissented. He was for affirming the decree.

The decree was as follows:

It seems to the court, that the appellants ought not to be estopped by the answer of the male appellant, filed in the suit brought by Jane Carter, Lyddall Bacon and others, in the County court of Notto-
51 way, *in January 1818, or by any other matter appearing in the cause, from participating in the distribution of the slaves assigned and allotted to Mrs. Carter in said suit, as her third part of the slaves of her deceased husband William Carter; and consequently that so much of the decree

of the 5th of October 1852, as decides that they are not entitled to such participation, and decrees the proceeds of the slaves allotted to the appellants by the commissioners in pursuance of the interlocutory order of the 1st of January 1852, is erroneous; and the said decree is reversed in said particulars, and affirmed as to the residue, with costs.

And it seeming further to the court, that before passing finally on the rights of the parties it would be right to allow the appellees to have an account of advancements made by the intestate William Carter in his lifetime, to the appellant Knight, if they or any of them shall so desire, and that whilst Knight, by his answer in the suit of 1818, before mentioned, has estopped himself from showing that such advancements are not equal in value to the respective shares received by the distributees in said suit, the appellees ought yet to be allowed to show, if they can, that said advancements were of greater value, the cause is remanded for further proceedings. And liberty is given to the appellees or either of them, to call for said account, and to show before the commissioners by any competent proofs, the value of said advancements.

In stating said account, the appellants are to be charged with said advancements as of the date of the death of the intestate, with interest thereon to the 1st of January, the date of the filing of the bill in the suit for a division in the County court of Nottoway, before mentioned; and if the aggregate of said advancements and interest shall be found to exceed in value the respective
52 shares allotted to the *distributees in said division, then such excess, together with interest thereon from the said 1st January 1818 to the 1st of January 1852, the date of the filing of the bill in this cause, is to be treated as the amount of advancements with which the appellants are to be charged before receiving, as distributees of the intestate, any part of the proceeds of the slaves allotted to them by the commissioners, in pursuance of the interlocutory order of the last mentioned date. If, however, on taking said account, it is made to appear that the advancements stated on the principles above indicated, did not, in January 1818, exceed the shares received by the distributees respectively, in the division aforesaid of that date; or if said account is not called for, the Circuit court is to render a decree in favor of the appellants for the proceeds of the slaves aforesaid, allotted to them by the commissioners as aforesaid.

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53 *Richardson's Ex'x & al. v. Jones.*

January Term, 1855, Richmond.

(Absent SAMUELS, J.†)

1. **Judgments by Confession—Entered by Mistake of Clerk.**‡—A judgment by confession entered by mistake of the clerk instead of a judgment upon *nil dicit*, cannot be corrected at the next term of the court, under either the first or the fifth sections of ch. 181 of the Code, p. 680.

2. **Same—Effect—Case at Bar.**—An entry that the defendant relinquishing his plea of payment, saith he cannot gainsay the plaintiff's action for the sum of &c. and judgment accordingly, is a judgment by confession, and releases all previous errors in the proceedings in the cause.

3. **Action of Debt—Joint Defendants—Revival of Suit against Administratrix of One—Case at Bar.**—In an action of debt against two, one dies, and the suit is revived against his administratrix; and then she and the other defendant give separate confessions of judgments, and a separate judgment is entered against each. This is not error.

The case is fully stated by Judge Lee in his opinion.

The case was submitted upon the petition by Morson, for the appellant.

There was no counsel for the appellee.

LEE, J. This is an action of debt brought in the Circuit court of Clarke county by James Jones against John Richardson and Thornton P. Pendleton, upon a single bill for the sum of five hundred and eighteen dollars and fifty-seven cents. The defendants appeared and filed the plea of payment, upon which issue was joined. At the May term 1849, the death of the defendant Richardson was suggested; and subsequently a scire facias was sued out against Mary Richardson his executrix, to show cause why the suit should not
54 *be revived against her. This process was returned executed, and at the October term an order was made reviving the cause against her as such executrix. An amended declaration was then filed by the plaintiff, and a special plea by the defendants. To this special plea a special demurrer was filed, and the defendants joined in the demurrer. At the October term 1851 this demurrer was argued and was overruled by the court; and upon the following day in the same term an entry was made to the following effect: "Came the parties by their attorneys and the defendant the executrix of John Richardson deceased, relinquishing her plea of payment saith she cannot gainsay the plaintiff's action for the sum of five hundred and eighteen dollars and fifty-seven cents, with interest from the 7th day of March 1843 till paid and the

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*For monographic note on Judgments by Confession, see end of case.

†He rendered the first judgment in the case.

‡Judgments by Confession—Correction of Errors.—In the first headnote of the principal case it is held that a judgment by confession entered by mistake cannot be corrected on motion at the next term of the court, under either section 1 or 5 of ch. 181, Code 1849, allowing the correction of clerical, etc., errors upon the motion in the same court. See upon the subject, Bell v. List, 6 W. Va. 473; Stringer v. Anderson, 23 W. Va. 485, 486; Bank v. Hysell, 22 W. Va. 149; Ohio River Railroad Co. v. Harness, 24 W. Va. 517; Steenrod v. Railroad Co., 25 W. Va. 137; Holliday v. Myers, 11 W. Va. 298; Watson v. Wigginton, 28 W. Va. 549; Shipman v. Fletcher, 91 Va. 489, 22 S. E. Rep. 458, and cases cited. See also, *foot-note* to Price v. Com., 33 Gratt. 819, all citing the principal case.

costs." And judgment accordingly was entered up against her to be levied of the goods of her testator, &c. And upon the same day a similar entry was made as to the defendant Pendleton, and judgment entered up against him for the same debt, interest and costs. At the following term of the court, that is to say, on the 2nd of May 1852, the following entry was made: "On motion of the defendant, (the plaintiff having notice,) and it appearing to the satisfaction of the court that the judgment rendered in this cause at the last term was erroneous by an error of the clerk in entering the same as a judgment by confession, it is ordered that the same be set aside and the following entry made nunc pro tunc: This day came the plaintiff by his attorney, and the defendant withdrawing the plea of payment, saith nothing in bar, whereby the plaintiff remains thereof undefended: Therefore it is considered by the court that the plaintiff recover against the defendant" the debt, interest and costs specified in the two former judgments. The defend-

55 *ants then applied for and obtained a supersedeas from this court.

The action of the court at the May term 1852 in setting aside the judgment of the previous term, and rendering a new judgment in lieu thereof, was founded, it may be presumed, upon the idea that the case was within the fifth section of ch. 181 of the Code, p. 681, authorizing the reversal and amendment of judgments in certain cases in the same court, at a subsequent term, or by the judge in vacation, or upon the notion that the supposed error in the judgments was one proper to be corrected by a writ of error coram nobis, and therefore might be made the subject of a summary proceeding by motion under the first section of the chapter above mentioned. I think it can be sustained upon neither. The judgment rendered at the October term (if the two several judgments then entered may be regarded as constituting one final judgment,) was set aside because it appeared to the satisfaction of the court, that it was improperly entered as a judgment by confession by an error of the clerk. This was a matter which could not appear from the record as it stood, but must have been shown in proof; and in such a case no reversal or amendment could be effected under the fifth section, which only applies where the supposed error appears in some part of the record. So recently held by this court in Powell's case, 11 Gratt. 822. Nor was it a proper case for a writ of error coram nobis. This writ lies where some defect is alleged in the process or the execution thereof, or some misprision of the clerk, or some error in the proceedings arising from a fact not appearing upon their face, as where judgment is rendered against a party after his death, or who is an infant or feme covert. Gordon v. Frazier, 2 Wash. 130; Bent v. Patten, 1 Rand. 25; Tidd's P. F. 513. But it does not lie to correct

56 any error in the judgment *of the court, nor to contradict or put in issue a fact directly passed upon and affirmed in the judgment itself. If this could be done there would be no end to litigation, and little security for the titles to property. Accordingly it is a well settled doctrine, that where a matter is plainly, directly and unequivocally affirmed by the judgment of a court of record, the record in itself imports such incontrollable credit and verity that it admits of no averment, plea or proof to the contrary. Coke Litt. 260 a; Field v. Gibbs, Pet. C. C. R. 155; Wood v. Jackson, 8 Wend. R. 1. And it has been held in this court, that where in an entry of a judgment against a principal and his sureties, the latter of whom appeared by an attorney in fact under a power, who confessed judgment for them, it was expressed that such judgment was with a stay of execution for a given time, it was not competent even in a court of equity to aver or prove that so much of the entry as related to the stay of execution was without the consent of the attorney for the sureties. Calwells v. Shields & Sommerville, 2 Rob. R. 305.

In this case the ground of the motion to set aside the judgment, was that the defendants had not said they could not gainsay the plaintiff's action, as the record stated; and that the entry of judgment thereupon as by confession was through an error of the clerk. It was thus sought directly to contradict the record by evidence aliunde, and to prove that what it asserted was not true. This we have seen could not be done. Nor can the error be regarded as a mere clerical misprision. If there were such error it consisted, in the legal sense, in the court's rendering a judgment as by confession, if such was the character of the judgment, where no acknowledgment of the plaintiff's action had been in fact made; and this was a matter not to be put in issue upon a writ of error coram nobis or the motion substituted in its place.

57 *I think therefore the Circuit court erred in its order of the 2d of May 1852, and in proceeding to render a new judgment in lieu of those which it undertook by that order to set aside.

This brings us to the two several judgments rendered on the 16th of October 1851. It is insisted on behalf of the plaintiffs in error, that there are various irregularities in the proceedings for which they also should be reversed. But a preliminary enquiry arises as to the true nature and character of these judgments. For if as the court in its order of the 2d May 1852 assumed, they are to be regarded as judgments by confession, they will not be disturbed by reason of any previous errors or irregularities that may have occurred in the proceedings; because by our statute a judgment by confession is equal to a release of errors. Code, ch. 181, § 2, p. 680. I think they are plainly judgments by confession. Judgment in an action at law for the plaintiff, is either by default for want of plea after appearance, or nil dicit as it is termed, or under our statute, by default for failure to appear after having been duly summoned, or by

non sum informatus where the defendant's attorney having appeared says he is not informed of any answer to be given to the action, or by confession or cognovit actionem. 1 Tidd's Pr. 609; 2 Id. 962; 2 Tuck. Com. 320; Code, ch. 171, § 42, p. 651. The judgments here were not of either of the three classes first named, but the defendants severally appeared and relinquishing their plea previously pleaded, said they could not gainsay the plaintiff's action for a specified sum with interest from a particular time and costs of suit. This was fully equivalent to an express acknowledgment of the action for so much, and it will be found that the judgments as rendered conform very nearly to the precedents of a judgment upon a cognovit actionem to be found in the books of Pleadings
58 *and Entries. See 2 Lilly's Ent. 470, 485; 10 Went. Plead. 450, 453; Tidd's Pract. Forms 191, 192. All enquiry into the regularity of the previous proceedings is thus closed, and the only question that can be made is as to the regularity of several judgments against the defendants. The acknowledgment of the action was not made by them conjointly but by each severally, by the executrix of Richardson for the estate of her testator, and by Pendleton for himself; and I can perceive no good reason why the judgments should not be entered up severally as the acknowledgments were made. Where two parties are bound by joint contract and one dies, by the common law rule the representative of the party so dying would be discharged from liability. 7 Bac. Abr. "Obligations," (D) 4, Bouv. ed. p. 249; Foster v. Hooper, 2 Mass. R. 572; Atwell's adm'r v. Milton, 4 Hen. & Munf. 253. By our statute, however, such representative may be charged in the same manner as he might have been if the parties had been bound severally as well as jointly. Code, ch. 144, § 13, p. 582. But at law he must be sued in a separate action, for he cannot be sued jointly with the survivor because the judgment against one is de bonis testatoris and the other de bonis propriis. 1 Chit. Pl. (Phil. ed. 1828,) p. 40, and authorities cited in note (i). And so if the death occur after suit brought upon the joint contract, and before verdict, the suit abates as to the party so dying, though by our statute, it may proceed against the surviving defendant, and the plaintiff is put to a new action against the representative of the deceased party. See Code, ch. 174, § 1, 2, p. 656. It should seem therefore that several judgments were more appropriate than a joint one against Pendleton personally and against the other defendant as executrix of Richardson. Certainly it cannot be to the prejudice of the plaintiffs in error that judgments were rendered
59 against *them upon their several confessions in the manner in which they were properly and legally chargeable; and if it were even an error in point of form to do so in a joint action, I should still think it not one for which those judgments should be reversed. In White v. Tally, 5 Call 98, the action was upon a joint bond against several. The writ was served upon the respective defendants at different times, but the pleas filed were the same, and separate judgments were rendered against the defendants during the same term. This was held not to be erroneous, and the judgments were affirmed.

I am of opinion to reverse the judgment of the 2d of May 1852, and to affirm those of the 16th of October 1851; and as the defendant in error must be regarded as the party substantially prevailing because he is thus restored to his judgments of the earlier date, I think he should recover his costs in this court.

The other judges concurred in the opinion of Lee, J.

The last judgment reversed, and the first judgment reinstated.

JUDGMENTS BY CONFESSION.

I. Who May Confess Judgment.
II. Confession without Action.
III. Confession after Action Brought.
IV. When Confession Is Required.
V. Effect of Confession.
VI. Relief in Equity.

I. WHO MAY CONFESS JUDGMENT.

Confession by Attorney for His Principal.—It is a well-settled rule that a debtor may authorize a confession of judgment against himself by a power of attorney, and it is not necessary that the attorney should be an attorney at law nor that the power should be under seal, and a judgment confessed under a power of attorney is valid though confessed under a power executed before action brought. Insurance Co. v. Barley, 16 Gratt. 363; Calwells v. Sheilds, 2 Rob. 305; Coker v. Wynne, 1 Va. Dec. 305, 2 Va. Law J. 374. See also, Wilson v. Bank, 6 Leigh 570.

And a confession of judgment under a power of attorney may be made either in vacation or during the term of court. Insurance Co. v. Barley, 16 Gratt. 363.

Power of Attorney—No Authority to Make Confession.—In an action of debt on a judgment rendered in the state of Ohio upon confession, under power of attorney made before action brought, the defendants pleaded that they never executed such power of attorney, and had no notice of the commencement or pendency of the suit in Ohio; on general demurrer to the plea, it was held that the plea was well pleaded and a good bar. Wilson v. Bank, 6 Leigh 570. And such plea cannot be objected to for the first time in the appellate court because not sworn to, as required by statute. Wilson v. Bank, 6 Leigh 570.

Authority of Attorney to Confess a Judgment with a Stay of Execution.—A general power of attorney to make a confession of judgment is sufficient authority to enable the attorney to make a confession of judgment with a stay of execution. Calwells v. Sheilds, 2 Rob. 305.

Confession of Judgment by a Person of Weak Understanding.—A confession of judgment will be supported though made by a person of weak understanding, in the habit of making improvident bargains and addicted to intoxication; and though such

confession was induced by the plaintiff giving him time to pay the money, if no other influence was exerted in obtaining the confession, and it was entered into deliberately and voluntarily by the defendant. Mason v. Williams, 3 Munf. 126.

Confession of Judgment by Husband to Wife Is Valid.—Under Acts of 1876-7, p. 333, a married woman can sue at law, and she is capable of suing her husband as well as another. A confession of judgment from her husband to her is therefore valid under this act; and while the husband will have to be joined with the wife in order to take the confession, he is only joined for conformity, and this will not affect the validity of the judgment. Alexander v. Alexander, 85 Va. 353, 7 S. E. Rep. 335.

Power of Attorney by Firm and Confession Thereunder Valid.—Where it appeared that a power of attorney to confess judgment was by a firm, and there was no proof that all the members of the firm did not consent to the execution of the power of attorney, it was held not to be subject to collateral attack, and it was therefore valid. Alexander v. Alexander, 85 Va. 353, 7 S. E. Rep. 335. See also, Pitts v. Spotts, 86 Va. 41, 9 S. E. Rep. 401.

Clerk Can Enter His Own Confession.—A clerk of court in entering a confession of judgment acts purely as a ministerial officer, and he may enter his own confession of judgment in favor of his creditor and it will be valid. Smith v. Mayo, 83 Va. 910, 5 S. E. Rep. 276.

II. CONFESSION WITHOUT ACTION.

Confession in Vacation.—By statute a judgment may be confessed in the clerk's office in vacation. Under this statute it has been held that a judgment confessed in the clerk's office on the morning of the first day of the term of the court, before the hour for opening the court, is a judgment confessed in vacation and valid. Brown v. Hume, 16 Gratt. 456.

Service of Process Not Necessary.—The object of having the defendant served with process is to give him notice of the suit, but by confession of judgment he waives notice by his appearance, therefore, a judgment confessed in the clerk's office, though no process appears to have been issued or served, and though the clerk has failed to enter it upon the order or minute book or any other book in his office, and the only evidence of it is an unsigned memorandum endorsed on a declaration which seems to have been filed, and the bond enclosed in the declaration, is a valid judgment and entitled to rank as such as against other creditors of the debtor. Shadrack v. Woolfolk, 32 Gratt. 707; Brockenbrough v. Brockenbrough, 31 Gratt. 580; Pickett v. Claiborne, 4 Call 99; Saunders v. Lipscomb, 90 Va. 647, 19 S. E. Rep. 450.

And though it is provided by statute (Va. Code, § 3233) that the defendant *in any suit* may confess judgment in the clerk's office, a judgment confessed in the clerk's office is not invalid because there was no suit pending and no previous process issued, as judgments by confession existed at common law whereof the statute is mainly declaratory, and only substantial compliance is required to validate such judgment. Saunders v. Lipscomb, 90 Va. 647, 19 S. E. Rep. 450; Brockenbrough v. Brockenbrough, 31 Gratt. 409; Shadrack v. Woolfolk, 32 Gratt. 707.

Entry of Judgment Confessed in Vacation.—If the entry of a judgment confessed in the office upon the order or minute book has not been made at the time of its confession, the clerk may make the entry at any time; and if he fails to do it, the court may at any time direct him to make the entry. Shadrack v. Woolfolk, 32 Gratt. 707.

And the statute (Code of Va., § 3283) requiring the clerk of court to enter in his order or minute book a judgment confessed in his office is directory only, and his failure to do so does not invalidate the judgment. Saunders v. Lipscomb, 90 Va. 647, 19 S. E. Rep. 450; Shadrack v. Woolfolk, 32 Gratt. 707.

Lien of Judgment Confessed in Vacation Commences When.—The lien of a judgment by confession, confessed in vacation begins on the first moment of the day on which it was confessed, regardless of the time of day at which it was confessed. It will, therefore, take precedence over a deed of trust admitted to record on the same day even though the deed of trust was admitted to record before the judgment was confessed. The law takes no notice of a fraction of a day as to the lien of the judgment. Hockman v. Hockman, 93 Va. 455, 25 S. E. Rep. 534.

Power of Court over Judgment Confessed in Vacation.—A court of general jurisdiction has the power at the next term, after a confession of judgment in the clerk's office during the vacation, to set aside, amend or correct, such judgment by confession, for any defect or error therein; but after that term, it becomes a final judgment of the court, which cannot be questioned collaterally, but only by writ of error or other proceeding applicable to other judgments of the court. Coker v. Wynne, 1 Va. Dec. 305, Va. L. J., 1878, p. 374.

III. CONFESSION AFTER ACTION BROUGHT.

Confession in Court.—While the statute makes provision only for the confession of judgment in the clerk's office, it is the uniform practice of the courts, to allow the defendant to acknowledge the plaintiff's action when the court is in session at any stage of the cause. The confession may be made either before or after plea. If made in court before plea, the form is simply that the defendant acknowledges the plaintiff's action; but if after plea, he withdraws his plea and acknowledges the plaintiff's action. Stringer v. Anderson, 23 W. Va. 482; Insurance Co. v. Barley, 16 Gratt. 363; Richardson v. Jones, 12 Gratt. 53; Compton v. Cline, 5 Gratt. 137.

And an entry that the defendant relinquishes his plea of payment and says he cannot gainsay the plaintiff's action for the sum, upon which judgment is entered, is a judgment by confession, and releases all previous errors in the proceedings in the cause. Richardson v. Jones, 12 Gratt. 53; Cooke v. Pope, 3 Munf. 167; Bent v. Patten, 1 Rand. 25.

Confession by One of Several Defendants.—Where one of several defendants confessed judgment in an action of ejectment, and was not induced to do so by any improper motive or any desire to injure or embarrass his codefendant, the judgment was upheld. Va. & Tenn. Coal & Iron Co. v. Fields, 94 Va. 112, 26 S. E. Rep. 426.

Scire Facias—Separate Confession of Judgment.—Where an action of debt was brought against two persons, and one of them died and the suit was revived against his personal representative, and he and the other defendant gave separate confessions of judgment, and separate judgments were entered against each, it was held no error. Richardson v. Jones, 12 Gratt. 53.

And upon a *scire facias* against heirs and devisees to revive a judgment in ejectment, if one of the defendants confess the plaintiff's right to revive the *judgment in the scire facias mentioned*, and thereupon

judgment be entered against him, that the plaintiff have execution for the *whole* tract of land in question, there is no error in such judgment of which *that* defendant can complain. Jones v. Doe, 6 Munf. 105.

Several Defendants Sued on a Joint Contract and Confession by One Effect.—Where several defendants are sued jointly on a *joint* contract, and one or more of them confesses judgment in open court for the *whole* amount or so much as the plaintiff is willing to accept, and the court enters up a formal judgment on such confession, and continues the action as to the other defendant, such confession and entry of judgment thereon, are in effect *no judgment*, and are to be held as nothing more than an acknowledgment of the plaintiff's action to that extent, and the court can enter no judgment thereon until the issues are tried as to the other defendants, and the judgment *then* rendered must be jointly against all of the defendants or against none. Hoffman v. Bircher, 22 W. Va. 537. But where several are sued jointly on a *joint and several* contract, and the court enters separate judgments against each it is no error, as they could have been proceeded against separately in the first place. Hoffman v. Bircher, 22 W. Va. 537.

Plea of Payment of Interest without Confessing Principal.—Where the defendant in an action upon a bill of exchange, pleads that he tendered the interest in paper money, without confessing the action as to the principal, or saying anything in bar of it, the plea is bad. Skipwith v. Morton, 2 Call 277.

Power of Court Where Confession Is for an Uncertain Sum.—A confession of judgment for an uncertain sum in an action sounding in damages, is not sufficient to authorize the court to assess the damages, and enter judgment for a certain sum, but a writ of inquiry should be executed. Dunbar v. Lindenberger, 3 Munf. 169.

Lien of Judgment Confessed in Pending Suit—Priorities.—A judgment confessed in court in a pending suit, and the oath of insolvency taken thereon, by the debtor upon his surrender by his bail, has relation to the first moment of the first day of the term; but a forfeited forthcoming bond which is not returned to the clerk's office until some day in the term after the first, when there is an award of execution thereon, has no relation, and hence the assignment by operation of law under the first has priority over the lien of the forthcoming bond. Jones v. Myrick, 8 Gratt. 179.

Damages in Declaration Laid in Tobacco.—In an action on the case, the plaintiff lays his damages in tobacco, and the defendant confesses judgment, the judgment is not erroneous. Pickett v. Claiborne, 4 Call 99.

Judgment against Two on Confession of One Is Erroneous.—A judgment against two defendants on the confession of one is erroneous, and therefore void. Ward v. Johnston, 1 Munf. 45; Wrenn v. Thompson, 4 Munf. 377.

But where the record in a case states that two defendants appeared and pleaded, the fact that it appears by an indorsement on the writ that only one of them was served with process does not affect the validity of judgment confessed in the action. Wrenn v. Thompson, 4 Munf. 377.

Judgment against Bail.—Where the defendant to a suit has not pleaded, but his appearance bail has, a judgment stating, "that the attorney for the defendant withdraws his plea, etc., and therefore, that the plaintiff recover against the defendant," must be understood as a judgment against the bail only, and is erroneous. Lee v. Carter, 3 Munf. 121.

IV. WHEN CONFESSION IS REQUIRED.

Where Defendant at Law Seeks Relief in Equity.—A defendant at law having a defence to the action and a distinct ground of equitable relief against the plaintiff's claim, may bring his suit in equity without waiting for the determination of the action at law, and may, without being compelled to waive his legal defence, by confessing a judgment, have a hearing in the court of chancery upon the merits of his case, and a decree for the proper relief. Warwick v. Norvell, 1 Rob. 308; Warwick v. Norvell, 1 Leigh 96; Ashby v. Kiger, Gilmer 153; Knott v. Seamands, 25 W. Va. 99; Branch v. Burnley, 1 Call 147; Dudley v. Miner, 93 Va. 408, 25 S. E. Rep. 100; Robinson v. Braiden, 44 W. Va. 183, 28 S. E. Rep. 798.

Staying Proceedings at Law.—Upon the principle that a man cannot proceed both at law and equity at the same time, courts of chancery in granting injunctions to judgment at law, generally require the person seeking to enjoin to confess judgment in the action at law. This, however, is merely the general rule and where the case is such that the defendant cannot consistently with the rights he claims safely confess judgment, it will not be required. Warwick v. Norvell, 1 Rob. 308; Staples v. Turner, 29 Gratt. 330; Dudley v. Miner, 93 Va. 408, 25 S. E. Rep. 100; Robinson v. Braiden, 44 W. Va. 183, 28 S. E. Rep. 798.

Matter of Discretion.—The better doctrine is, that the question of requiring a defendant at law, who seeks upon equitable grounds to enjoin the action against him, to first confess judgment at law as a condition of relief in equity, rests in the discretion of the court, to be exercised according to the circumstances of the case upon well-defined principles of law and equity. The object to be attained in such cases is to preserve the rights of the person enjoined and at the same time to inflict no wrong on him who seeks relief in equity. The court should not require the defendant at law to confess judgment, if such course would manifestly endanger his rights, or when his bill wholly denies the right of the plaintiff at law to recover. Knott v. Seamands, 25 W. Va. 99; Ashby v. Kiger, Gilmer 153; Staples v. Turner, 29 Gratt. 330; Great Falls Man. Co. v. Henry, 25 Gratt. 575; Miller v. Miller, 25 W. Va. 495; Parsons v. Snider, 42 W. Va. 517, 26 S. E. Rep. 285; Dudley v. Miner, 93 Va. 408, 25 S. E. Rep. 100; Robinson v. Braiden, 44 W. Va. 183, 28 S. E. Rep. 798.

It is error to require the defendant in an action at law on notes to confess judgment at law as a condition precedent to the continuance of an injunction against the action at law, where he denies all liability on the notes on account of fraud, of which the plaintiff in the action at law had notice at the time they were transferred to him. Dudley v. Miner, 93 Va. 408, 25 S. E. Rep. 100.

Judgment Conclusive if Injunction Is Denied.—Where a defendant at law is required to confess judgment in the action at law before the court will give him equitable relief, he cannot, after a decree against him, have the judgment set aside because of legal defences not made known to the court. Robinson v. Braiden, 44 W. Va. 183, 28 S. E. Rep. 798.

Refusal to Confess Judgment—Dissolution of the Injunction.—Where an injunction is granted, and the chancellor dissolves the injunction on account of

the refusal of the complainant to confess judgment at law, and there is an appeal from the order, the appellate court will not examine the merits of the case, though, at the time the order was made the cause stood for hearing. Warwick v. Norvell, 1 Leigh 96.

Judgment Confessed Is Conditional.—Where a court requires a confession of judgment as a preliminary to enjoining the action at law, and the injunction is afterwards dissolved, the court of chancery will not allow the judgment which is confessed at law to stand, but will direct that it be set aside and the case reinstated on the docket as it was when the injunction was granted. In granting the injunction the court of chancery should expressly provide that the judgment confessed is to be dealt with as the court of chancery may direct and although there is no such express provision in the order granting the injunction, if the court of chancery dismisses the bill for want of jurisdiction, it should, in the order of dismissal, direct that the judgment at law be set aside. Thornton v. Thornton, 31 Gratt. 212; Knott v. Seamands, 25 W. Va. 99; Miller v. Miller, 25 W. Va. 495; Parsons v. Snider, 42 W. Va. 517, 26 S. E. Rep. 285; Dudley v. Miner, 93 Va. 408, 25 S. E. Rep. 100; Robinson v. Braiden, 44 W. Va. 183, 28 S. E. Rep. 798.

V. EFFECT OF CONFESSION.

Release of Errors.—It is a well-settled rule that a confession of judgment is a release of all previous errors in the proceedings in the cause. Cooke v. Pope, 3 Munf. 167; Worsham v. McKenzie, 1 H. & M. 342; Edmonds v. Green, 1 Rand. 44; McRae v. Turnpike Co., 3 Rand. 160; Stanard v. Timberlake, 3 Leigh 681; Brockenbrough v. Brockenbrough, 31 Gratt. 580; Com. v. Offner, 2 Va. Cas. 17; Richardson v. Jones, 12 Gratt. 53; Saunders v. Lipscomb, 90 Va. 647, 19 S. E. Rep. 450.

And it is further held, that a confession of judgment on a forthcoming bond is a release of errors on the original judgment. McRae v. Turnpike Co., 3 Rand. 160; Edmonds v. Green, 1 Rand. 44; Stanard v. Timberlake, 3 Leigh 681.

Cures Want of Declaration.—A confession of judgment by the defendant in a pending cause cures the want of a declaration. Leftwitch v. Stovall, 1 Wash. 303.

Judgment by Confession Entered by Clerk through Mistake.—A judgment by confession entered by the clerk through mistake, instead of a judgment by *nil dicit*, releases all previous errors in the proceedings in the cause, and cannot be corrected at the next term of court by writ of error *coram nobis* or motion. Richardson v. Jones, 12 Gratt. 53.

Error Cannot Be Corrected on Motion.—Where a declaration in an action of debt brought on a bond for one hundred and eighty-eight dollars, through mistake only demanded one hundred and eight dollars, and the defendant confessed judgment thereon, it was held that this was not such a clerical error as the court might correct on motion. Compton v. Cline, 5 Gratt. 137. See also, Stringer v. Anderson, 23 W. Va. 482.

And where an action is brought on a note, which was executed at the time when five per cent. was the legal rate of interest, upon which the defendant acknowledged the action for the principal with interest from the date of the note, on which acknowledgment a judgment was rendered for the principal with interest at the rate of six per cent., this is not a mere clerical error, but one which can only be rectified by an appellate court. Bent v. Patten, 1 Rand. 25.

Confession on a Defective Presentment for Gaming.—Where defendant confessed judgment on a presentment for gaming, for fine and cost, although the presentment might have been defective on a special demurrer, it was held that judgment could not be reversed on a writ of error. Com. v. Offner, 2 Va. Cas. 17.

Confession by Principal Discharges Appearance Bail.—Where the principal himself appears and confesses judgment, the appearance bail is thereby discharged, and no judgment ought to be entered against him. Fisher v. Riddell, 1 Hen. & Munf. 330.

Effect of Confession by Appearance Bail.—Where the appearance bail after being admitted to defend the suit, waives his plea, judgment should be entered against the principal as well as the bail, and a failure to do so is error. Wallace v. Baker, 2 Munf. 334; Vanmeter v. Fulkimore, 1 Hen. & Munf. 330; Lee v. Carter, 3 Munf. 121; Fisher v. Riddell, 1 Hen. & Munf. 330.

Estoppel.—A confession of judgment precludes a party from availing himself of an equity of which he was or must be presumed to have been acquainted at the time of the confession. Syme v. Johnston, 3 Call 558.

And if there be judgment by confession without a declaration, the plaintiff, in a second action for the same cause, must show two subsisting debts, or he cannot sustain his action, if the former recovery is pleaded. Pickett v. Claiborne, 4 Call 99.

Confession Fixes the Value of Currency.—Where a defendant confessed judgment in an action of debt for "£1800 of Penn. currency worth £1440 of Va. currency, to be discharged by the payment of £720 of Va. currency," the confession of judgment was held to have fixed the standard of value of money and furnished the clerk with a standard for ascertaining the value of the sum mentioned in the condition. Strode v. Head, 2 Wash. 149.

Executors Personally Liable.—Where executors were sued on a bond of the testator and they knowingly and willingly made an *unconditional* confession of judgment, they were under the circumstances held personally liable. Freelands v. Royall, 2 H. & M. 575. See also, Worsham v. McKenzie, 1 H. & M. 342; Clay v. Williams, 2 Munf. 105.

VI. RELIEF IN EQUITY.

No Relief in Equity against a Judgment Fraudulently Confessed.—If an executrix for the fraudulent purpose of protecting her testator's estate from the demands of creditors, gives her own bond, as executrix, for a fictitious debt, and confesses a judgment for same, she is not entitled to relief in equity, nor will equity give its aid to the obligee, but will leave him to his remedy at law. Yet if the obligee be entitled independently of the transaction in question, to an account of assets, the court would decree such an account, and allow him what might be justly due, not exceeding the amount of the judgment, the rule in such case being that the obligee was bound by his own fraud, so far as it operated against him. Clay v. Williams, 2 Munf. 105.

Confession of Judgment as Collateral Security—Exoneration.—Where a firm was indebted to a bank the bank agreed to extend time to the firm, if the firm would get their endorsers to confess judgment for the aggregate, as collateral security. The firm agreed to this, and secured the confession of one of

the endorsers but could not get the confession of the other, of which fact they informed the bank, and the bank promised to obtain judgment against the other endorser. The notes wholly failed, and the endorser who had confessed judgment was held liable for the whole amount, and not entitled to exoneration from the bank, as it was the firm's duty to secure the confession of judgment by the other endorser, and the promise of the bank to do so was *nudum factum*. Kelly v. Taliaferro, 82 Va. 801, 5 S. E. Rep. 85.

Equity Will Not Enjoin a Judgment by Confession on Purely Legal Grounds.—A judgment obtained by confession will not be enjoined by a court of equity on purely legal grounds, unless there is some other ground for equitable relief; such as ignorance of facts, fraud, or undue influence through which the judgment was obtained. Alleman v. Kight, 19 W. Va. 201; Harner v. Price, 17 W. Va. 533.

Judgment Confessed by Executor.—After a confession of judgment by an executor, in an action brought on his executorial bond, for the purpose of recovering against him and his sureties for a *devastavit*, he cannot resort to a court of equity for relief, on the ground that he had fully administered the estate of his testator. Worsham v. McKenzie, 1 H. & M. 342; Freelands v. Royall, 2 H. & M. 575; Clay v. Williams, 2 Munf. 105.

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60 *Suckley's Adm'r v. Rotchford & als.*

January Term, 1855, Richmond.

[65 Am. Dec. 240.]

1. **Act of 5 George 2—Payment of Debts.**—The act of 5 George 2, ch. 7, § 4, subjecting lands, slaves, &c. in the colonies to payment of debts, was the law of Alexandria county in the District of Columbia from June 24th, 1812.

2. **Same—Judgment Debt of Decedent—Property Liable.**†—In favor of a judgment creditor of a deceased debtor, his real estate was not merely a secondary fund for the payment of the debt, but the real and personal estate were equally liable.

3. **Chancery Practice—Bill to Enforce Judgment.**—The judgment creditor might file a bill in equity against the executor and devisees to subject the real and personal estate to the payment of his debt.

4. **Same—Same—Case at Bar.**—The judgment creditor was not bound to pursue debtors of his debtor living out of the District of Columbia, before proceeding to subject the real estate.

5. **Bill of Review—Case at Bar.**‡—A party to the suit claiming to have purchased a part of the real estate at a sale for taxes, and to have received a conveyance therefor; but such purchase having been made before the decree directing the real estate to be sold at the suit of the creditor, he cannot set up his purchase by a bill to review the decree on that ground.

6. **Supreme Court Rules—Conflict with Act of Congress.**—A rule of practice prescribed by the Supreme court, which is in conflict with an act of congress, is void.

At the April term 1820 of the Circuit court of the District of Columbia for the county of Alexandria, George Suckley, surviving partner of Holey & Suckley, recovered a judgment against Richard Libby for the sum of eleven thousand and seventy-one dollars and thirty-two cents, with interest from the 19th of June 1819; upon which an execution was issued in the following November, and was returned "no property found." This judgment was upon a debt which had accrued since the year 1812. Libby made a payment on this judgment by the assignment of eighteen notes of R. L. Carne, so that the balance due on
61 the 1st of *December 1820 was five thousand four hundred and four dollars and eighty-three cents.

In 1821 Libby died, having first made his will, by which he gave the whole of his estate to the children of his deceased sister Carne; and Lewis Hipkins, who had married one of these children, qualified as executor of the will.

In January 1824 Suckley filed his bill in the Circuit court of the District of Columbia for Alexandria, in which he set out his judgment against Libby, and the payment he had made upon it, the death of Libby, and his will. He alleged that Libby had died seized of some real and a small personal estate within the county of Alexandria; that the children of Mrs. Carne, to whom it was given by his will, were Mary the wife of Lewis Hipkins, Jane the wife of Bartholomew Rotchford, Susanna the wife of Nicholas Thornton, Richard L. Carne and William Carne; and making the children and the husbands of the females, and Hipkins as executor, parties defendants, he alleged that the personal estate was insolvent and inadequate to the payment of the testator's debts; and asked that he might have satisfaction of his judgment out of the real estate to the extent the personal estate should prove insufficient.

Hipkins and wife and Richard L. and William Carne answered the bill. They admitted the judgment and the will, and that the devisees and legatees were properly named. Hipkins stated a further payment that he had made upon the judgment; and they all insisted that the real estate was not liable, because they said there was a large personal estate belonging to the testator, consisting chiefly of sundry large debts due from persons in the states of Virginia and Kentucky, which, when collected, would be more than sufficient to discharge the balance due upon the judgment. And they refer to a debt due from John Field
62 of Kentucky, *and three debts due from Aaron Kee of Virginia, which were placed by Libby in the hands of the plaintiff, and were to be applied to this judgment, but for which the plaintiff had

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***For monographic note on Creditors' Bills, see end of case**

†**Debt of Decedent—Property Liable.**—See principal case cited in James v. Life, 92 Va. 705, 24 S. E. Rep. 275; Saddler v. Kennedy, 26 W. Va. 641.

‡**Bill of Review.**—See monographic *note* on "Bills of Review" appended to Campbell v. Campbell, 22 Gratt. 649.

not given the credit, nor had he rendered any account to the defendants.

In 1826 an order was made on the motion of the plaintiff, directing a commissioner of the court to report to the court the account between the plaintiff and the executor of Libby, showing the balance due on the judgment. This report was returned in June 1826, and showed a balance due of four thousand nine hundred and sixty-nine dollars and thirty cents, with interest from the 1st of June 1825. In 1830 the court made another order, directing a commissioner to settle the account of Hipkins' administration on the estate of Libby. This report was returned in 1831, and shows a balance of four hundred and thirteen dollars and twenty-six cents due by the executor on the 1st of November 1830. This report did not allude in any manner to the debts of Field and Kee.

At the October term for 1839 the cause came on to be heard, and the decree recites that it was set for hearing as to Hipkins and wife, and the two Carnes, upon the bill, answers, &c.; that the bill had been regularly taken for confessed and set for hearing as to Rotchford and wife; and it appearing to the satisfaction of the court that the order of publication made at November term 1823 against Nicholas Thornton and Susanna his wife, had been duly executed, and they failing to appear, &c., the court doth order the bill to be taken for confessed and set for hearing as to said Nicholas Thornton and Susanna his wife. It then directs Hipkins to pay to the plaintiff the sum of four hundred and thirteen dollars and twenty-six cents, ascertained by the report of the commissioner to be in his hands as executor of Libby, with interest. And unless the defendants or
63 some of them should by the *11th of May next pay to the plaintiff the balance of his judgment, after crediting the sum aforesaid with interest, a commissioner named was directed to sell the real estate of which Libby died seized, or so much as might be necessary to pay said balance, in the manner and upon the terms stated in the decree.

A copy of this decree was served on Rotchford on the 1st of April 1840; and it was endorsed, to be final as to Rotchford and wife, unless cause be shown to the contrary on or before the first day of the next term.

"And at a court continued and held the day of May 1840, came the parties by their attorneys, and on the plaintiff's motion, the decree of the last term is made final."

In April 1841 Rotchford and wife, and Richard, Mildred, William and Mary Thornton filed a bill to enjoin the execution of the decree of October 1839, and to review it. They charge that Nicholas and Susanna Thornton died as early as 1827, but that the suit had not been abated as to them or revived against the complainants Richard, &c., who were the heirs of Susanna Thornton. That the bill of the plaintiff does not allege that execution had been issued upon his judgment in the lifetime of Libby. That the judgment had not been revived either against the executor or the heirs. And Rotchford alleges that the real estate of Libby, which remained to be sold by the commissioner, had been sold for taxes due to the city of Alexandria, and purchased by him, and had been regularly conveyed to him on the 24th of June 1839. And they set out the following errors, for which the decree should be reviewed and reversed:

1st. That the complainant had a complete and adequate remedy at law, and therefore the court as a court of equity, had no jurisdiction of the cause.

2d. That Nicholas Thornton and Su-
64 sanna his wife *were not alive at the time of said decree made in the cause.

3d. Because the said Richard, Mildred, William and Mary Thornton were not parties to the suit, and were not bound by the decree.

4th. Because said property had been before the rendition of said decree, legally sold and conveyed by the common council of Alexandria for a valuable consideration.

For these errors they prayed that the decree of 1840 might be reviewed and reversed; and in the mean time that the sale of the real estate of Libby might be enjoined. The injunction was granted as prayed.

Suckley answered the bill at great length, but it is unnecessary to state the grounds of defense taken in it. As to the sale of the property for taxes, he insisted that the sale was void for irregularity; and that some of the devisees of Libby lived all the time in Alexandria, with ample means to pay the taxes, and that Rotchford himself during the whole time lived either within the city or within a mile of it, and was in independent circumstances.

In November 1844 the cause came on to be heard, when the court annulled and set aside the decree of 1840, except as to so much of the property as had been sold by the commissioner, for which conveyances were directed to be made to the purchasers. And leave was given to Suckley to amend his bill and make the children of Susanna Thornton parties defendants to this suit.

Suckley having died, his suit was revived in the name of his administrator, who in 1851 filed an amended bill making the heirs of Susanna Thornton parties defendants. Rotchford answered, and there was an order of publication as to the children of Susanna Thornton. And on the 10th of Feb-
65 ruary 1852 *the cause came on to be finally heard, when the court perpetuated the injunction, without prejudice to any direct proceeding the plaintiff might institute for the purpose of vacating the conveyance from the common council to Rotchford of the property protected by the injunction. From this decree Suckley's administrator applied to this court for an appeal, which was allowed.

Heath and Neale, for the appellant.
H. Winter Davis, for the appellees.

SAMUELS, J. The constitution of the United States, art. i, § 8, clause 16, declares, "The congress shall have power" "to exercise exclusive legislation in all cases whatsoever, over such district, (not exceeding ten miles square,) as may, by cession of particular states, and the acceptance of congress, become the seat of government of the United States."

The state of Virginia, by the act of assembly passed December 3d, 1789, 13 Hen. St. p. 43–44, declared, "That a tract of country, not exceeding ten miles square, or any lesser quantity, to be located within the limits of this state, and in any part thereof as congress may by law direct, shall be and the same is hereby forever ceded and relinquished to the congress and government of the United States, in full and absolute right, and exclusive jurisdiction as well of soil as of persons, residing or to reside therein, pursuant to the tenor and effect of the eighth section of the first article of the constitution of the government of the United States.

"§ 2. Provided, that nothing herein contained shall be construed to vest in the United States any right of property in the soil, or to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States.

66 *"§ 3. And provided also, that the jurisdiction of the laws of this commonwealth over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease or determine until congress, having accepted the said cession, shall by law provide for the government thereof, under their jurisdiction, in manner provided by the article of the constitution before recited."

The state of Maryland having by statute provided for a cession of territory to the federal government, the acts of congress passed July 16, 1790, 1 U. S. Stat. at Large, p. 130, and March 3d, 1791, 1 U. S. Stat. at Large, 214, and the executive action under those acts, fully completed the cession, and parts of Virginia and Maryland made to form the District of Columbia, the seat of the federal government.

In discharge of the duty to provide laws for the government of the district thus established, it was enacted by congress February 27th, 1801, 2 U. S. Stat. at Large, p. 103, ch. 15, § 1, "That the laws of the state of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia which was ceded by the said state to the United States, and by them accepted for the permanent seat of government."

In further discharge of the duty to provide laws, it was enacted by congress June 24, 1812, 2 U. S. Stat. at Large, p. 756, ch. 106, § 4, "that real estate in the county of Alexandria shall be subject to the payment of debts hereafter contracted in the same manner, to the same extent, and by the same process as real estate in the county of Washington is subject to the payment of debts by the laws now in force in the said county of Washington, the operation of which laws is hereby extended to real estate in the said county of Alexandria for the satisfaction of debts hereafter contracted." 2 U. S. Stat. at Large, p. 756, ch. 106, § 4.

67 *The county of Alexandria, in this act mentioned, included that part of the district of Columbia which was ceded by the state of Virginia, and the county of Washington that part which was ceded by the state of Maryland. The law governing the county of Washington is the same as the law of Maryland: And thus the liability of real estate in Alexandria to be applied in satisfaction of debts is regulated and controlled by law the same as that of Maryland.

It was conceded in the argument here, and is fully shown by numerous adjudged cases in the Court of appeals of Maryland, that the statute 5 George 2, ch. 7, § 4, was in force in that state February 27th, 1801, when their laws were extended by act of congress to Washington county; and was in force in Washington county June 24th, 1812, when the law of that county was extended to Alexandria county.

The statute 5 Geo. 2, ch. 7, § 4, provides, "That from and after the twenty-ninth day of September one thousand seven hundred and thirty-two, the houses, lands, negroes, and other hereditaments and real estates situate or being within any of the said plantations, belonging to any person indebted, shall be liable to and chargeable with all just debts, duties and demands, of what nature or kind soever, owing by any such person to his majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof in like manner as real estates are by the law of England liable to the satisfaction of the debts due by bond or other specialty, and shall be subject to the like remedies, proceedings and process in any court of law or equity in any of the said plantations respectively, for seizing, extending, selling or disposing of any such houses, lands, negroes and other hereditaments and real estates, towards the satisfaction of such debts, duties and demands, and in like manner as personal estates in any of the said plantations respectively are seized, extended, sold or disposed of for the satisfaction of debts."

68 *The act of the general assembly passed February 3d, 1846, Sess. Acts, p. 50, the act of congress passed July 16th, 1846, and the act of assembly passed March 13th, 1847, Sess. Acts, p. 41, taken together, produced the effect of bringing the county of Alexandria again within the jurisdiction of this state, and making the territory a part of the state. They had the further effect of securing to all persons all rights acquired under the laws theretofore in force in that county, and of preserving all actions there pending; and of requiring the courts

of this state to respect all proceedings theretofore rightly had in such actions, and that all ulterior proceedings should be had according to the laws of Virginia.

The judgment was rendered in favor of Suckley, the surviving partner, against Libby in his lifetime, at April term 1820, for a debt contracted after June 24, 1812.

The act 5 Geo. 2, ch. 7, § 4, according to its literal reading, as well as by the rules for construction of remedial statutes, subjected Libby's whole estate to sale for satisfaction of Suckley's debt, regarding it as a debt merely apart from its character as a judgment. The appellant's intestate, the judgment creditor, having established his debt against Libby in his lifetime, was not compelled to look to the real estate as merely a secondary fund for payment, but had the right to look upon the estate, real and personal, as equally liable. This right the creditor might exercise, unless some equitable reason should require him to proceed first against the personal estate. Hanson v. Barnes' lessee, 3 Gill & Johns. 359; Gaither and Warfield v. Welch's estate, Id. 259.

In the case before us the creditor filed a bill in chancery, alleging that the personal estate had been exhausted without paying his debt, and praying that the real estate might be subjected to the payment thereof.

The executor and devisees being all
69 parties, *the court directed an account of the personal estate in the hands of the executor, and in case of the real estate, held it liable for only so much of the debt as the personal estate would not pay. The devisees have nothing to complain of, seeing that the creditor was thrown first upon the personal fund for payment. In the argument here, and in the answers of the defendants to the original bill, it was earnestly insisted that the creditor should seek satisfaction out of certain personal assets, that is, a debt due from Kee of Virginia, and another from Field of Kentucky, to Libby's estate. The answer to this pretension is obvious; Libby's executor had no authority to enforce the collection of these debts. There is, moreover, nothing to show that these debtors were solvent. On the contrary, certain facts in the record tend to show they were not so: An account of the personal estate was taken in which neither of these debts is mentioned, and no exception is taken for the omission. Moreover, there is no reason why the creditor should be required to give up a fund subject to a primary liability for his debt, and pursue another fund subject to the same liability. If any thing could have been realized from these debts of Kee and Field, it was the duty as well as the interest of the legatees and devisees to have looked after them.

In my opinion the appellant's intestate was rightly in court praying the relief sought. His proceedings for maturing his case seem to have been had under the laws of Virginia in force February 27, 1801. I perceive no error therein, taking, as I do, the recitals in the decree as sufficiently showing that the case had been regularly proceeded in. If it should be conceded that a rule of the court did require the bill to be filed before the subpœna issued, still as the law directed otherwise, the law must prevail. Although the supreme court

had authority to prescribe rules of
70 *practice in the circuit courts, those rules must be subordinate to the law. Although congress might have repealed or altered the law, yet it could not delegate that authority to another body.

After the decree at October term 1839 (made final as is said by the decree of May term 1840) had been rendered, Rotchford and wife and the heirs of Mrs. Thornton united in a bill praying an injunction to the further execution of the decree, and for a review and reversal thereof.

Regarding the decree of October term 1839 and the order of May term 1840 as one, yet according to the practice in Virginia, it should be held interlocutory only, and therefore not such as could be reversed upon bill of review. See 2 Rob. Pract. 414; Dunbar's ex'ors v. Woodcock's ex'or, 10 Leigh 628.

But according to the practice at that time prevailing in the District of Columbia, the decree would be held so far final as to be the subject of review by a bill for that purpose. Whiting v. The Bank of the U. S., 13 Peters' R. 6; Ray v. Law, 3 Cranch's R. 179.

Whatever may be the character of the decree complained of in the bill of review, and conceding for the present, that it was such as might be reversed on a bill of review showing sufficient cause for reversal, it yet remains to consider the sufficiency of the causes alleged in this bill, and how far they are sustained by proof. We are met at once by the obvious fact that some of these causes are personal and peculiar to Rotchford alone, or to Rotchford and wife, and others of them to Mrs. Thornton's heirs. The only cause common to all the plaintiffs in the bill of review is the alleged want of jurisdiction to entertain the bill of complaint. In support of this objection, it is said that the judgment should have been revived at law against the devisees, and the land thus subjected to the satisfaction

of complainant's judgment. In reply
71 to this, it may *be said, that the creditor might have thus revived his judgment: and so, he might have revived it against the executor. But in either case, it would have been material to ascertain the amount due on the judgment, and possibly different results might have been arrived at in two several trials. In pursuing the fund in the hands of the executor it might have been necessary to convict him of a devastavit, by settling his account with the estate in his hands.

This objection to the jurisdiction, when properly analyzed, will be found to rest upon the ground that the creditor should have tried the same fact, that is, the amount of his debt, in two several suits; one with the

executor, the other with the devisees: or, that the creditor, to avoid two suits, might forego his claim on one or the other of the funds; that if he pursued the personal fund, he must encounter a second suit at law or in chancery, to subject the executor for a devastavit: that the devisees and legatees being the same persons, have the right to insist on having the creditor put to two suits; one against the executor, a trustee for the legatees; the other against the devisees directly: and all this for the purpose of obtaining payment of a debt, out of real and personal estate substantially belonging to the same persons as devisees or legatees.

The general principles of equity clearly justify the creditor in convening in one suit all parties interested in controverting the amount of his debt, and holding in their own hands or in the hands of their trustee the estate on which the debt is chargeable. The practice under the stat. 5 Geo. 2, ch. 7, § 4, is to convene all parties in interest, so that any party may defend his own interest without relying upon another for that purpose.

On the whole, I am of opinion the case was one peculiarly suitable for the cognizance of a court of equity.

72 *The objection that Thornton and wife were dead at the date of the decrees of October term 1839, and May term 1840, is not sustained by proof. Moreover they were proceeded against as absent defendants; and the statute prescribes a different mode in which they or their heirs shall make defense.

The fact alleged that Rotchford had become the purchaser of the real estate or a portion of it, at a sale for the payment of taxes due the corporation of Alexandria, cannot sustain the bill of review, because his purchase, even if valid, was made before the decree of October 1839, and should have been relied on as a defense against the relief prayed in the original bill.

The causes for reversal alleged in the bill of review I regard as wholly insufficient for that purpose; and the Circuit court erred in permitting it to be filed. The subsequent proceedings in the cause having been had to some extent in consequence of the bill thus improperly filed, are necessarily also erroneous.

I am of opinion to reverse the decrees of the court below subsequent to that of May term 1840, in the manner and to the extent set forth in the decree of this court.

The other judges concurred in the opinion of Samuels, J.

The decree was as follows:

The court is of opinion that the said decree of the Circuit court rendered February 10th, 1852, is erroneous; that so much of the decree of November 28th, 1844, as annuls and sets aside the decree of May term 1840, which last mentioned decree makes final the decree of October term 1839; and so much thereof as gives leave to file an amended bill is also erroneous, such amended bill not being necessary in the position in which the case should be made to stand.

73 *The court is further of opinion that there is no error in so much of the decree of November 28th, 1844, as approves and confirms the sales made under the decrees of October 1839 and May 1840. Therefore, it is decreed and ordered that such and so much of the several decrees hereinbefore declared to be erroneous be reversed and annulled; and that such part of the decree of November 1844 as is declared to be free of error be affirmed; and that the appellees do pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here.

And this court, proceeding to pronounce such decree as the Circuit court should have pronounced, it is further decreed and ordered, that the decrees of October term 1839 and May term 1840 be reinstated in their original force and effect; that the injunction awarded upon the filing of the bill of review be dissolved, and the bill of review dismissed; that the amended bill filed by complainant at September rules 1845 be also dismissed as being unnecessary, and that the appellees do pay unto the appellant his costs in the Circuit court expended in defending himself against the bill of review and in filing his amended bill.

It is further ordered, that the bill of revivor (erroneously called a bill of review) filed July rules 1851, to revive in the name of Suckley's administrator, be dismissed, the suit having been so revived at June term 1851. And the cause is remanded, with directions to revive the suit, if revivor be necessary, and for further proceedings to enforce the rights of the appellant accrued under the laws heretofore governing the county of Alexandria, but according to the practice prescribed by the laws of this state now in force in that county.

CREDITORS' BILLS.

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Cross References to Monographic Notes.

Costs, appended to Jones v. Tatum, 19 Gratt. 720.
Decrees, appended to Evans v. Spurgin, 11 Gratt. 615.
Executors and Administrators.
Fraudulent and Voluntary Conveyances, appended to Cochran v. Paris, 11 Gratt. 348.
Injunctions, appended to Claytor v. Anthony, 15 Gratt. 518.
Judicial Sales, appended to Walker v. Page, 21 Gratt. 636.
Private Corporations, appended to Slaughter v. Com., 13 Gratt. 767.

I. IN GENERAL.

Defined.—Creditors' bills, in their most comprehensive sense, are bills in equity by creditors to enforce the payment of debts out of the property of debtors, under circumstances which impede or render impossible the collection of the debts by the ordinary process. "It is true that creditors' bills are usually employed to settle up decedents' or other estates, and to prevent a multiplicity of suits by creditors, each eager to establish by suit a priority of lien upon the assets out of which he is to be paid. But there is no principle of equity which confines these suits to any one class of cases. As society advances, and its methods of business undergo change, equity will adapt its relief to the changed condition of things." Per HUGHES, J., in Fink v. Patterson, 21 Fed. Rep. 602.

Nature—Relief Sought and Mode of Obtaining.

In General.—It is a ground for equitable jurisdiction that the parties in interest are numerous. And in such cases one or more are allowed to sue or defend for themselves, and all others similarly situated. Likewise in the case of creditors, one or more may institute a suit in equity in behalf of themselves and all other creditors whose debts are, or may be, specifically charged upon a certain subject. Martin v. So. Salem Land Co., 94 Va. 28, 26 S. E. Rep. 591. Simple contract creditors, have under the Virginia statute, such lien as will entitle them to unite or bring such suit, after the death of the debtor. General creditors' bills is a term usually applied to such bills as are brought in behalf of all the creditors of the debtor. They are generally classified as those brought for the purposes, (1) of winding up insolvent estates of deceased debtors, or, (2) against a living debtor, to subject property to the payment of debts. So a bill to wind up the affairs of an insolvent corporation, and to distribute its assets among its creditors, is a creditors' bill, coming under the latter division, and is in many respects analogous to a bill in behalf of creditors of a decedent. Finney v. Bennett, 27 Gratt. 365. These will be taken up and dealt with more at length. See *post*, "Specific Classification of Creditors' Bills."

What is usually termed a judgment creditor's bill is one instituted by an unsecured creditor, or several creditors, if they choose to unite, against a living debtor, for the purpose of subjecting equitable and other interests of the debtor, or of removing obstructions in the way of the process of execution, such as fraudulent conveyances. See in general connection, Poindexter v. Green, 6 Leigh 504; Reynolds v. Bank of Va., 6 Gratt. 174; Hudgins v. Lanier, 23 Gratt. 494.

The court assumes the whole administration of the fund, directs the marshaling of the assets, and makes a decree for the benefit of all creditors who may come in under the decree, or by petition in the cause, and prove their demands. This is usually done before a commissioner of the court, to whom it is referred to take an account of all the debts charged on the fund. All of the creditors do not have to convene. Burt v. Timmons, 29 W. Va. 441, 2 S. E. Rep. 780. See in this connection, Core v. Cunningham, 27 W. Va. 207.

But if after reasonable notice creditors decline to come in before the commissioner and prove their claims, or by petition, they will, at least in the case of suits against deceased debtors, be excluded from the benefits of the decree, and yet they will be considered as bound by the acts done under its authority. See Story's Eq. Pl. § 99, p. 100 (Ed. 1879); Barton's Ch. Pr. (2d Ed.), p. 286 *et seq.*

In instituting a creditors' suit the bill should state that it is in behalf of all creditors. This same principle is applicable where a part of the tax payers of a school district file a bill in chancery, to enjoin the collection of taxes. They should file the bill in behalf of themselves and all others similarly situated as taxpayers in the district, as such an averment is essential to a complete determination of all the rights affected by the suit. Doonan v. Board of Ed., 9 W. Va. 246. Nevertheless, it may be held to constitute a creditor's bill if it substantially appear from the tenor of the bill that it is such, although it be not expressly stated. See *post*, "What May Become a Creditor's Bill." For authorities in this connection, see Umbarger v. Watts, 25 Gratt. 171; Ewing v. Ferguson, 33 Gratt. 558; Harvey v. Steptoe, 17 Gratt. 289; Kent v. Cloyd, 30 Gratt. 555; Duerson v. Alsop, 27 Gratt. 235; Hartley v. Roffe, 12 W. Va. 402; Anderson v. Nagle, 12 W. Va.

113 ; Piedmont & A. Life Ins. Co. v. Maury, 75 Va. 510.

As a general rule the creditor who institutes the suit is *dominus litis*, and may dismiss the suit at his pleasure, until some of the creditors generally, who are not parties to the suit, have been admitted as parties. This power of absolute control exercised by the creditor filing the bill, ceases, however, as soon as the creditors become parties ; and they become parties, in a general sense, when a decree or order for a general account is entered, under which they may prove their demands. But before any decree for general account is entered a creditor may, in a proper case, be admitted a party on the record upon a special application for the purpose ; and when that is done, he acquires such control of the suit as that it cannot be dismissed without his consent. Nevertheless, the original plaintiff may still dismiss the suit so far as he is concerned, and it may be prosecuted by the newly introduced party for his own benefit. It should be carefully observed, however, that the mere filing of a petition will not operate *proprio vigore* to make the petitioner a party. To effect this an order of court is necessary. Piedmont & A. Life Ins. Co. v. Maury, 75 Va. 512 ; 4 Min. Inst. (3d Ed.) 1246 *et seq.*; Duerson v. Alsop, 27 Gratt. 229.

See in general connection, Russell v. Randolph, 26 Gratt. 705; Kelly v. Hamblen, 98 Va. 383, 36 S. E. Rep. 491 ; Kennewig Co. v. Moore (W. Va.), 38 S. E. Rep. 558 ; James v. Life, 92 Va. 702, 24 S. E. Rep. 275 ; White v. Mech., etc., Ass'n, 22 Gratt. 233 ; Moran v. Brent, 25 Gratt. 104 ; Tilson v. Davis, 32 Gratt. 92 ; Galt v. Calland, 7 Leigh 594 ; Belton v. Apperson, 26 Gratt. 207 ; Shannon v. Hanks, 88 Va. 338, 13 S. E. Rep. 437 ; Finney v. Bennett, 27 Gratt. 365 ; Poore v. Price, 5 Leigh 52 ; Triplett v. Woodward, 98 Va. 187, 35 S. E. Rep. 455 ; Kilbreth v. Roots, 33 W. Va. 600, 11 S. E. Rep. 21.

Same—What May Become a Creditor's Bill.—It is not essential that a creditor's suit should be such in its inception. A bill filed by a single creditor of a decedent's estate, or a single judgment-lien creditor of a living debtor, if in other respects proper, may by an order of reference to a commissioner and convention of other creditors entitled to be provided for in the suit, be converted into a creditor's suit, and it will be regarded as such from the time such order of reference is made. Arnold v. Casner, 22 W. Va. 444. And although the bill is not in form a general creditor's bill, yet if the case stated and the relief contemplated and prayed are such as are contained in a general creditor's bill, it will be considered and treated as such. Thus, where a creditor files a bill against a company, alleging its insolvency, asking that the creditors be convened, that the amount of debts and assets be taken, and that a receiver be appointed, it is a creditor's bill in substance and legal effect as if it had been framed as such in the technical form, although the bill is not in so many words professed to be on behalf of himself and of other creditors. Piedmont & A. Life Ins. Co. v. Maury, 75 Va. 508. In Williams v. Newman, 93 Va. 724, 26 S. E. Rep. 19, the court says: "It is well settled that a suit in chancery, brought by one creditor against the estate of a decedent, although filed on behalf of himself only, may, by decree convening all the creditors and directing a statement of proper accounts, be converted into a general creditor's bill, and from the date of such a decree it will be considered and will carry with it all the incidents and consequences attending the filing of a technical creditor's bill." Beverly v. Rhodes, 86 Va. 418, 10 S. E. Rep. 572; Rice v. Hartman, 84 Va. 252, 4 S. E. Rep. 621; Hurn v. Keller, 79 Va. 418; Paxton v. Rich, 85 Va. 378, 7 S. E. Rep. 531 ; Carter v. Hampton, 77 Va. 637; Ewing v. Ferguson, 33 Gratt. 548; Gordon v. R. F. & P. R. Co., 81 Va. 621. And though a creditor files a bill to subject personal and real estate of a deceased debtor to the payment of his debt saying nothing of other creditors, yet if he prays that the administration account may be settled, that an account of all debts and liabilities of the estate may be taken and their priorities be fixed, that the amount and value of real estate may be ascertained, and that all other accounts and orders which are proper may be taken and made, this is a creditor's bill. And under such a prayer a decree for a general account may be made; or all the creditors may be permitted to come in and prove their debts, or an order staying other suits may be made, and all the assets be administered in the one suit. Duerson v. Alsop, 27 Gratt. 229. Thus, where a bill is filed by a single creditor against an administrator and the heirs of a decedent to subject the real estate descended to the heirs to the payment of his claims, although not in form a creditor's bill, it will become a creditor's suit from the time the court makes an order referring the cause to a commissioner to convene the creditors by publication, and report the debts of decedent. Laidley v. Kline, 23 W. Va. 565. And a suit of distributees to ascertain and pay the debts of an estate, and to distribute the surplus is substantially a creditor's bill. Norvell v. Little, 79 Va. 141.

Form—Relief Which May Be Sought.—A creditor's bill should state the plaintiff's case with reasonable certainty, that is,—the right of claimant, the injury complained of, and the relief he seeks, with the facts to justify,—with such accuracy and clearness, and with such detail of the essential circumstances of time, place, manner, etc., as will so make out his case as to inform the defendant of what he is called upon to meet ; stating, not conclusions of law, but the facts out of which arises his right to some specific relief. But the bill may be framed with a double aspect, and ask relief in the alternative, but the state of facts upon which such relief is prayed must not be inconsistent. Moreover, the bill must not be multifarious, that is, two distinct grounds of equitable relief, even between the same parties, must not be joined in one bill. Zell Guano Co. v. Heatherly, 38 W. Va. 409, 18 S. E. Rep. 611. But it is not essential as before stated, that a creditor's suit should be such in its inception. A bill filed by a single creditor of a decedent's estate, or a single judgment-lien creditor of a living debtor, if in other respects proper, may by an order of reference to a commissioner, and a convention of the other creditors entitled to be provided for in the suit, be converted into a creditor's suit, and it will be regarded as such, from the time the order of reference is made. However, the more usual and better practice, in such cases, is for the plaintiff to sue on behalf of himself and all other creditors of the same class as himself. In West Virginia it is held that the authority for such suit is not derived from statute, but exists independently of it. The W. Va. Code, in force in 1881, ch. 86, § 71, however, confers upon a personal representative of a decedent the right to bring such suit where the personal estate is insufficient to pay the debts, a right which he did not have before the statute. And creditors who file their claims before a commissioner in such a suit, although not formal

parties to the bill, become informal parties to the suit, and are as effectually bound, and the court has the same jurisdiction over them, as if they had been made formal parties to the bill, and been served with process. Arnold v. Casner, 22 W. Va. 444. And it is the settled practice in Virginia, to entertain a suit of a judgment creditor for relief in equity, when the debtor has, subsequent to a judgment, conveyed his land in trust, for the payment of debts, or on other trusts authorizing the sale of the land. And in such case a court will decree a sale to satisfy the judgment. And it is not necessary that a judgment creditor should have issued an elegit on his judgment before coming into equity for relief. Taylor v. Spindle, 2 Gratt. 44. See in this connection, Boyd v. Stainback, 5 Munf. 305. See *post*, "Conditions Precedent to Limb."

In Hudgins v. Lanier, 23 Gratt. 494, judgments were recovered against a debtor and docketed. The debtor afterwards made a deed in which his wife joined, conveying certain real estate to a trustee, in trust to sell, upon the request of a majority of his creditors, and pay his debts ratably; but if any had obtained liens, they were to have been paid first. He, at the same time, conveyed to the trustee, other real estate, in trust for the separate use of his wife, stated upon the express consideration of executing the first deed. The deed did not name a creditor or enumerate the debts. One of the judgment creditors, filed a bill to enforce the payment of his debt. He said that he did not mean to give up any right he had, but was willing to proceed as against the land conveyed in the deed. He made the debtor, trustee, and the judgment creditors defendants; and the bill was taken for confessed as to all of the defendants. The commissioner stated the debts of the judgment creditors, and there was no exception to the report; and there was a decree appointing a commissioner to sell the land conveyed in the deed, at auction; but with the consent of the debtor, there could have been a private sale. The debtor negotiated with a purchaser for the sale of a part of the property at $4,500, which he proposed to the commissioners, and they were disposed to accept the offer; but before it was closed, another bidder offered $5,000, and then the debtor *proceeded* against the sale to the first person with whom he negotiated, and insisted that it should be sold at auction; but the first person with whom he had negotiations declined to give more, and the commissioners accepted the offer made by the second person, and the debtor excepted to the report. The debtor then filed his answer, insisting that the trustee should elect whether he would proceed under his judgment lien or under the deed; and insisted that under the deed, only a majority of the creditors could direct a sale. And he filed a petition saying that an offer had been made of $5,100, for the property; and proposed to give bond and security, that if accepted, the offer would be complied with in five days after the rising of the court. The court held, that, the deed not naming the creditors, the only mode of proceeding open to them, was by bill in equity, where the necessary parties might be convened, their rights and liabilities ascertained and adjusted, and the trust enforced under the supervision of the court.

And though a *fi. fa.* against the estate of a testator, cannot lawfully be levied upon slaves which, being specifically bequeathed are in the possession of the legatees, as their property, either by actual delivery from the executor, or by his permission, yet in such case a court of equity, at the instance of creditors, may award an injunction to prevent a sale of the property. Sampson v. Bryce, 5 Munf. 175 (1816); Randolph v. Randolph, 3 Munf. 99; Wilson v. Butler, 3 Munf. 559. But where a creditor has obtained judgment against an executor as such, and has sued out a *fi. fa. de bonis testatoris*, which proves ineffectual, he may either resort to his action at law to establish a *devastavit*, or file a bill in equity against the executor and legatees, for an account of assets and proportional contributions to pay the debt. Sampson v. Payne, 5 Munf. 176; Burnley v. Lambert, 1 Wash. 312.

Consolidation of Suits.—Where several suits are pending at the same time by different creditors, a court will order the proceedings in all the suits but one to be stayed, and will require the several parties to come in under the decree in said suit, so that only one account of the estate may be necessary.

Thus, in Devries v. Johnston, 27 Gratt. 805, there were three suits in equity brought by the same plaintiffs against the same defendants to enforce payment of debts by attachment and sale of the same land. By order of the court these suits were directed to be heard together, and then the plaintiffs filed an amended bill bringing in a third party. There being a decree dismissing the attachments, the plaintiffs could appeal to the court of appeals, though neither of the debts amounted to $500, the sum of all of them being more than that amount. See Patterson v. Eakin, 87 Va. 54, 12 S. E. Rep. 144; Bristow v. Home Bldg. Co., 91 Va. 18, 20 S. E. Rep. 946; Va. Code 1887, § 2460, Pol. Supl. Code, § 2460; Stephenson v. Taverners, 9 Gratt. 398.

Statute of Limitations.—In a creditor's suit, where the object and purpose are to ascertain all the liens upon the debtor's real estate, and their priorities, and to provide for their payment, the statute of limitations will in general cease to run against such liens after the entering of an order of reference. N. & W. Bank v. Hays, 37 W. Va. 475, 16 S. E. Rep. 561. So where a bill is filed by creditors to subject the lands of the debtor, it is converted into a creditor's suit by order of court referring the cause to a commissioner, and with notice to creditors to convene; and the statute of limitations will cease to run from that time against all the creditors of the estate of the decedent, whether formal parties to the suit or not. Laidley v. Kline, 23 W. Va. 565.

Bar to Suit.—The pendency of an action by a creditor to have the estate of a deceased partner administered for the benefit of the separate creditors, and in which a decree for an account has not been rendered, will not bar an action to administer the partnership property for the benefit of the partnership creditors. Robinson v. Allen, 85 Va. 721, 8 S. E. Rep. 835.

Suspension.—But a suit to enforce liens, under W. Va. Code 1891, ch. 139, sec. 7, by one judgment creditor, suing for himself and other lienors, will not be suspended by payment of the debt of the plaintiff after an order of reference. It may and will proceed in the name of the plaintiff, unless an order be made substituting another person as plaintiff. Shumate v. Crockett, 43 W. Va. 491, 27 S. E. Rep. 240.

II. SPECIFIC CLASSIFICATION OF CREDITORS' BILLS.

A. BILLS FILED BY CREDITORS OF DECEDENTS.

In General.—The principles applicable to suits instituted by creditors to wind up and administer the

estate of a decedent, are in the main the same as those which govern general creditors' bills, and reference is made to these principles, which are set forth *ante*, "I. In General," and the heads following the one now under discussion. Therefore, as the principles regulating the two classes of bills so far as treated in this note, are so nearly identical, after a brief summing up of some of the general principles under this head, reference will be made to the note in general, as the two classes will be treated as one, proper discrimination being made when necessary. Thus, in Williams v. Newman, 93 Va. 724, 26 S. E. Rep. 19, the court said: "It is well settled that a suit in chancery brought by one creditor against the estate of a decedent, although filed on behalf of himself only, may, by decree convening all the creditors and directing a statement of accounts, be converted into a general creditor's bill, and from the date of such a decree it will be so considered, and will carry with it all the incidents and consequences attending the filing of a technical creditor's bill."

See also, the following cases: Duerson v. Alsop, 27 Gratt. 229; Beverly v. Rhodes, 86 Va. 415, 10 S. E. Rep. 572; Rice v. Hartman, 84 Va. 252, 4 S. E. Rep. 621; Piedmont, etc., Co. v. Maury, 75 Va. 510; Hurn v. Keller, 79 Va. 418; Carter v. Hampton, 77 Va. 637. For instance where a creditor's bill is filed against the administrator, devisees, and legatees, and a decree for an account is made in the cause, no other creditor of the estate can maintain a separate suit in another court for the satisfaction of his debt. And if the bill shows that he had knowledge of the decree for an account in the first suit, his suit will be dismissed upon demurrer to the bill. Kent v. Cloyd, 30 Gratt. 555. And he will be compelled to pay the cost of his suit. Laidley v. Kline, 23 W. Va. 565. And where a bill has been filed by a single creditor against an administrator and heirs of a decedent to subject the real estate descended to the heirs to the payment of his claims, an order of reference operates as a suspension of all other suits against the estate of the decedent; and such order may be made in the first cause ready for hearing, although not the first suit brought. Laidley v. Kline, 23 W. Va. 565.

In this connection it should be noted that where heirs who reside out of the state, have instituted suit for the sale of land descended to them, which has been sold, and the proceeds placed in the hands of a commissioner directed by the court to collect them, a creditor of the ancestor seeking to subject these proceeds to the payment of his debt, should apply by petition to the court to be made a party to the cause, and to have the fund applied by proceedings in that cause to the payment of his debt. Or if he proceeds by foreign attachment the commissioner should be a party, and be restrained by the endorsement on the process, from disposing of the proceeds. Or if the creditor proceeds against the heirs to marshal the assets, there should be an injunction to restrain the commissioner from paying away the money in his hands. And the commissioner though a party, as administrator of the debtor, to the creditor's suit, but having in fact no knowledge of the objects of it, paying over the money to the heirs under the order of the court whose commissioner he is, will not be affected by the *lis pendens* of the creditor's suit so as to be held liable to pay it over again to the creditors. Carrington v. Didier, 8 Gratt. 261. See monographic *note* on "Executors and Administrators."

B. BILLS FILED BY CREDITORS OF A LIVING DEBTOR OR CORPORATION.

1. SUITS AGAINST CORPORATIONS.—For principles applicable, see monographic *note* on "Private Corporations" appended to Slaughter v. Com., 13 Gratt. 767.

2. BILLS FILED BY CREDITORS TO SET ASIDE FRAUDULENT AND VOLUNTARY CONVEYANCES.—This particular class of creditors' bills, which is properly a part of the main subject, has been treated in the monographic *note* on "Fraudulent and Voluntary Conveyances," to which reference is made.

3. GENERAL CREDITORS' BILLS AGAINST INSOLVENT PERSONS.—The scope of this note is intended to embrace the principles applicable to bills filed by creditors of insolvent living debtors for relief, by renting or sale of such property as is liable to the payment of their debts, and is in a position to be subjected; also to bills filed by creditors of a decedent to wind up and distribute the estate of such debtor. See *ante*, "Bills by Creditors against Decedents." Reference is made, therefore, to the subject as discussed throughout this note, which is devoted more particularly to the principles applicable to these two classes of creditors' bills, which are, as before stated virtually treated as one class throughout the note.

III. RIGHTS AND PROPERTY LIABLE TO SUBJECTION BY CREDITORS.

In General—Extent of Equity Assistance.—As a general rule a court of equity, at the suit of a creditor of an insolvent debtor, will pursue property, the avails of his labor, in the hands of parties united with him, to screen the same from his creditors, or in the hands of voluntary purchasers from such parties. Com. v. Ricks, 1 Gratt. 416.

And in Mercer v. Beale, 4 Leigh 207, JUDGE TUCKER says: "I incline to think, that where a creditor is in pursuit of his demand, and the debtor transfers his choses in action, money, stock or other funds, which cannot be reached by execution, to trustees for his own benefit, leaving no property out of which the debt can be made, the creditor is entitled to demand the assistance of equity in getting at the property."

Lands.

Preference over Personalty.—Where lands are devised (without any specific charge by will or deed) they ought not to be charged in equity to satisfy the bond debt of the devisor, until the personal estate is exhausted, including a remainder in slaves, expectant upon an estate for the life of the testator's widow. Foster v. Crenshaw, 3 Munf. 514.

Trust Property—Creditors against Wife and Children of Donor.—And in Markham v. Guerrant, 4 Leigh 279, a grantor by deed conveyed land and slaves and other personalty to a certain grantee, in trust, for the support and maintenance of himself and wife, and their children, and family, during the joint lives of the grantor and his wife, and the life of the longest liver of them, and the remainder to their children with full power to the trustee to manage the estate, and to sell any part of the trust subject to pay the debts of the grantor then due; the grantor in the space of seven months contracted a debt to merchants for goods furnished to an amount equal to the whole yearly profits of the trust estate. In a contest between creditors and the trustee, the court held, that the debt contracted by the grantor could not be properly charged by a court of chancery on the prospects of the estate,

so as to bereave the grantor's wife and children of support.

Same—Vendor against Heirs of Vendee.—But in Triplett v. Romine, 33 Gratt. 651, a widow, having property settled upon her by her former husband, purchased land, and borrowed money to pay for it in part. Being about to marry again she entered into a marriage contract with her intended husband by which she conveyed all her property real and personal to the trustee in trust for the separate use of herself and husband; the money she borrowed to pay for the land still being due and unpaid. Upon these facts the court held that the land was liable to pay the money borrowed as against the children who were included in the deed of trust.

Same—Deed Does Not Show Trust—Creditors of Secret Beneficiaries against Bona Fide Purchaser.—Nevertheless, if deeds do not show upon their face any trust to be held upon land therein conveyed, which land has been sold to third parties, judgments against parties who are alleged to be secret beneficiaries in such deeds, cannot be enforced against the lands in the hands of third parties, who are innocent purchasers without notice. Hill v. Ruffner, 3 W. Va. 538.

Principal and Surety—Lands of Principal to Be First Subjected as a General Rule.—Upon a bill by a judgment creditor to subject the lands of his debtors to satisfy a judgment obtained against them as the maker and endorsers of a note, whose liabilities *inter sese* are successive, it is error to decree a sale of the lands of the last endorser before resorting to the lands of the maker and prior endorsers of such note, unless to require the plaintiff to exhaust the estates of those debtors, whose liability is prior to the last endorser, and will in the opinion of the court unduly delay the plaintiff in the collection of his debt. Shenandoah Valley National Bank v. Bates, 20 W. Va. 210; Rixey v. Deitrick, 85 Va. 42, 6 S. E. Rep. 615.

Rule When Property of Husband and Wife Is in Question—When Wife Purchases at Tax Sale.—If the wife with her separate estate purchases lands of the husband sold by a commissioner at a tax sale, creditors of the husband, becoming such after the sale, cannot subject the land to the payment of their debts. Cale v. Shaw, 33 W. Va. 299, 10 S. E. Rep. 637.

Same—When Land Held by Entireties—Husband's Interest.—And where a husband and wife hold land by entireties, and the creditor of the husband files a bill to subject the real estate of the husband to the payment of his debt, it is error in the court, to hold that the husband is entitled in fee simple to the undivided one-half interest in such tract of land, and to direct such undivided half to be sold for the husband's debts. Farmers' Bank v. Corder, 32 W. Va. 232, 9 S. E. Rep. 220.

Same—Antenuptial Contract—Effect—Husband Trustee for Wife—Wife's Creditors' Rights.—Moreover, if a husband and wife before their marriage, enter into a contract by which it is agreed that the property of the husband shall be alone liable for his debts, and that of the wife alone liable for her debts, and after the marriage the husband is a trustee of his wife's property, a creditor of the wife for a debt due before the marriage, may sue both the husband and wife in equity to subject the property she owned to satisfy the debt. But a creditor of the wife, who has proceeded in equity to subject the wife's property to the payment of her debt, cannot have a personal decree against the husband and wife for the debt; but he must proceed against the wife's property on the terms and conditions on which that property was dedicated to his security, that is, that the husband and his property shall be exempt from all liability. Coles v. Hurt, 75 Va. 380.

Same—Separate Estate—Improvements by Husband—Subjection.—Furthermore, a court of equity will not at the instance of the husband's creditors attempt to charge a wife's separate property with alleged improvements put thereon by the skill and labor of the husband, unless the evidence establishes the existence, and at least the approximate amount, of such improvements. Board of Education of Oceana Dist. v. Mitchell, 40 W. Va. 431, 21 S. E. Rep. 1017.

Equitable Interests—When Liable in Equity though Not Capable of Being Subjected by Execution.—In Coutts v. Walker, 2 Leigh 268, real estate was vested in a trustee by deed of marriage settlement, in trust to pay the wife's annuity out of the profits, and, subject to the annuity, in trust for the son of the grantor. While the annuitant was yet living, a creditor of the son recovered a judgment against him, and exhibited his bill in chancery, to subject the son's equitable interest in the estate to the debt. The court held that such an equitable interest could not be taken in execution at law, but that it was bound by the judgment in equity, which court would apply it to the satisfaction of the debt.

Same—Subjection of Vendor's Interest in Land for Unpaid Purchase Money—Creditor against Assignee.—So a creditor by judgment or decree may in equity subject the debtor's equitable interest in land sold by him, for the purchase money unpaid. And such creditor will be preferred to an assignee of the purchase money claiming under an assignment made subsequent to the judgment or decree. Withers v. Carter, 4 Gratt. 407.

Choses in Action, and Other Personal Property.

Liability of Property Remaining with Unlicensed Auctioneer or Commission Merchant.—And if a person who has no license as an auctioneer or commission merchant transact business in his own name under a general merchant's license, all the property, stock, and choses in action acquired or used in such business are liable for his debts under the express terms of sec. 2877 of the Virginia Code 1887. Personal property consigned to such person under unrecorded written contracts, or left with him for sale in the course of his business under verbal instructions from the owner, is property, "used in such business" within the meaning of sec. 2877 of the Va. Code of 1887, and is liable for the debts of such persons; but personal property stored with such person with no power of sale, and office furniture rented with the building, are not so liable. Edmunds v. Hobbie Piano Co., 97 Va. 588, 34 S. E. Rep. 472.

Same—Assignor's Interest in Assigned Contract—Creditors.—In Carroll v. Tiffany, 9 Gratt. 269, a father made a contract with a county court for building a courthouse, and by the terms of the contract he was to give security for his performance; but owing to his insolvency he was not able to give the security, and with the consent of the county court entered of record, he assigned the contract to his son who gave the security; the persons becoming security for the son being unwilling to become securities for the father. The son then sold the contract for $1,000. The court held upon these facts that the father did not have at any time such an interest in the contract as could be subjected to the satisfaction of his creditors.

Rule When Infant Ward's Property Rights Are in Question.

Guardian Solvent—Education and Maintenance—Creditor's Rights.—Where the wards of a guardian are his infant children, the general creditors of the guardian, after his death, are not entitled, upon filing a creditors' bill, to have charged upon such guardian's account the expenses incurred in educating and maintaining the wards, when the guardian is solvent at the time of his death, though there are losses occurring after his death which make it impossible to pay in full his indebtedness. Griffith v. Bird, 22 Gratt. 73.

IV. CONDITIONS PRECEDENT TO FILING A BILL.

Lien.—The general rule prevails in equity that a simple contract creditor cannot interfere in any way with the disposition which his debtor desires to make of his property; neither can he file a bill in equity to subject the property to the payment of his debt. It is necessary that the creditor's debt be specifically charged against the property of the debtor before he will be recognized in a court of equity. Thus in Rhodes v. Cousins, 6 Rand. 187, it was held that the creditor, to subject real estate must have obtained a judgment at law; and to subject personal property he must have a judgment and execution. See Mut. Assur. Soc. v. Stanard, 4 Munf. 539. By statute, however, in both Virginia and West Virginia, there is a qualification of this general rule when applied to creditors who file bills to set aside fraudulent transfers of property by their debtor. Thus a creditor before obtaining judgment, may now sue in equity to avoid a fraudulent transfer of his debtor's property. See Va. Code 1887, § 2460; W. Va. Code 1899, ch. 133, § 2; Guggenheimer v. Lockridge, 39 W. Va. 457, 19 S. E. Rep. 874; Armstrong v. Pitts, 13 Gratt. 235; Johnson v. Riley, 41 W. Va. 140, 23 S. E. Rep. 698. The discussion of this exception of the general rule properly falls under the treatment of a creditors' bill to avoid fraudulent and voluntary conveyances, and reference is therefore made to monographic *note* on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348, division "Remedies," where the necessity of a lien as a condition precedent to the institution of suit is discussed, and the authorities prior and subsequent to the statutory provisions bearing on the question are collected. See in this connection, Poindexter v. Green, 6 Leigh 504; Winchester & S. R. R. Co. v. Colfelt, 27 Gratt. 777; Reynolds v. Bank, 6 Gratt. 174; Hudgins v. Lanier, 23 Gratt. 494.

Exhaustion of Legal Remedies.—But in Stovall v. Border Grange Bank, 78 Va. 188, decided in 1883, it was held that under the provisions of Va. Code 1873, ch. 182, § 9, a judgment creditor did not have to exhaust his remedies at law before going into chancery to subject his debtor's land. See also, Price v. Thrash, 30 Gratt. 515.

Process—Waiver.—In Barger v. Buckland, 28 Gratt. 850, there were three suits by judgment creditors to subject the land of their debtor which he had conveyed in trust to secure a debt, the trustee and creditor were made defendants in each of them. The process was properly served on all the parties in two of the cases, and on the trustee and creditor in the third. The court made an order that the causes should be consolidated and heard together, and that was done; and the debtor appeared and made defences in all the causes without objecting that the process was not properly served in the third case. By so doing he waived the objection on that ground, if he had any.

Issuing Elegit on Judgment.—It is a settled practice in Virginia, to entertain the suit of a judgment creditor for relief in equity, when the debtor has, subsequent to the judgment, conveyed his land in trust for the payment of debts, or on other trusts authorizing the sale of the land. But in such case the court will decree the sale and satisfy the judgment. But it is not necessary that the judgment creditor should have issued an elegit on his judgment, before going into equity for relief. Taylor v. Spindle, 2 Gratt. 44.

V. WHO MAY SUE OR BE SUED, AND DEFENCES WHICH CAN BE MADE.

Where a creditor's bill has been filed against an administrator and legatees, and a decree for an account has been entered in the cause, and the account has been taken, reported and confirmed, no other creditor (especially one whose debt has been established by the confirmation of that report) can maintain a separate suit for the establishment of his debt. And if the bill shows that he had knowledge of the decree for account in the first suit, his suit will be dismissed upon demurrer. Saunders v. Griggs, 81 Va. 506; Kent v. Cloyd, 30 Gratt. 555; Laidley v. Kline, 23 W. Va. 565; Ewing v. Ferguson, 33 Gratt. 548.

Moreover, a single creditor at large may sue a personal representative of a deceased debtor in equity for an account of assets, payment of his debts and general relief. Other creditors may by petition come into the suit, however, and be made parties thereto. Beverly v. Rhodes, 86 Va. 415, 10 S. E. Rep. 572; Rice v. Hartman, 84 Va. 251, 4 S. E. Rep. 621.

So a creditor of an absent debtor, who is one of the heirs and distributees of a deceased intestate in Virginia, may go into a court of equity, for the purpose of having a division and distribution of the estate of the decedent, and of procuring payment of debts, out of the share of the absent debtor, in the estate. Moores v. White, 3 Gratt. 139.

Furthermore, a court of equity will entertain creditors, where a bill is filed to discover the real and personal assets of a deceased debtor, to settle the administrational account, and subject the assets to the payment of the debts of the creditors. Such bill is a creditor's bill, although filed by one or more creditors, even though no mention be made of other creditors. Carter v. Hampton, 77 Va. 631.

And creditors of a deceased debtor may proceed by foreign attachment (in equity) against the heirs residing abroad to subject land or its proceeds, in the state, descended to them from the debtor. So creditors may proceed against them as absent defendants in equity to marshal the assets, and thus subject the lands descended to them. Carrington v. Didier, 8 Gratt. 261.

And the fact that a deceased debtor is one of two joint and several guarantors, and creditors have a remedy at law against the surviving guarantor, does not deprive them of their remedy in equity against the assets of the deceased guarantor. Carter v. Hampton, 77 Va. 631.

But creditors who have not recovered judgment or other specific liens, against a debtor, cannot come into equity to subject trust property, though the debts were contracted for necessaries for the support of the family of the debtor. Armstrong v. Pitts, 13 Gratt. 235.

Moreover, where a personal representative of a decedent has failed to institute such suit as is pre-

scribed by the W. Va. Code 1868, ch. 87, § 7, creditors of the decedent after the expiration of six months from the qualification of the personal representative, whether they have obtained judgment for their claims or not, may institute and prosecute such suit; and this is true if one creditor institutes suit, such creditor being the only creditor of the decedent. Broderick v. Broderick, 28 W. Va. 379.

And a creditor having two different securities, or two sets of obligors bound for his debt, may proceed against both at the same time, although he is entitled to but one satisfaction. Carter v. Hampton, 77 Va. 631.

So creditors can assert their claims against the whole subject-matter of a contract, where such contract is made for the sale of real estate payable in confederate paper, and is partly executed, and the vendor dies. Such contract will not be allowed to interfere with the rights or claims of third parties, creditors of the deceased vendor. This principle was laid down in Weeden v. Bright, 3 W. Va. 548.

VI. PROCEDURE AND DETERMINATION OF CAUSE.

A. JURISDICTION.

In General—Form of Suit Necessary to Give Jurisdiction.—It is not essential that a creditor's suit should be such in its inception. A bill filed by a single creditor of a decedent's estate, or a single judgment-lien creditor of a living debtor, if in other respects proper, may by an order of reference to a commissioner and convention of the other creditors entitled to be provided for in the suit, be converted into a creditor's suit, and it will be regarded as such from the time the order of reference is made. However, the more usual and better practice, in such cases, is for the plaintiff to sue on behalf of himself and other creditors of the same class as himself. And the authority for such suit is not derived from West Virginia Code in force in 1881, ch. 86, § 71, but exists independently of it. The statute, however, confers upon the personal representative of a decedent the right to bring such suit where the personal estate is insufficient to pay the debts, a right which he did not have before the statute. And the creditors who file their claims before the commissioner in such a suit, although not formal parties to the bill, become informal parties to the suit and are as effectually bound, and the court has the same jurisdiction over them, as if they had been made formal parties to the bill and been served with process. Arnold v. Casner, 22 W. Va. 444; Laidley v. Kline, 23 W. Va. 565.

Same—When State Courts Not Ousted.—In Barr v. White, 30 Gratt. 531, a creditor filed his bill in the circuit court to subject the real estate of a certain debtor to satisfy a judgment with interest and costs, which he had recovered against him. The bill charged that the rents and profits would not discharge the debt in five years. The bill was taken for confessed, and there was a decree that the appointed commissioner sell the land or so much as would be necessary to satisfy the judgment and the costs of the suit, upon credits stated. The land was accordingly sold for $2,000 to a purchaser, who complied with the terms of the sale; and the commissioner reported the sale to the court, and it was confirmed. After the sale, but before it was confirmed the debtor was declared a bankrupt; and without taking any step in the state court he applied to the United States district court, and there obtained a decree setting aside the sale, which decree was reversed by the United States circuit court, and the assignee in bankruptcy was directed to proceed in the case in the state court to obtain such relief as he might be entitled to. It was held that the state court having possession of the case, and having made a decree therein before the bankruptcy of the debtor, he or his assignee should only proceed in that court to maintain their rights. See also, Sively v. Campbell, 23 Gratt. 893, Francisco v. Shelton, 85 Va. 779, 8 S. E. Rep. 789, as discussing and sustaining the general rule that the court that first obtains jurisdiction of the parties and the subject-matter (when there is concurrent jurisdiction) retains it. See Griffin v. Birkhead, 84 Va. 612, 5 S. E. Rep. 685; Parsons v. Snider, 42 W. Va. 517, 26 S. E. Rep. 285.

When Dependent on Amount Involved.—Where several judgment creditors with judgments each below $500, unite in one suit to enforce their liens on the judgment debtor's land, and their bill is dismissed by the court below, this court has no jurisdiction to entertain their appeal. Thompson v. Adams, 82 Va. 672; Umbarger v. Watts, 25 Gratt. 167. But see Devries v. Johnston, 27 Gratt. 805.

B. PARTIES.

1. WHO ARE NECESSARY PARTIES.

a. Creditor.

In General.—The general principles of equity clearly justify a creditor in convening in one suit, as defendants, all parties interested in controverting the amount of his debts, and holding in their own hands, or in the hands of their trustee, the estate on which the debt is chargeable. Suckley v. Rotchford, 12 Gratt. 60. See Norris v. Bean, 17 W. Va. 655.

And to a suit in equity brought by a creditor to satisfy his debt, other creditors of the defendant may be admitted as parties. Simmons v. Lyles, 27 Gratt. 922; Piedmont, etc., Insurance Co. v. Maury, 75 Va. 513; Preston v. Aston, 85 Va. 114, 7 S. E. Rep. 344; Karn v. Rorer, 86 Va. 760, 11 S. E. Rep. 431; Patterson v. Eakin, 87 Va. 53, 12 S. E. Rep. 144. See also, Min. Inst. (2d Ed.) 1248; Barton's Ch. Pr. (2d Ed.) 187.

But where there is a creditor's bill, in the usual form, to subject the estate of a debtor to the payment of his debts, if the debtor is the holder of an undivided interest in real estate, it is necessary to make all having or claiming a common interest and common liability, as respects the subject-matter in controversy, parties to one and the same suit, in order to carry out the single object of the bill. Hutchison v. Mershon, 89 Va. 624, 16 S. E. Rep. 874.

Yet in a suit by a general creditor of a married woman to subject her property to the payment of her debts, other general creditors are not necessary or proper parties, nor, except under special circumstances, are creditors having mortgages or a vendor's lien on her land. Howe v. Stortz, 27 W. Va. 555. See in general connection, Allan v. Hoffman, 83 Va. 129, 2 S. E. Rep. 602; Turk v. Skiles, 38 W. Va. 404, 18 S. E. Rep. 561; Hinchman v. Ballard, 7 W. Va. 152; Snyder v. Brown, 3 W. Va. 143; Chilicothe Oil Co. v. Hall, 4 W. Va. 703; Dellinger v. Foltz, 93 Va. 729, 25 S. E. Rep. 998; Martin v. So. Salem Land Co., 94 Va. 28, 26 S. E. Rep. 591.

Trust Creditors.—However, trust creditors in interest should be made parties to a bill by the judgment creditor to enforce his lien against the subject of the trust. Laidley v. Hinchman, 3 W. Va. 423.

Decree Creditors.—And where the principal object of a bill is to have the profits of a lease collected and applied to pay certain decrees against complainant and insolvent defendant, a prayer that accounts be

taken to ascertain the rights of the parties under the lease, and the profits applied to pay the decrees and the balance according to the rights of the parties, does not make the bill multifarious, but the decree creditors should be made parties. Yates v. Law, 86 Va. 117, 9 S. E. Rep. 508.

Lien Creditors.

When Necessary.—It is the duty of the plaintiffs in a creditors' bill to make parties thereto all the lien creditors of the debtor known to him, and those whose liens are disclosed by the judgment-lien docket or records of the courts of any of the counties, in which are any of the lands sought to be sold. Bilmyer v. Sherman, 23 W. Va. 656; Pappenheimer v. Roberts, 24 W. Va. 702; Neely v. Jones, 16 W. Va. 625. If they are not made formal parties to the bill, he should in the order of reference in the cause provide for calling in all judgment creditors of the debtor by publication. Livesay v. Feamster, 21 W. Va. 83. And his failure to do so is ground for reversal of a decree ordering the sale of the land. Grove v. Judy, 24 W. Va. 294; Pappenheimer v. Roberts, 24 W. Va. 703; McMillan v. Hickman, 35 W. Va. 705, 14 S. E. Rep. 227.

And it is necessary, in a bill to enforce a judgment lien by a surety, where such surety has paid the judgment, that the original judgment creditors, whose judgment he has paid, be made parties. Hoffman v. Shields, 4 W. Va. 490; Conaway v. Obdert, 2 W. Va. 25.

And of course judgment creditors are necessary parties in proceedings to subject lands, upon which their judgments are liens, to the payment of other judgment liens. Hoffman v. Shields, 4 W. Va. 490.

Moreover, where there is a suit in equity, to sell land to satisfy a judgment lien, or to enforce the payment of purchase money, if it appears that there is a prior lien for unpaid purchase money on the land, those entitled to the benefit of such prior purchase money lien, should be made parties to the suit. Dickinson v. Railroad Co., 7 W. Va. 390.

When Not Necessary.—However, a judgment creditor who brings an action against an insolvent judgment debtor, to subject the latter's interest in real estate to the payment of his judgment, is entitled to sue on behalf of himself and all other judgment creditors without making them formal parties. Neely v. Jones, 16 W. Va. 625.

And in a suit in equity by a judgment creditor to reach the property of his debtor and subject it to the satisfaction of his judgment, it is not necessary that the person for whose benefit the suit at law was brought, and the judgment rendered, should be a party to the suit in equity, if he was not a party to the suit at law, unless it should appear that he controverted the plaintiff's right to recover. Hale v. Horne, 21 Gratt. 112.

So in a suit in chancery to enforce the lien of a judgment against a principal and sureties, if other judgments are proved upon which other persons than those before the court are also bound, it is not necessary to make such other persons parties. Wytheville Ice Co. v. Frick, 96 Va. 141, 30 S. E. Rep. 491.

When They May Become Parties.—Where a vendor of land, who has retained the title, files a bill against the widow and infant children of the vendee, for a sale of the land to satisfy his debt, and the widow answers, claiming dower in the land subject to the vendor's lien, judgment creditors of the vendee may make themselves parties to the cause, and have the land, subject to the vendor's lien and the widow's dower, applied to the payment of their debt. Simmons v. Lyles, 27 Gratt. 922. See *post*, "Intervention."

b. Heirs.—If in a suit by a judgment creditor to subject lands in the hands of a *bona fide* purchaser from the vendee, the purchaser dies pending the suit, his heirs are necessary parties, and a court will reverse the decree for the want of such necessary parties, even though the objection is not taken in the court below. Taylor v. Spindle, 2 Gratt. 44.

c. Shareholders.—But upon a bill filed by a creditor of an insolvent corporation solely for the purpose of winding up its affairs and of subjecting its property and franchises to the payment of its debts, the shareholders are neither necessary nor proper parties, if no relief is sought against them. They are represented by the company. Bristol I. & S. Co. v. Thomas, 93 Va. 396, 25 S. E. Rep. 110. See monographic *note* on "Corporations."

d. Mortgagee and Pledgee.—Persons having charges against real estate are not necessarily parties defendant to a bill by a judgment creditor to subject it to his judgment, as the purchaser takes only the interest of the debtor. Moore v. Bruce, 85 Va. 139, 7 S. E. Rep. 195.

e. Co-obligors.—However, in a creditors' bill against an administrator and heirs of a decedent, to enforce the collection of a debt, secured to the plaintiff by the joint and several obligation of the decedent, and another obligor, such obligor is a necessary party to the bill, although he may be a nonresident. And in such a case, the nonresident obligor, has the right to appear, and make defence to the bill; and the administrator and heirs of such decedent have the right to require him to be made a party to the suit, so that in case he should appear his liability for such debt may be ascertained and determined, as between him and the decedent. White v. Kennedy, 23 W. Va. 221.

But a creditor who has compounded with one of several joint obligors may maintain a creditors' bill against the other obligors without making the released obligor a party defendant, under Va. Code 1887, §§ 2856-57-59, providing that the creditor may compromise with any co-obligor without impairing the contract obligation, and that the right of contribution between the co-obligors shall not be impaired thereby. Penn v. Bahnson, 89 Va. 253, 15 S. E. Rep. 586.

Yet in a creditors' bill against the administrator and heirs of a decedent to enforce the collection of a debt, secured to the plaintiff by the joint and several obligations of the decedent, and another obligor, such obligor is a necessary party to such bill, although he may be a nonresident. White v. Kennedy, 23 W. Va. 221.

Nevertheless, the executor of a co-obligee of a judgment plaintiff, who dies pending the action on the bond for the breach of which the judgment was recovered, is not a necessary party to such bill. Beckham v. Duncan (Va.), 9 S. E. Rep. 1002.

f. Trustee, Assignor, Assignee, Grantee.

Trustee—Condition Precedent to Sale—Trustees in deeds of trust constituting liens upon land must be made formal parties, before any sale of the debtor's lands can be ordered; and they cannot be made informal parties by publication; and where a decree of sale is made in the absence of the trustee, the decree will be reversed, although *cestui que trust* had his debt audited in the suit. Bilmyer v. Sherman, 23 W. Va. 656; Norris v. Bean, 17 W. Va. 655.

Assignor—Whole Interest Assigned.—But if an as-

signment purports to transfer the whole interest of the assignor, and there is nothing in the pleading and proof to induce the belief that it really did not do so, the assignor is not a necessary party to the suit. Scott v. Ludington, 14 W. Va. 387. However, in Neely v. Jones, 16 W. Va. 625, it is held that, the assignor of a judgment may be properly made coplaintiff in a chancery suit to enforce the lien of it on the debtor's lands. Preston v. Aston, 85 Va. 104, 7 S. E. Rep. 344; J. R. & K. Co. v. Littlejohn, 18 Gratt. 53.

Assignee—Enforcement of Lien.—An assignee of a judgment may be properly made coplaintiff in a chancery suit to enforce the lien of it on the debtor's lands. Neely v. Jones, 16 W. Va. 625. But in a creditors' suit where the defendant debtor becomes a bankrupt *pendente lite*, and his assignee is not made a party, but is counsel in the cause, and one of the commissioners to sell, it is no objection to the sale that he had not been made a party to the suit. Mer. Bank v. Campbell, 75 Va. 455. However, on a creditors' bill to annul deeds made by a debtor, on the ground of fraud, alleging that the debtor was thereafter adjudged a bankrupt, and had never obtained a discharge, the assignee in bankruptcy is a necessary party. Tabb v. Hughes (Va. 1887), 3 S. E. Rep. 148. See in general, Holsberry v. Poling, 38 W. Va. 186, 18 S. E. Rep. 485.

g. Contracting Parties—Waiver.—Where defendant in a creditor's bill has executed deeds of trust to secure advances made upon a contract to deliver lumber within a given time, in the event of his failure to comply with the terms of the contract, and has failed to comply with it, it is error to declare such deeds absolute liens on the land, and to decree its sale to pay them, without requiring the other contracting parties to be made formal parties to the suit, where they have received lumber after the time specified in the contract, and so may have elected to waive the forfeiture of the contract. Smith v. Parsons, 33 W. Va. 644, 11 S. E. Rep. 68.

h. Judgment Debtor.—In Shands v. Grove, 26 Gratt. 652, G brought a creditor's suit against the executrix of S, to subject the estate of S to satisfy a judgment. The order book of the court was destroyed, but some of the papers were preserved; and it was proved by a witness that G recovered a judgment against the R. I. Co., and issued execution upon it; and then at the instance of S, sued out a suggestion against him as a debtor of the company and that S appeared in court and acknowledged his indebtedness to the company, and judgment was rendered against him. The proceedings in both cases to the judgments were endorsed on the papers preserved. An account taken in the cause showed the executrix indebted to the estate for considerably more than the claim of the plaintiff, besides large assets in her hands; and an inquiry ordered as to the debts of S was not acted on, no other creditor making claim. The court held that G was entitled to recover his debt from the estate of S. And the proceeding being against the estate of S as the debtor of G, the company was not a necessary party.

i. Alienees.—But in a creditor's suit, the assignor, with recourse, of obligation, whereon is founded a judgment sought to be enforced, and the subsequent alienees of land sought to be subjected, are proper parties. Preston v. Aston, 85 Va. 104, 7 S. E. Rep. 344; J. R. & K. Co. v. Littlejohn, 18 Gratt. 83.

j. Debtors of Estate.—However, in a suit by a creditor to settle the estate of a decedent it is not proper to unite the debtors of the estate as defendants. As a general rule, the debtors of the estate must be sued by the personal representative. The creditor can only sue the personal representative for settlement, and, if the land is to be sold, unite with him those interested in the land, unless some independent source of equity shall be made to appear as to the other parties introduced. Wilson v. Wilson, 93 Va. 546, 25 S. E. Rep. 596.

k. Remaindermen.—And remaindermen are not necessary parties to a creditors' bill, as the creditors can only subject their debtor's interest in the land. The omission of a necessary party, who voluntarily appears, is a harmless error. Moore v. Bruce, 85 Va. 139, 7 S. E. Rep. 195; Davis v. Bruce, 85 Va. 139, 7 S. E. Rep. 195.

Thus, in a suit by creditors to subject the real estate of a decedent to the payment of his debts, where it appears that the decedent devised his real estate to his wife for life, with remainder in fee in equal parts to his two children, but, if either died without issue, remainder over to his sister, with power to the wife to sell and reinvest proceeds, if deemed advisable, the sister is not a necessary party. New v. Bass, 92 Va. 383, 23 S. E. Rep. 747.

2. RIGHTS OF PARTIES.

Right to Sue.—A judgment creditor may sue in equity to enforce his lien on his judgment debtor's lands for himself and all other judgment creditors of his debtor, other than those made defendants in his bill. Norris v. Bean, 17 W. Va. 655. See also, Neely v. Jones, 16 W. Va. 625.

Right of Heir and Administrator to Dispute Claim.—Where a purchaser of land which is subject to the lien of a judgment takes it subject only to the amount called for by the judgment, and it is not liable to the judgment increased by usury under a subsequent agreement between the creditor and judgment debtor, and a creditor's suit is afterwards brought by another creditor to convene and enforce liens against lands of such judgment debtor, but not against the land so sold, the administrator and heirs of such purchaser are not precluded by such convention of creditors and decree following, from disputing the amount of a debt as fixed by the decree. Bensimer v. Fell, 35 W. Va. 15, 12 S. E. Rep. 1078.

Relief.

Filing Bill—Ascertaining Liens—Avoiding Multiplicity.—And where a party has conveyed all his property to a trustee to pay all his debts, not specifying them, the trustee, to avoid multiplicity of suits, may file a bill like a creditor's bill to ascertain all liens. Ambler v. Leach, 15 W. Va. 677.

Same—To Have Decree Annulled.—In Preston v. Aston, 85 Va. 104, 7 S. E. Rep. 344, five suits were pending by creditors to enforce liens on a judgment debtor's lands. No account was taken, but on proof of sufficiency of rents to pay the liens in five years, a decree in each suit to rent was entered, but not executed. A creditor, with a lien older than those asserted in these five suits, brought his bill reciting these facts, charging sale of the land to be necessary, praying that all the lien holders be convened, for an account of liens of lands, for hearing the suits together, for annulling the decrees to rent, and for sale of the land. A decree was accordingly rendered, and properly so.

Same—Relief Given to Purchaser under Void Decree.—And a purchaser of land under a void decree, whose money has been applied upon liens on the land valid against the owner of the land, will be entitled to charge such money upon such land by

substitution to the right of the creditor, upon disaffirmance of the sale. And such purchaser may maintain a bill to enforce such right, and, as incident to his relief, make his bill a creditor's bill. Hull v. Hull, 35 W. Va. 155, 13 S. E. Rep. 49; Dudley v. Hull, 35 W. Va. 155, 13 S. E. Rep. 49.

Same—Correcting Order.—If an order has been made upon suggestion under a junior execution, directing a chose in action not yet due, to be delivered by the garnishee to the sheriff, and directing him to collect the amount when due, and, after paying off a prior claim upon it, to pay the plaintiff his debt out of the proceeds, a creditor in a senior execution may proceed by petition, filed in the court in which the order was made, and in that proceeding, to have the order corrected; or he may file his bill in equity to have it done. Charron v. Boswell, 18 Gratt. 216.

Defences—Set-Off.—And on a bill by a creditor to subject to the payment of his judgment lands conveyed by the debtor, the defendant purchaser may set off the amount which he is entitled to receive of the vendor by reason of his not having been put in possession of part of the land sold. Taylor v. Spindle, 2 Gratt. 44.

Right of Appeal—When Granted.—In Callaghan v. Circle, 12 W. Va. 562, a bill was brought to enforce a vendor's lien, and a decree was rendered to sell the land to pay the balance of the purchase money found due. A sale was made and the report of the sale was excepted to, and before the same was acted upon the vendor died and a petition for a rehearing of the first decree was filed by the executor of the vendor. Subsequently a judgment creditor filed a creditor's bill to subject the same land and all the deceased vendor's other estate to pay his debts. The executor, the widow and heirs, were made parties to the last suit, but the first suit was never revived against them. The causes then came on by consent to be heard together, and a decree was rendered in them overruling the exceptions to the report, of the sale of the land, and confirming the same and dismissing the petition for a rehearing; the plaintiff in the last suit appealed from this decree. The appellate court held that he had a right to appeal though he was not a party to the suit in which the sale was made.

C. DISMISSAL.—And although a bill is in behalf of all creditors, it is yet under the control of the party bringing the suit, at least until there is a decree for an account. Duerson v. Alsop, 27 Gratt. 229. However, though he acts on his own motion, and retains absolute dominion of the suit until the decree, and may dismiss the suit at his pleasure, yet, after a decree he cannot deprive, by his conduct, others of the same class of the benefit of the decree, if they think fit to prosecute it. Piedmont & A. Life Ins. Co. v. Maury, 75 Va. 508.

But a nominal plaintiff, after satisfaction of his debt may have the cause dismissed, as to himself, but not as to the other creditors who are parties, formal or informal to the creditors' suit. It is error for the court, on motion of a nominal plaintiff whose debt has been satisfied, to set aside an order, on motion of the plaintiff, reinstating a suit erroneously dismissed. Furthermore, it is error for a court to dismiss a general lien-creditors' suit on motion of the nominal plaintiff, whose debt has been satisfied. So it is error for a court to dismiss a creditors' suit, on motion of the debtor defendant, which is pending before a commissioner upon an executed order of reference entered at his instance. Lewis v. Laidley, 39 W. Va. 422, 19 S. E. Rep. 378; Linsey v. McGannon, 9 W. Va. 154; Bilmyer v. Sherman, 23 W. Va. 656.

D. PROCESS AND APPEARANCE.—Under West Virginia Code 1891, ch. 139, § 7, providing that, in every suit to enforce judgment liens, all persons having liens on the land to be subjected shall be made parties, it is not sufficient, in a creditors' bill to reach land encumbered by a trust deed, to make the trustees formal parties by publication. McMillan v. Hickman, 35 W. Va. 705, 14 S. E. Rep. 227.

And in Barger v. Buckland, 28 Gratt. 850, it is held, that where three different creditors bring separate suits against their common debtor, a failure of one of them to obtain service on their debtor is waived by his appearance in the suits when consolidated, and failing to object to such want of service.

E. EFFECT OF NONJOINDER OR MISJOINDER.

When Bill Should Not Be Dismissed.—If proper parties are not made, a creditors' bill should not be dismissed; but the plaintiff should have leave to amend, and make the proper parties, unless a decree for an account has been made in some other creditors' suit having the same object in view. Stephenson v. Taverners, 9 Gratt. 398.

Thus, in Triplett v. Romine, 33 Gratt. 651, a creditor filed his bill against a husband and wife to subject land which had been conveyed by the wife prior to her marriage to a trustee in trust for the use of herself and husband, to the payment of his debt. The husband and wife answered; an account was ordered and taken fixing the amount of the debt, to some items of which the husband excepted. After the death of the wife, and eight years after the suit was brought, the children filed their petition in the cause setting out their claim under the deed, and asking to be made parties in the cause. The administrator of the plaintiff answered the petition, and the court decreed against the children in the lower court. Upon appeal the court held that they should have been made parties; but as their case was fully stated and investigated upon their petition and the answer of the administrator, and after the delay they should not be allowed to disturb the report of the commissioner, therefore the appellate court should not reverse the decree: however, they could be made parties, if they desired, when the cause went back.

When Demurrer Will Not Be Sustained.—In Reynolds v. Bank, 6 Gratt. 174, a debtor conveyed a large property, real and personal, in trust to secure numerous creditors, who were divided into three classes. The first two classes were creditors by judgment. The trustees not having signed the deed, refused to act; and thereupon two of the creditors of the first class filed a bill on behalf of themselves and the other creditors secured by the deed, against the grantor and the trustees, and for general relief. The grantor appeared and demurred to the bill for want of proper parties plaintiffs. The court held that in such case, one or more creditors could sue for themselves and the other creditors secured by the deed.

When a Person Is Such a Party to the Cause as to Be Bound Personally by Decree.—If, on a bill filed by creditors to subject the estate, real and personal, of a decedent, to the payment of his debts, a copy of decedent's will is filed, by which he devised and bequeathed certain property to his wife for life, and nominated her as executrix, and the wife is made a party defendant as executrix and "as widow," this is sufficient to bind her personally by

any proper decree made in the cause. New v. Bass, 92 Va. 383, 23 S. E. Rep. 747.

F. INTERVENTION.—A bill which sets up complainant's claim only, and does not purport to be a creditors' bill, may, nevertheless, be treated as such, because other creditors may come into the suit by petition. Hurn v. Keller, 79 Va. 415. See also, Ewing v. Ferguson, 33 Gratt. 548.

So upon a bill filed by a judgment creditor, on behalf of himself and all other lien creditors of the defendant, a creditor holding a vendor's reserved lien on a part of the land of the defendant may come in by petition, and assert his lien, and it is immaterial whether the rents and profits of that and other lands will, within five years pay and satisfy the amount of such lien. He is entitled to a decree for the sale of the land on which he has a vendor's lien, although he may also have a judgment for the amount. Kane v. Mann, 93 Va. 239, 24 S. E. Rep. 938.

And in Kanawha Valley Bank v. Wilson, 29 W. Va. 645, 2 S. E. Rep. 768, a tract of land was sold at a tax sale and purchased by and in the name of one of the several heirs to the property, and subsequently the land was regularly conveyed. Many years after the purchaser had obtained his deed, and after a creditors' bill to subject the land for the payment of his debt had been pending for eleven years, certain *pendente lite* purchasers of the interest of one of the heirs, none of whom were parties to the suit, filed a petition therein, praying to be made defendants and that their rights might be protected. The court held that the plaintiff should have been required to amend his bill by making all the heirs and those claiming under them defendants in order that the true state and condition of the title of the first-named heirs might be ascertained before directing a sale of a portion of the property for the benefit of creditors.

But where a judgment creditor files a bill to subject lands in the hands of the alienees of his debtor to the payment of the debt and one of the alienees conveys the land in trust during the pendency of the suit, it is not necessary that the plaintiff should amend his bill and make the trustee a party in order to dispose of the subject-matter. Price v. Thrash, 30 Gratt. 515.

G. BILL OF DISCOVERY.—After a judgment against an executor, and a return of "no effects," on an execution against the goods and chattels of his testator, a suit in equity may be brought for a discovery of the assets, to which suit the securities of the executor and all other persons (however remotely concerned in interest), against whom a decree can be rendered, ought to be made defendants. Clarke v. Webb, 2 H. & M. 8.

H. RECEIVERS.

Rule in Appointing—Extreme Caution Exercised.—A court of equity should exercise extreme caution in the appointment of receivers on *ex parte* applications, and be careful that a proper case is presented before exercising this extraordinary procedure; and it should not be done without notice to the party whose property is to be affected, except in cases of the greatest emergency, demanding the immediate interference of the court. Ruffner v. Mairs, 33 W. Va. 655, 11 S. E. Rep. 5.

But where a decree creditor of a husband, who has sued out two executions, which have been returned "no effects unincumbered," files his bill against the husband who has been carrying on business as his wife's agent, to enforce payment of his debt, on the ground that the agency was fraudulent, and the property belonged to the husband, or that, at any rate his services and those of his minor sons gave him an interest in it, it is entirely proper for a receiver to be appointed. Penn v. Whiteheads, 12 Gratt. 74.

And in a suit by judgment creditors to subject real estate of their debtor to pay his debts, where there are deeds of trust on the property and numerous judgments against the debtor which are to be ascertained and their priorities fixed, and the real estate is not sufficient to pay all the debts, the court may appoint a receiver to take possession of the property and rent it out. And such receiver may be appointed by the judge in vacation. Smith v. Butcher, 28 Gratt. 144.

However, the appointment of the receiver in such case may be dispensed with, if the debtor gives security to account for the rents and profits, in case there should be a deficiency upon the sale of the premises under the decree. Grantham v. Lucas, 15 W. Va. 429.

J. WHO ARE SPECIAL RECEIVERS — WEST VIRGINIA.—It is the practice in West Virginia, however, to treat trustees, special commissioners, and others empowered or directed to sell, as special receivers of the proceeds of the sale. And in such cases, except under special circumstances, such trustees and commissioners to sell, are not chargeable with interest on the proceeds of sale. And a receiver, general or special, as the law now is in this state, has no authority to invest or loan out at interest any such funds in his hands, unless ordered by the court so to do. Darby v. Gilligan, 37 W. Va. 59, 16 S. E. Rep. 507.

Placing Assets of Estate in Hands of Receiver—Personal Representative.—In a creditors' suit a court of equity has authority to call in the assets of the estate from the personal representatives and place them in receivers' hands. Davis v. Chapman, 83 Va. 67, 1 S. E. Rep. 472; Farmer v. Yates, 23 Gratt. 145. See in general connection, Crumlish v. Shen. Val. R. Co., 40 W. Va. 627, 22 S. E. Rep. 90.

K. RIGHTS ACQUIRED BY SUIT.

Lien—When It Begins.—A creditor at large, successfully suing to set aside a deed conveying property in fraud of creditors, has a lien on the property from the time of suit brought; and a creditor, who comes into the suit, shall have a like lien from the filing of his petition; but, as against creditors, with or without notice, and purchasers for value without notice, from the time of his filing a memorandum of his *lis pendens*. Davis v. Bonney, 89 Va. 755, 17 S. E. Rep. 229; Wallace v. Treakle, 27 Gratt. 479. See in this connection, Baer Sons Groc. Co. v. Williams, 43 W. Va. 323, 27 S. E. Rep. 345.

Same—Priority.—And creditors may, by petition, go into a suit attacking a deed on the ground of fraud, and their priority will be determined by the date of filing their petition, unless they have other ground of priority. Richardson v. Ralphsnyder, 40 W. Va. 15, 20 S. E. Rep. 854.

But, if several creditors under judgments of different dates, resort to a court of equity for satisfaction out of an equitable interest of their debtor in real estate, they are to have satisfaction out of the fund, according to the order of their judgments in point of time, the elder being entitled to priority over the younger. Haleys v. Williams, 1 Leigh 140.

Same—Marshaling.—And if in a suit brought by a judgment creditor against the judgment debtor to

sell his lands to satisfy the liens thereon, one of his creditors has a lien on two parcels of land, to only one of which the other lien creditors can resort for the payment of their debts, a court of equity will require the creditor having two securities to exhaust the one to which he only can resort for the payment of his debt, before he is entitled to charge the other land of the debtor, to which alone the other lien creditor can resort. Kan. Val. Bk. v. Wilson, 25 W. Va. 242.

Enforcement—Consolidation—Appeal.—Where several judgment creditors with judgments each below $500, unite in one suit to enforce their liens on the judgment debtor's land, and their bill is dismissed by the court below, this court has no jurisdiction to entertain their appeal. Thompson v. Adams, 82 Va. 672; Umbarger v. Watts, 25 Gratt. 167. See in this connection, Devries v. Johnston, 27 Gratt. 805.

Cessation of Its Enforcement.—The lien of a judgment is a creature of statute, and cannot be enforced in equity after it ceases to be enforceable at law. Hutcheson v. Grubbs, 80 Va. 251; Va. Code 1887, § 3573.

Suit to Set Aside Deed—Application of Purchase Money.—Though a bill seeks to set aside a deed for fraud, yet, if it makes a case entitling the plaintiff to be paid out of the purchase money of the land, and asks for general relief, though the fraud is not proved, they may have the purchase money applied to the payment of their judgments. Hale v. Horne, 21 Gratt. 112.

Re-estimate—Resale.—Where in a suit to which creditors and heirs are parties, the widow agrees to sell her dower at a price approved by a decree of the court, a resale and re-estimate will not be decreed on the ground that the allowance was excessive especially when the creditors do not complain. Scott v. Ashlin, 86 Va. 581, 10 S. E. Rep. 751.

L. DECREE.

Effect—Limitation.—Upon an entry of a decree for an account in a technical creditors' bill or one which is substantially so, time ceases to run against all creditors of the estate. Norvell v. Little, 79 Va. 141; Bank of Old Dominion v. Allen, 76 Va. 200; Houck v. Dunham, 92 Va. 211, 23 S. E. Rep. 238.

Appeal—Two Decrees.—And in Burkholder v. Ludlam, 30 Gratt. 255, a bill was filed by judgment creditors to subject real estate held by different parties to the satisfaction of their judgments; there was a decree dismissing the bill as to one of the parties, from which there was no appeal; subsequently there was another decree subjecting the other parcel of land; and the holder of this land obtained an appeal from this last decree. The court held that, the last appeal did not bring up the first decree, and that the appellees could not set out any objection to the first decree upon the appeal. Repass v. Moore, 96 Va. 147, 30 S. E. Rep. 458.

How Decree Should Distribute Proceeds.—Moreover, in a creditors' suit to reach a debtor's property, conveyed by him in trust for his wife and children, where the deed is on valuable consideration *quoad* the children only, the land should be decreed to be sold, after the widow's dower in it has been assigned, and the proceeds applied, first, to pay the children's claims, and, secondly, to satisfy the debts. Rixey v. Deitrick, 85 Va. 42, 6 S. E. Rep. 615; White v. Kennedy, 23 W. Va. 221.

Reversal.—And if a suit is brought by a judgment creditor to subject lands of his debtor to payment of his judgments, and the lands have been sold under decree in the cause, and the sale has been confirmed, and it appears that the necessary parties were not formally or informally before the court, the decree ordering the sale to be made, as well as the decree confirming the sale made in pursuance thereof will be reversed and the sale set aside. Pappenheimer v. Roberts, 24 W. Va. 702. See *ante*, "Necessary Parties."

Appeal.—And if a creditors' bill is brought against the administrator of a decedent, and other defendants, not designated therein as his heirs, or as his creditors, praying for a settlement of the administration accounts of such administrator, and for a sale of the lands of such decedent for the payment of debts, and such other defendants are treated by the court and decreed against as such heirs; if one of them appears and answers such bill, and makes defence thereto, and the court improperly decrees the lands to be sold after the payment of the debts, he may appeal from such decree, although he is not designated in the appeal as an heir of the decedent, and if such decree be erroneous, as to him, it will be reversed as to all such other defendants. White v. Kennedy, 23 W. Va. 221. See monographic *note* on "Decrees" appended to Evans v. Spurgin, 11 Gratt. 615.

M. BILL PRO CONFESSO—SUPERSEDEAS.—When a creditors' bill is brought to sell lands of the debtor, and the defendant fails to answer or plead, and decrees in the cause are made and entered on bill taken for confessed, but the defendant appears and files exceptions to the report of sales made by the commissioner of the court, and the court overrules the exceptions to such report of sales, the appellate court will consider and determine the appeal and *supersedeas* of the debtor as to so much of the action of the court, as relates to said exceptions and the overruling thereof, but will generally dismiss the appeal and *supersedeas* as improperly allowed as to other decrees in the cause and parts thereof, which were made and rendered on bill taken for confessed, the appellant not having applied to the circuit court, or the judge thereof in vacation, to reverse or correct the same according to the provisions of the 5th section of chapter 134 of the Code, before applying for and obtaining the appeal and *supersedeas* as to such decrees and parts thereof, as were made on the bill taken for confessed. Hartley & Co. v. Roffe, 12 W. Va. 402.

N. PLEADING.

Issue.—And where a general creditors' bill alleges that the rents and profits of defendants' lands will not pay the liens within five years, and the answer denies the allegation, the value of the lands is made an issue, and it is the duty of the court to ascertain their value with reasonable certainty before decreeing their sale. Dillard v. Krise, 86 Va. 410, 10 S. E. Rep. 430.

Plea—When Multifarious.—Where a creditors' bill is based upon a judgment on a note, which judgment is joined against all defendants, and he notifies all the creditors having several judgments against any of these defendants severally, the bill is not multifarious. Shen. Val. Nat. Bank v. Bates, 20 W. Va. 210.

Same—Repetition.—And a plea, that is only another mode of asserting an objection to a plea, that has already been asserted by an overruled demurrer, should be rejected. Thus, a plea that judgments were assigned to plaintiff on division of the assets of the firm composed of him and the assignors, that they are collectible from the debtor, and that the assignor is not, nor has ever been, liable on them, is properly rejected, it being but another mode of

objecting to the parties, and is not relevant to anything in the plea. Preston v. Aston, 85 Va. 104, 7 S. E. Rep. 344.

Allegations—Averment of Suit Pending—Demurrer.—And if a lien creditor brings suit to subject the real estate of his debtor to the payment of his debt, the fact that his bill avers that there is then pending a suit by another creditor, to subject the same real estate to their debts, is not ground for sustaining a demurrer to such bill. See v. Rogers, 31 W. Va. 473, 7 S. E. Rep. 436.

Retention of Case on Docket.—Moreover, where in a creditors' suit the original plaintiff has obtained satisfaction of his debt, and has dismissed the suit as to himself, it is not error to retain the case on the docket, under the original title for further proceedings in behalf of other parties, as no prejudice is done the original plaintiff thereby. Linsey v. McGannon, 9 W. Va. 154.

Exhibits.—And in Love v. Tinsley, 32 W. Va. 25, 9 S. E. Rep. 44, a judgment creditor, in a bill to enforce his judgment lien, alleged that he filed as part of his bill copies of his judgment and of the lien docket marked "Exhibit B" and "C," but "Exhibit B," the copy of the judgment, was not found among the papers, or copied as part of the record. The court declared that it was probable that "Exhibit B" was never filed, but nevertheless it was probable that it existed, and it was so necessary to a just decision of the cause, that it was proper for the court to remand the case to the lower court in order that the plaintiff might have an opportunity to supply such exhibit.

Control of Fund Assumed by Court.—In a creditors' suit the whole administration of the fund is assumed by the court, the assets are marshaled and a decree is made for the benefit of all the creditors who may come in under the decree, or by petition in the cause, and prove their demands before the master commissioner, to whom it is referred to take an account of all the debts charged on the fund, and all who do so will obtain satisfaction equally with the plaintiff, and will be treated as parties to the cause. And if after reasonable notice they fail to come in before the master, or by petition, they will be excluded from the benefit of the decree, at least in the case of suits against the estates of deceased debtors, whilst they will be bound by any act done under authority. Umbarger v. Watts, 25 Gratt. 171.

Refusal to Delay Cause.—And where a judgment creditor files his bill against a judgment debtor and other judgment alienors, to enforce his judgment lien, and the debtor files his answer, claiming that the consideration of the bond, on which the plaintiff's judgment was recovered, has in part failed; and claimed a credit on such judgment to the extent of such failure, and also filing an amended answer setting up such failure of consideration more specifically, and thereupon the plaintiff files an amended bill, bringing all the parties interested in such consideration, if any, before the court, and setting up such a state of facts as would, if true, show that there ought not to be any credit on the judgment, and the plaintiff replies generally to the answer, and the defendant debtor does not answer the amended bill, neither are the facts therein set up controverted, and no proof is taken as to such alleged failure of consideration, the court does not under such circumstances err in refusing to delay the hearing of the cause and decree that plaintiff's judgment shall be paid in full. Scott v. Ludington, 14 W. Va. 388.

O. EVIDENCE.—In a creditor's suit to enforce a judgment rendered against a surety, on an issue whether the plaintiff be compelled to first seek satisfaction out of property which the principal was alleged to have conveyed to a third person in trust for the payment of plaintiff's claim, the deed of trust is inadmissible against the plaintiff, he not being a party thereto. Price v. Thrash, 30 Gratt. 515.

And in a contest between creditors and the wife of an insolvent debtor claiming property levied upon as the husband's property under executions against him, declarations of the husband as to the ownership of the property are not admissible as evidence against the wife. Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. Rep. 570. See also, Stockdale v. Harris, 23 W. Va. 499.

P. TRIAL.

In General—Determining Mode of Relief.—Where A executes his note to B for an amount three or four times greater than is due and owing from A to B, and executes a deed of trust on a certain tract of land to secure its payment, this tract of land being all the visible real estate owned by A at that time, and at a sale, made under the deed of trust, B becomes the purchaser of the land at less than its real value, these facts being alleged in a bill filed by subsequent judgment creditors of A, who are also creditors at the time of the execution of the deed, and being sustained by the evidence, it is error to dismiss the bill, without an inquiry being first directed to ascertain the true amount due from A to B, at the time of the sale, as well as of the value of the land, with the view of determining the proper mode and measure of the relief to which the plaintiff may be entitled, as connected with said deed of trust and sale. Smoot v. Newberry, 8 W. Va. 400.

Same—Court's Power to Pass upon Validity of Instruments.—A court of equity has jurisdiction to pass upon the validity and regularity of the record of a deed in the office of the clerk of the county court in a suit pending by a creditor's bill, which alleges that by reason of defects in the acknowledgment such deed must be postponed to the liens sought to be enforced by a bill. Janesville H. T. Co. v. Boyd, 35 W. Va. 240, 13 S. E. Rep. 381.

Reference.

When Commissioner Incompetent.—A commissioner is incompetent to take and report an account in a general creditors' suit in which he is a creditor and a party. Dillard v. Krise, 86 Va. 410, 10 S. E. Rep. 430.

Necessity of Reference.—And before a decree can be entered, at the petition of judgment creditors, ordering a sale of land, a cause should be referred to a commissioner of the court that the judgment debtor may have an opportunity of showing any set-offs to which he may be entitled. Kendrick v. Whitney, 28 Gratt. 646.

Effect of Order—Suspension.—A decree or order of reference to a commissioner in one creditor's suit operates a suspension of all other pending suits for the administration of the debtors' assets; and such decree may be made in the cause first ready for hearing, although it may not be the suit first instituted. Bilmyer v. Sherman, 23 W. Va. 656.

Report.

Rental Value of All Lands Should Be Included.—In a suit to enforce a judgment lien, where there has been a reference to ascertain whether or not defendant's "property would rent for a sufficient sum in five years to pay the indebtedness of defendant," the commissioner should consider and report the

rental value of all lands owned by defendant, though in counties other than the one in which the suit was begun. Kane v. Mann, 93 Va. 239, 24 S. E. Rep. 938.

Conclusiveness of Report.—And in a suit by judgment creditors against a debtor owning land, and other judgment creditors, the report of a commissioner, therefor appointed, as to the priority of the various liens, is conclusive save as to the parts properly excepted to before the hearing. Hutton v. Lockridge, 22 W. Va. 159.

Hearing—Right of Creditors to Contest Claims.—Where a reference has been made to a commissioner to settle the accounts of an intestate, the creditors may appear before the commissioner and contest the claims of each other. Woodyard v. Polsley, 14 W. Va. 211.

Q. JUDGMENT AND DECREE.

1. IN GENERAL.

Decree for Account of Debts.—Where the judgment creditors of a bankrupt debtor file a bill against the administrator and heirs of a debtor's surety, to subject the surety's land to the payment of the debts, and other creditors are admitted by petition, the plaintiffs are entitled to a decree for an account of debts. Ewing v. Ferguson, 33 Gratt. 548. See in general connection, Core v. Cunningham, 27 W. Va. 207.

When Decree in Favor of Receiver Not Improper.—And a decree rendered on a creditors' bill is not erroneous because rendered in favor of a receiver, rather than complainants, as such decree vests no title in the receiver, but virtually keeps the property *in custodia legis*. Harman v. McMullin, 85 Va. 187, 7 S. E. Rep. 349.

Order of Making Decree.—Moreover, where several creditors' suits are pending, the decree may be made in the cause first ready for a hearing, though that is not the first suit brought. Stephenson v. Taverners, 9 Gratt. 398.

Assignment of Specific Portion of Debtor's Property.—But in no case can a court of equity assign to a creditor a specific portion of his debtor's property. Auld v. Alexander, 6 Rand. 97.

Insolvent Cosureties—Contribution.—And in a suit in equity to subject the land of a judgment debtor to judgments against him, which are numerous, and in favor of different persons, the fact that in one of the debts, he is surety with other solvent sureties of an insolvent principal, does not require that lands of the insolvent cosureties be brought into the case, and subjected to pay a portion of that debt, though these cosureties are parties by reason of the right of contribution; nor does it require a decree of contribution therein. Farmers' Bank, etc., v. Woodford, 34 W. Va. 480, 12 S. E. Rep. 544.

Decree Based on Commissioner's Report—When Erroneous.—In Farr v. Baldwin (Va. 1892), 14 S. E. Rep. 703, it appeared, upon the filing of a creditor's bill, that the debtor had executed a deed of trust on certain land to secure a note given to complainant, and one given to another person; that the complainant had agreed that the latter note might have priority, but relinquished no other right; and that for this purpose the debtor was allowed to cut timber on the land, and apply the net proceeds to the payment of the note. The court held that a decree as to the amount due, based on a commissioner's report, should be set aside, where evidence showed that a part of the proceeds of the timber had been applied to an old indebtedness, instead of to the note mentioned in the deed of trust, and that a certain amount of timber had been cut and sold, and that less than one-half of this amount had been credited as payment on the note, and that these errors were not remedied in the decree.

Decree for Purchase Money, Interest and Costs—When Proper.—If on a creditor's bill to subject the estate of a defendant, who is a special commissioner in another suit, it appears that the defendant, without having given bond as required by the decree under which he acts, has collected the purchase money for certain land sold by him, and misapplied it; that a rule afterwards issued against the purchaser under which said land was resold, and a personal judgment against the purchaser entered for the deficiency; and that the defendant executed a trust deed to indemnify the purchaser for loss by such misapplication, it is proper for the lower court to decree to the purchaser his original purchase money with interest and costs, without adjudging further that the amount of such personal judgment should also be paid out of the estate. Eggleton v. Dinsmore, 84 Va. 858, 6 S. E. Rep. 146.

When Resident Defendant May Be Regarded as a Trustee for Nonresident Defendant—Effects in Possession.—And where it appears in a suit in chancery, against a resident and a nonresident defendant, that the resident defendant is not a debtor of the absentee but holds effects belonging to him, by a title not effectual against creditors or without any title at all, he may be considered a trustee for the use of creditors, as to any property remaining in specie in his hands. Gibson v. White, 3 Munf. 94.

2. RELIEF NOT PRAYED FOR.—The rule is still maintained in equity that a complainant cannot have relief in the absence of proof which substantially establishes the case which his bill presents. Thus in Baugher v. Eichelberger, 11 W. Va. 217, there was a creditor's bill, filed to enforce liens on a particular tract of land. It was held that such bill would only warrant a decree against that tract; and to allow the accounting to extend to and embrace liens on all defendant's lands was error.

3. CLAIMS.

Presentation and Proof.—Pending a bill in equity to enforce a judgment lien against a debtor's land, persons who have meanwhile obtained judgments against him may be permitted to prove the same before a commissioner, under the general order to enforce, and, so far as practicable, without delaying the plaintiff's cause, may file petitions to be made parties thereto. Marling v. Robrecht, 13 W. Va. 440.

And where a bill sets up complainant's claim only, and does not purport to be a creditors' bill, and other creditors come in by petition, a decree of account of debts may be entered, which will operate a suspension of other suits of creditors, who must prove their debts under said decree. Hurn v. Keller, 79 Va. 415; Ewing v. Ferguson, 33 Gratt. 548.

But upon a bill by creditors of a decedent, to charge the debts due on the debtor's real estate in the hands of devisees, the court should always make an order to call in all creditors of the estate, to receive their dividends of the real assets. Kinney v. Harvey, 2 Leigh 70.

Moreover, after a decree for a general account of debts in a creditors' suit, other creditors may come in and prove their claims before the commissioner to whom the cause is referred. This should be done by the creditor or some one authorized by him, and not by the administrator of the debtor whose duty it is to represent the estate. The better prac-

tice is to require the creditor to file an affidavit that the debt remains due, but the affidavit is not evidence to prove the debt. Conrad v. Fuller, 98 Va. 16, 34 S. E. Rep. 893.

And if a creditor is admitted as a party plaintiff for the purpose of obtaining a portion of an equitable fund, he may, on filing his bill, at once prove the claim before a commissioner without waiting until the cause, as to him, shall have been set for hearing in the usual course of the court. Anderson v. Anderson, 4 H. & M. 475.

Allowance.—A decree in a creditor's suit disallowing a claim presented by the administrator of a deceased creditor of the defendant is proper, where the demand is stale and was never asserted by decedent in his lifetime, and by reason of lapse of time, death of parties, loss of evidence, and loose business methods of the parties, an accurate and fair settlement of their account is impossible. Kavanaugh v. Kavanaugh, 98 Va. 649, 37 S. E. Rep. 275.

Confirmation.—And where, in a creditor's suit, judgments against the administrator of a decedent are filed before a commissioner, and he reports them as liens on the real estate of such decedent, and the report is confirmed without exception, it is too late to make objections to the claims after confirmation of the report, unless it is done by petition for a rehearing or a bill of review. Arnold v. Casner, 22 W. Va. 444.

4. SALE.

a. Necessity and Propriety of Decree for Sale.

Land Included in Marriage Settlement—Showing Value.—In a creditor's suit to subject to the payment of a judgment, land which the judgment debtor in a marriage settlement settled upon his wife, it is not necessary to show the assessed value of the wife's land before a decree for sale. Sively v. Campbell, 23 Gratt. 893. And in Grantham v. Lucas, 24 W. Va. 231, the broader principle is laid down that, in suits to subject real estate to the payment of liens thereon, it is not necessary to ascertain the value of real estate before its sale is ordered. Grantham v. Lucas, 24 W. Va. 231.

Propriety of Decree for Sale without Inquiry Concerning Rents and Profits.—And in Ewart v. Saunders, 25 Gratt. 203, a suit was filed in equity to subject land to satisfy a judgment, and the bill stated a valuation of the land, and that the judgment could not be satisfied from the rents and profits in five years. The answer said nothing on the subject, and no application was made for an enquiry, but the court in its decree expressed the opinion that the judgment could not be satisfied out of the rents and profits in five years, and appointed a commissioner to sell the land. It was held, that as the statute prescribed no particular mode by which it should be made to appear that the rents and profits would not pay the judgment in five years, if none of the parties asked for an enquiry, there could, in a proper case, be a decree for the sale of the land without it.

Fund in Another Court Applicable to Payment of Debts—Propriety of Decree for Sale.—Moreover, if it appears from the pleading and proof in a creditors' suit, that judgment creditors are enforcing their liens or debts in another court, against the parties liable for such other debts, and that there is a large fund under the control of the latter court, applicable to such debts, it is error to decree the sale of land, on the failure of the debtor to pay the entire amount of such judgment, without taking steps to ascertain what would remain unpaid, after the application of such funds to the liquidation of such judgments. Murdock v. Welles, 9 W. Va. 552.

Land Decreed to Be Sold for Cash—When Premature and Erroneous.—And where there are several creditors claiming to be paid their debts out of the land of a debtor, some by deed and others by judgment, an interlocutory decree, in a bill to which they are parties, not deciding upon their rights, but directing the land to be conveyed and sold for cash, and the proceeds to be paid into the cause, is premature and erroneous, as it tends to discourage bidders, thereby sacrificing the property. Cole v. McRae, 6 Rand. 644.

b. Account of Liens as Condition Precedent.—Moreover, an account of liens and priorities should be taken before there is a sale of the land in question. Rohrer v. Travers, 11 W. Va. 146; Kendrick v. Whitney, 28 Gratt. 646. See monographic *note* on "Judicial Sales" appended to Walker v. Page, 21 Gratt. 636, and cases cited.

c. When Sale Dependent on Amount of Rents and Profits.—And upon a bill to enforce a judgment lien, a court may decree a sale of the land; but is not bound, and ought not to decree such sale if the rents and profits of the land will satisfy the rents charged upon it in a reasonable time, unless consent to such sale be made. Rose v. Brown, 11 W. Va. 122.

And an inquiry as to the amount of the rents and profits should be made even though there is no averment in the bill, or admission or proof regarding them. Price v. Thrash, 30 Gratt. 515. See monographic *note* on "Judicial Sales" appended to Walker v. Page, 21 Gratt. 636.

As further held in Horton v. Bond, 28 Gratt. 815, upon the filing of a bill by a judgment creditor to subject the lands of the principal debtor and his sureties, it is the law and practice in courts of equity that before there can be a decree for a sale of the lands, it must be made to appear to the court that the rents and profits of the lands in five years will not discharge the judgment; also, if there are incumbrances they and their priorities must be ascertained by a commissioner; also the title to the land should be ascertained and settled. See in general connection, McClung v. Beirne, 10 Leigh 394.

Furthermore, it is error to decree a sale of land, where on a commissioner's report that the rents and profits of the land will pay the debts in five years, there is an ineffectual effort to rent, which is made at a distance from the land and at an unsuitable season. Mustain v. Pannill, 86 Va. 33, 9 S. E. Rep. 419.

However, it is not error to confirm a master's report and decree a sale of land, where the master's report shows, on testimony of several witnesses that the rents and profits will not pay the debts within five years,—the annual rents being $246, and the debts about $2,500. Cooper v. Daugherty, 85 Va. 343, 7 S. E. Rep. 387.

Moreover, where a bill which has been taken for confessed charges that the rents and profits of the land will not pay the debt in five years. it is not error to decree a sale of the land without directing an enquiry whether the rents and profits will pay the debt in five years. Barr v. White, 30 Gratt. 531.

And after the debt secured by a trust deed falls due, and no sale is made thereunder, such deed standing in the way of younger liens, a court of equity will interfere at the instance of a judgment creditor, and will direct a sale of the land, and not the mere equity of redemption alone, to satisfy

the debts of both classes of creditors, provided the rents and profits will not satisfy the liens in five years. Laidley v. Hinchman, 3 W. Va. 423.

And a decree is proper, which annuls certain other decrees previously rendered for renting the debtor's property, none of which decrees have been executed, where it further appears that the real estate will not in five years rent for enough to discharge the liens. And it may direct a sale of so much of the property as may be necessary. Preston v. Aston, 85 Va. 104, 7 S. E. Rep. 344.

It should be observed in this connection, that in a suit by creditors to set aside a fraudulent conveyance, the grantee can be held liable for rents and profits prior to the time of the decree against him, where the creditors have already obtained judgments against the debtor. Parr v. Saunders (Va. 1880), 11 S. E. Rep. 979.

Furthermore, upon a creditors' bill to subject lands of a debtor to the payment of the lien of a judgment thereon, the debtor cannot, by any agreement with his wife, who is in nowise bound for the judgments, and is not a party to the suit, have the rents and profits of her lands considered in an estimate to ascertain whether the rents and profits of his lands for five years will pay and satisfy such judgment. Kane v. Mann, 93 Va. 239, 24 S. E. Rep. 938.

5. NATURE AND REQUISITE OF A DECREE FOR SALE.—A decree for a sale of land to satisfy a judgment, without inquiring into and protecting the interest of a tenant in possession under a lease made prior to the judgment, is erroneous. Moore v. Bruce, 85 Va. 139, 7 S. E. Rep. 195.

And where the bill and proceedings specify the land, a decree for the sale of the land in the bill and proceedings mentioned, or so much as may satisfy the purposes of the decree is sufficiently certain. The maxim "that is certain which may be made certain," applies. Barger v. Buckland, 28 Gratt. 850.

And where a judgment creditor, without suing out execution, files a bill to subject to the payment of his judgment, property conveyed by the debtor, after the judgment by deed of trust purporting to convey all his real and personal estate, and the bill is dismissed as to the personal property, without prejudice to the right of the plaintiff to the surplus after satisfying the purposes of the trust, the trustee should be directed to sell the land and satisfy the judgment, first, out of the proceeds, and afterwards apply them to the purposes of the trust. Mut. Assur. Soc. v. Stanard, 4 Munf. 539.

6. GIVING DAY TO REDEEM.—On a bill to enforce a judgment lien it is error to decree a sale of the real estate, without giving the defendant a day to redeem the property by paying the amount charged upon it; but it is not giving a day to redeem, to postpone the time in the decree, for the property to be advertised and sold. Rose v. Brown, 11 W. Va. 122.

7. LEASE.

Ascertaining Propriety of Making Lease—Term.—Upon a bill filed by a judgment creditor to subject the land of his debtor to satisfy his debt, under Virginia Code 1873, ch. 182, § 9, the court, in order to ascertain whether the rents of the land will pay the debt in five years, should generally direct the commissioner to offer it first for one year, and if that will not pay the debt, then for two years, and so on, if necessary, up to five years, closing the contract whenever the rents will pay the debt, the term of payment of the rent to be fixed by the court, looking to the kind of property and the usage of the country. If it will not rent for enough in five years, the commissioner should report the fact to the court for further proceedings. Compton v. Tabor, 32 Gratt. 121.

In Winch. & Strasb. R. Co. v. Colfelt, 27 Gratt. 777, it appeared from the report of the commissioner that the annual rent of the railroad was $37,000, and the debts proved were but $1,286.91. Upon these facts the court held that the road should be leased out for the shortest period, for which a sufficient rent could be obtained to pay the debts and the costs of the suit. And if to accomplish this object, it was necessary to lease the railroad for a term which would yield in rents a sum far exceeding the amount of the judgments, and could not be leased at all for a shorter term, the creditors were entitled to have it leased for the longer term.

When Improper to Lease without Consent of Parties.—And in an action by judgment creditors to subject certain lands of their judgment debtors to the satisfaction of their judgments, the lands were, by consent of the parties, leased by the officers or agents of the court for the benefit of plaintiffs from year to year for ten years. Before the expiration of the tenth year, the court made an order that the lands be leased for the ensuing year at public auction. On appeal by defendants from such order, it was held, that until the court had first ascertained or determined by its decree that plaintiffs had a lien upon the land of the defendants, or upon its rents and profits, for the payment of some debt or liability, the court had no right to rent their land without their consent, and that defendants were entitled to recover the rents and profits realized from such lease. Hollingsworth v. Brooks, 7 W. Va. 559.

8. AMOUNT AND PRIORITY OF LIENS.—A decree which orders the sale of real property without first fixing the amount and priorities of liens charged upon it, is erroneous, and will be reversed. Anderson v. Nagle, 12 W. Va. 98. The reason for this rule is, that otherwise, the tendency would be to sacrifice the property, by discouraging creditors from bidding. Beaty v. Veon, 18 W. Va. 291.

And the decree of the court ought to determine the priority and validity of liens, fixing the amount to be paid to each, and not referring the matter to a commissioner, appointed to make the sale. Tinsley v. Anderson, 3 Call 329.

Therefore, as it is the duty of the court before it decrees a sale of the land to definitely fix the amounts and priorities of the liens, it is error to provide that any of the parties may apply for further relief, if it should appear that a credit allowed to the judgment was improper. And where there are a number of judgment liens against the lands of the debtor, it would be error to decree that the land should be sold to pay the lien of the plaintiff only; the decree should provide for the payment of all the liens audited against the land. Scott v. Ludington, 14 W. Va. 387.

And when a court of equity takes control of property conveyed by deed of trust to secure creditors, it is proper for the court to have the claims and priorities of all parties ascertained and fixed before directing a sale, except for some good reason to be specially shown; and it does not usually disburse the proceeds of sale until it can do complete justice to all the creditors according to their respective rights. Zell Guano Co. v. Heatherly, 38 W. Va. 409, 18 S. E. Rep. 611.

And where a decree in a suit brought by judg-

ment creditors shows upon its face the amount and priority of every debt against the land of the judgment debtor, the person to whom the same is payable, and the fund out of which he is entitled to be paid, a decree in such cause, that the judgment debtor (naming him) "do pay to the complainant and other judgment and trust creditors of the said debtor the several sums ascertained to be due to them respectively by the report of the commissioner contained on designated pages of the report," is erroneous. Kanawha Val. Bank v. Wilson, 25 W. Va. 242.

9. AMOUNT TO BE SOLD.

When Moiety Only Will Be Sold.—On a bill by a creditor against his debtor, who has escaped, and the debtor's alienee, to subject lands devised to the debtor after his escape, and conveyed away by him while at large, a court of equity will decree a sale of so much as is liable to the elegit lien, namely, a moiety, if it appear that the profits thereof are insufficient to keep down the interest of the debt, but it will go no further, and will not decree a sale of the whole land. Stuart v. Hamilton, 8 Leigh 503.

But if two creditors obtain decrees on the same day against a defendant's land, the whole, and not a moiety only of the land, ought to be directed to be sold. This for the reason, that at law each of the two judgments would have taken a moiety of the land and both of course the whole, if it had been extendible at law. Coleman v. Cocke, 6 Rand. 618.

And in a creditors' suit for the purpose of enforcing a lien, unless it appear with reasonable certainty that the land first liable will be sufficient to discharge it, it will not be error to decree and advertise together the sale of all the land upon which the lien exists, and then proceed to sell it in the order in which it is liable, until a sufficient sum is realized to pay off all the judgments and costs of the suit. Handly v. Sydenstricker, 4 W. Va. 605.

10. PERSONS BOUND BY DECREE.—If a creditor files a bill to subject the real estate of a debtor to a judgment lien, and in his bill fails to state that there is any other lien on the real estate, or to ask the auditing of other liens, and makes only the debtor a party defendant, though the court in such case by its decree directs a commissioner to ascertain all liens and their priorities, still the court cannot, upon the report of the commissioner that a prior deed of trust had been satisfied, decree that the debts secured by it, have been paid, and order its release. Such a decree of the court is a mere nullity, and not binding on the trustee, or *cestui que trust*, because they were not parties to the suit; nor does such order of reference or an actual service of notice by the commissioner on the *cestui que trust*, make him a party, or render such a decree valid as against him. McCoy v. Allen, 16 W. Va. 725.

R. EXECUTION AND ENFORCEMENT.

In General.—A court of equity in the exercise of its general jurisdiction over creditors' suits, may decree a sale, though the creditor who brought the suit has parted with his interest before the decree, if such sale is for the benefit of the creditors. Karn v. Rorer Iron Co., 86 Va. 754, 11 S. E. Rep. 431.

So a court may set aside a sale of lands made by a special commissioner under its decree of sale upon any evidence of fact or facts before it, which clearly show, that the land was sold, at a greatly inadequate price. Beaty v. Veon, 18 W. Va. 291.

Thus, under a decree of a court, land was sold by a commissioner, and was bought in by a debtor but he could not comply with the terms of the sale, and by agreement, by parol, that another should be reported as the purchaser instead of the debtor, a commissioner reported such third person as the purchaser, and the report was confirmed by the court. Subsequently, at the same term, another creditor offered for one of the tracts disposed of an upset bid of twenty per cent. advance on the price paid by the debtor as purchaser at the judicial sale. It was proper to set aside the order confirming the first sale. And the creditor had the right to ask the court to set aside the order of confirmation of sale although it was shown that the debtor had other real estate ample to pay his debt. Nat. Bank of Kingwood v. Jarvis, 28 W. Va. 805.

And where a judgment creditor brings a suit to enforce his lien, and after an account ordered and taken, and other liens proved, other lienors become parties to the suit, they are entitled to have the land sold for their relief in the order of their respective priorities, and aliened land of the debtor must be sold in the inverse order of the alienation. Brengle v. Richardson, 78 Va. 406; P. & A. L. Ins. Co. v. Maury, 75 Va. 508; Va. Code 1873, ch. 182, § 10.

When Commissioner Should Sell.—Where after a decree for the sale of land for the payment of judgment liens, the debtor executed a second trust deed and died, and, the cause being revived, the trustee and *cestui* in the second deed were made parties, it was *held*, that the trustee had no right to sell and bring the money into court, but that the sale should have been by the court through its commissioner. Bock v. Bock, 24 W. Va. 586.

Distribution.—At the suit of certain creditors a deed for certain land was set aside as fraudulent, and there was a decree after the death of the grantor for the sale of the land, and for amount of the debts of the grantor and their priorities. The report showed that there was one judgment against the grantor before the deed was made. Some of the plaintiffs in the bill were creditors by judgment, one a creditor at large; a number came in by petition before the decree; and a number came in before the commissioner, and by petition after the decree. It was held, that in distributing the fund, it should be applied, first, to pay the judgment recovered before the deed was made. Second, to the judgments recovered before the bill was filed. Third, to the creditors at large who joined in the bill. Fourth, to the creditors by petition before the death of the grantor, in the order in which their petitions were filed. Fifth, to all the other creditors *pro rata*. Wallace v. Treakle, 27 Gratt. 479.

S. APPEAL.—When a creditors' bill is brought to sell lands of a debtor, and the latter fails to answer or plead, and decrees are entered on bill taken for confessed, but defendant appears and files exceptions to the report of sale made by the commissioner of the court, and the exceptions are overruled, and the sale confirmed, the appellate court will entertain an appeal by the debtor as to so much of the action of the court as relates to said exceptions. Beaty v. Veon, 18 W. Va. 291.

T. COSTS.—Creditors have no legal right to be reimbursed by their debtors for counsel fees contracted by them. Gurnee v. Bausemer, 80 Va. 867.

However, where a petitioner (with other counsel) files a bill on part of a creditor, who sues also in behalf of all other creditors who might become parties and contribute to the expenses, and, after a fund has been secured for distribution among the creditors who have become parties, another cred-

itor is admitted, and his claim is allowed, though petitioner has already received compensation out of the trust fund, and from the creditors previously admitted, he is entitled to additional compensation from such other creditor, to be measured by his services, by which he has been benefited, but not to be increased by reason of the failure of his fellow counsel to make a similar claim. Howard v. First Nat. Bank of Charleston (Va.), 27 S. E. Rep. 492.

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74 *Penn v. Whiteheads.

January Term, 1855, Richmond.

(Absent LEE, J.)

1. **Husband and Wife*—Husband Agent for Wife—Rights of Husband's Creditors.†**—A husband carries on a mercantile business as agent for his wife, and he is aided by his sons, who are minors. The business is profitable, and property is accumulated from its profits. The husband has an interest in this property, which may be subjected by his creditors to the payment of his debts.

2. **Same—Same—Same—Injunctions‡—Receiver.**—Upon a bill by the creditor of the husband, who had recovered a judgment upon which an execution had issued, and had been returned "no effects unencumbered," to subject the property, charging that the agency was a fraud, and that the property was the husband's; or that at least he had an interest in it on account of his services, and the services of his sons, who were minors, and asking for an injunction to restrain the collection of the debts and the disposition of the property, and for a receiver, the injunction was properly granted: And upon a motion in vacation to dissolve the injunction, which was overruled, it was proper to appoint a receiver to sell the property and collect the debts.

3. **Partners—Debts of Firm—Case at Bar.**—In this case, one of the sons of the husband having come of age, was taken in as a partner, and there were debts due for goods purchased, for which the son was liable. If these debts were entitled to be first paid out of the property, it was still error to direct the receiver to pay them, before having a report upon them by a commissioner of the court.

In January 1853 James S. Penn filed his bill in the Circuit court of Nelson county, in which he alleged that Floyd L. Whitehead was indebted to him in the sums of eight hundred and twelve dollars and fifty cents, and one thousand nine hundred and eighty-four dollars and sixty-three cents, with interest from the 1st of January 1842, which he had recovered against the said Whitehead by a decree of the Circuit court of Nelson made in October 1842, upon which execution had been issued and re-
75 turned "no effects *unencumbered." That Whitehead had conveyed away all his property except money to secure creditors to the exclusion of the plaintiff, and except certain property conveyed to one Charles Williams, in trust for Maria P. Whitehead his wife. That by a suit in the County court of Nelson, Whitehead contrived to have Williams removed and himself appointed trustee in his place. That Whitehead afterwards commenced the mercantile business in the county of Nelson, styling himself agent for Maria P. Whitehead, and was aided by his two sons, both of whom were minors, and owed their service to their father, and not to their step mother Mrs. Whitehead. That Whitehead was in fact doing business for himself. That Mrs. Whitehead furnished no money at the commencement or during the progress of the business to carry it on. That she had nothing except the property conveyed in trust as aforesaid for her benefit; and that she continued to hold.

He further charged, that for the purpose of carrying on his fraud, Whitehead changed the style of his business, and pretended that his son Alexander, who was then a minor, and without money, was a partner; and the business was then conducted under the style of Floyd L. Whitehead, agent, & Son.

He further charged that Whitehead was then engaged in the mercantile business with Joseph B. Coffey. That Whitehead, agent, & Son had recently ceased to sell goods, and the stock which was on hand had been sent to the establishment of Whitehead & Coffey; and the father and son were then engaged in settling up the business of the other two concerns. He charged that the books and papers of the three concerns were the property of Floyd L. Whitehead; and that a tract of land which he had acquired, and a negro man and three horses he had purchased were his property; and not the property of his wife.

76 *The plaintiff further charged that if Whitehead was in fact acting as agent of his wife, his services and the services of his two sons were worth at least the sum of three thousand dollars, which a court of equity would charge upon the trust property in favor of creditors. And making Whitehead and his wife and his son Alexander defendants to the suit, he asked for an account of the profits of the mercantile concern, and of the capital invested therein by Floyd L. Whitehead; and if necessary, an account of the value of the services of said Whitehead, and of his sons, whilst they were under the age of twenty-

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***Married Women—Separate Estate—Payment of Debts.**—The principal case was cited in Carey v. Burruss, 20 W. Va. 579, to the point that a court of equity will subject the separate estate of a married woman to the payment of a debt incurred by her engaging in trade.

See generally, monographic *note* on "Husband and Wife." For sequel of principal case, see Penn v. Whitehead, 17 Gratt. 503.

†**Rights of Creditors—Services of Insolvent Husband**—As to the rights of creditors where money is expended, or services rendered, by insolvent husband, upon his wife's estate, see *note* in 3 Va. Law Reg. 430.

‡**Injunctions—Receiver.**—See principal case cited in B. & O. R. R. Co. v. Wheeling, 13 Gratt. 60; Fredenheim v Rohr, 87 Va. 785, 13 S. E. Rep. 193 (dissenting opinion of FAUNTLEROY, J.). See generally, monographic *note* on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518.

one years; and also for an injunction to restrain the defendant from selling the property, and collecting or otherwise disposing of the debts until they should give security in the penalty of three thousand dollars, with condition to have that amount arising from the collection of the debts, forthcoming to answer the future order of the court; and if they should fail to give the security in a limited time, that a commissioner might be appointed to collect said debts. The injunction was granted according to the prayer of the bill.

The defendants answered separately. They all denied the fraudulent intent imputed to them. They denied that Floyd L. Whitehead had any personal interest in either of the mercantile concerns. They admitted that no capital was put in by either Mrs. Whitehead or by Alexander Whitehead. Whitehead and Mrs. Whitehead stated that the place where the business was conducted, and the first goods purchased, were rented and purchased of H. W. Heath & Co. who had conducted a store at the place; and were made upon the faith of Mrs. Whitehead's trust property. That the subsequent purchases were in like manner made upon her credit, and all persons were informed of the character in which Floyd L. Whitehead acted. As to the services of the son, the younger was
77 going *to school the greater part of the time, and Alexander was supported by Mrs. Whitehead. And as to Floyd L. Whitehead, the books would show that he had drawn out of the concern full as much as his services were worth. Alexander Whitehead stated that for the two years he was a partner, he was to receive one-fourth of the profits. That the debts of Whitehead, agent, & Son, for which he was responsible, amounted to eight thousand two hundred dollars, debts which had been contracted for goods; and he insisted that he should not be deprived of the assets of the concern, and left subject to this liability.

A mass of testimony was taken in the cause, which it is unnecessary to notice further. It is sufficiently stated in the opinion of the court.

The defendants gave the plaintiff notice that they should, on the 3d of February 1853, at the office of the judge, in vacation, move him to dissolve the injunction: And accordingly, the cause came on, on that motion, when the court held that the whole net profits of the concern of Whitehead, agent, and three-fourths of the profits of Whitehead, agent, & Son, and of Whitehead & Coffey, whether existing in the form of money or property, real or personal, or choses in action, being the fruits of the labor and skill of Floyd L. Whitehead and his minor sons, and not in fact the profits or product of the trust estate of his wife, were not protected from the payment of his debts by the arrangement resorted to, to give them the semblance of profits realized from the separate estate of the wife upon a bona fide separate trading of the wife, in pursuance of a lawful and binding contract, or permission or consent of the husband, either before or since the coverture. And that the nominal contract by Whitehead, agent, &c., and Whitehead, agent, & Son, carrying on concerns in these names and styles, however free from mala fides or actual fraud they may have been, in
78 *consequence of having resulted from the mistaken opinion or advice of counsel, or the mistaken opinion of the client as to the rights of his wife or his own rights, duties and responsibilities, were, in legal contemplation, fraudulent devices or contrivances for the purpose of defeating the creditors of the husband, and securing to him and his family the profits of his skill, labor, resources and contracts against their demands: And he therefore overruled the motion to dissolve the injunction.

The judge then went on to decree, that unless the defendants, or one of them, or some one for them, executed the bond required by the order granting the injunction, within ten days, that Robert Whitehead be appointed a commissioner and receiver of the court, to take into his possession the books, papers and evidences of debt of the said concerns, and the property, real, personal and mixed, appertaining thereto; to collect the debts, and make sale of the property on the usual terms; and pay out of such debts, collections and sales of property, all the liabilities of said concerns to merchants or others who have trusted them for supplies of goods, moneys or other things; and that he hold the residue or profits of said concerns subject to the future order of the court; and that he make report to the court of his proceedings under this decree. And the court would thereafter direct the account prayed for, to ascertain the net profits of the concerns; and the value of the services of said Whitehead and his minor sons; and upon the final hearing would determine as if upon review or reconsideration of the decree, whether the plaintiff was entitled to subject the whole of the profits of the first concern and three-fourths of the second, or only such part as would be equivalent to the services of the said Floyd L. Whitehead and his minor sons. From this decree Penn obtained an appeal to this court.

79 *Patton, for the appellant.

Morson and Robinson, for the appellees.

MONCURE, J., delivered the opinion of the court.

The order appealed from in this case was made on a motion founded on the provision in the Code, ch. 179, § 12, p. 678, which declares that "the judge of a Circuit court in which a case is pending, wherein an injunction is awarded, may, in vacation, dissolve such injunction, after reasonable notice to the adverse party." In deciding on this motion, it was only necessary for the judge to determine whether or not (looking to the case as it then stood) it ap-

peared that the appellee Floyd L. Whitehead had any interest in the subject in controversy, which could be made liable to the claims of his creditors, and that the appellant was a creditor entitled to enforce such liability. If it did so appear, it was proper to continue the injunction; otherwise it was proper to dissolve it. It was unnecessary and premature in that stage of the case to enquire, or express any opinion, as to the precise extent of the interest which could be so made liable, whether it embraced the whole subject in controversy, or the surplus thereof, after paying the debts of the mercantile concerns mentioned in the order, or either of them, or an undivided portion of such surplus.

We are of opinion that the said appellee had such an interest in the subject in controversy. He carried on the trade as agent of his wife and on her separate account. She pledged her separate estate (so far as she had power to do so) for the stock of goods with which the trade was commenced; and the store-house was leased to her husband as her agent. The subsequent purchases, or many of them, were made on the credit of her separate estate, or of her husband as her agent. But she invested no money in the business, and always remained in the possession and enjoy-
80 ment *of her separate estate. It is comparatively of small value, and consists of unproductive personal property, much of which is perishable. She has but a life estate in the property, with a power of appointment "by will to such person or persons as she shall choose, but not out of her own family, or the family of her said husband." And it is provided in the deed of settlement that even during her life the property shall remain in her possession for the support and maintenance of herself and her issue and family, and for no other purpose whatever. She could certainly pledge or charge no more than her life estate in the property if even she could do that: which is at least very questionable. At all events, it is obvious that whatever was acquired by the trade was acquired, in whole or in part, by the labor and skill of the husband. Creditors trust their debtor on the faith, not only of his present property, but of his future acquisitions, whether made by his labor and skill or otherwise; and he has no right to devote either to the separate use of his wife, in exclusion of their claims. He is certainly under a high obligation to support his family; but he is under a still higher obligation to pay his debts. If the wife in this case had no power to pledge or charge her separate estate, then the arrangement under which the trade was carried on by her husband as her agent was purely voluntary; and though it might be valid as between the husband and wife, it would seem to be void as to his creditors. Whether in that case the creditors, whose debts were created on the faith of the arrangement, would be entitled to priority of payment out of the subject in controversy, is a question which it is unnecessary now to consider. If she had such power, then the arrangement would be void as to his creditors to some extent, and whether in whole or in part, would be a question for the court to decide at the hearing. If valid as
81 to them to any extent, it *would only be to the extent of compensating her just interests in the subject; on the principle of the cases of Quarles v. Lacy, 4 Munf. 251; Blanton v. Taylor, Gilm. 209; and Taylor v. Moore, 2 Rand. 563. It would be difficult, if not impossible, for the court to adjust the relative and conflicting interests of the wife and the creditors of the husband in the profits of the trade; and to ascertain how much she should receive for the credit of her separate estate, and they for the labor and skill of himself and his infant sons in carrying on the business. She might at least be entitled to require that the property acquired by the trade should be applied to the payment of the debts of the concern, before it was subjected to the claims of his individual creditors. She would certainly not be entitled, as against them, to all the profits of the business, however large they might be, on the ground that the services of the husband and his infant sons in carrying it on had been adequately compensated by the support which they derived from it. A man may be so successful in business as to make more than a support for his family, and more than the ordinary value of such services as were rendered by him in carrying it on; and his creditors are entitled to the benefit of all that he can make. He cannot, by trading as agent of his wife and on the credit of her separate estate, secure to her separate use, in exclusion of the claims of his creditors, all the proceeds of his future labor and skill beyond the necessary support of his family. The business in this case appears to have been very successful, and to have yielded a profit beyond the support of the family, including the wife. We deem it unnecessary to express any opinion as to any right or interest of the appellee Alexander R. Whitehead in the subject in controversy; and think enough has been said to show that the appellee Floyd
82 L. Whitehead has *an interest therein which is liable to the claims of his creditors.

We are also of opinion that the appellant is a creditor entitled to enforce such liability. He is a decree creditor, and avers in his bill that he has sued out two executions on his decree, which have been returned "no effects unencumbered." He exhibits a copy of his decree, though not of the executions and returns. But the averment in the bill in regard to the executions is not denied in any of the answers; and, on a motion to dissolve, must be taken to be true. Having thus acquired a right to have satisfaction out of his debtor's property specifically, he is therefore entitled to come into equity to impeach the arrangement in question, on the ground of fraud. Whether a creditor at large would be so entitled, under the provision in the Code,

ch. 179, § 2, p. 677, is a question which need not be considered. It is stated in the answer of Floyd L. Whitehead, that the appellant has long since conveyed away his claim by deed of trust for the benefit of his creditors; a copy of which deed is in the record: and it is contended that the appellant has therefore no right to maintain this suit. It is not pretended that the claim was ever sold under the deed of trust; and, even if the deed be still unsatisfied, we are of opinion that the appellant has a sufficient interest in the claim to entitle him to maintain the suit; though it may be necessary hereafter to make the trustee in the deed a party to the suit.

The motion to dissolve the injunction was therefore properly overruled.

We are also of opinion that there is no error in so much of the order as appointed a receiver to take into possession all the papers, books, accounts, evidences of debt, &c., of the concerns therein mentioned, and the property, real, personal or mixed, appertaining thereto, collect the debts, make sale of the property upon the
83 *usual terms, and make report to the court. The power to appoint a receiver, when one is necessary for the collection, preservation or sale of property pending an injunction suit, is incident to the power to grant an injunction; and the latter power being expressly conferred by law on a judge in vacation, the former is conferred on him by implication. The necessity for the appointment of a receiver in this case for the purposes before mentioned, is shown by the answers of the appellees; from which it appears that when arrested by the injunction they were engaged in winding up their business, by selling their property, collecting their credits, and paying their debts, and their interests required that the sales and collections should be made with as little delay as possible. Indeed, the counsel of the appellees, in their argument of this case, did not question, but seemed to admit, the propriety of appointing a receiver, if it was proper to continue the injunction.

But we are of opinion that there is error in so much of the order as directed the receiver to "pay out of such debts, collections and sales of property, all the liabilities of said concern to merchants or others who have trusted them for supplies of goods, moneys or other things." It was premature to determine, before the hearing of the cause, whether the creditors of the said concerns, or either of them, are entitled to priority of payment out of the subject in controversy; and if they are so entitled, it was erroneous to direct the receiver to pay their claims before they were ascertained and allowed by the court. Before any such direction is given, an order should be made directing a commissioner of the court to take an account of what is due to the said creditors, and to cause them, upon due public notice, to come before him and prove their claims; so that an opportunity may be afforded to the appellant and the creditors respectively, to contest any
84 *of the said claims before the commissioner, or before the court, on exceptions to his report.

Therefore, so much of the said order as is in conflict with the foregoing opinion is reversed, with costs to the appellant, and the residue thereof is affirmed. And the cause is remanded to the Circuit court for further proceedings to be had therein.

Decree reversed.

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85 *Hutcheson, Sheriff, Adm'r &c. v. Priddy.

January Term, 1855, Richmond.

1. **Public Administrators§—Premature Appointment—Effect.***—If the County court commits an estate to the sheriff for administration, before the expiration of three months from the death of the testator or intestate, the act is not void but voidable.
2. **Same§—Same—Collateral Attack.**†—In such a case the County court, having general jurisdiction to grant administration, the act of the court in committing the estate to the sheriff cannot be questioned in any collateral proceeding.
3. **Same§—Revocation of Appointment—Right to Notice.**—An estate having been committed to the sheriff, the County court cannot grant the administration to a distributee, without notice to the sheriff of the application.
4. **Same§—Same—Discretion of Court.**‡—It is not imperative on the County court to grant administration to a distributee after the estate has been committed to the sheriff; but there is a legal discretion in the court.

This is a controversy concerning the right to administer upon the estate of a decedent.

At the October term in the year 1853 of the County court of Henrico, a paper writing purporting to be the last will and testament of James O'Brien deceased, and bearing date on the 16th of June 1846, was duly proved and ordered to be recorded as the true last will and testament of the deceased. And thereupon the appellee Elijah Priddy, the executor named in the will, appeared in court and refused to take upon himself the burden of the execution thereof.

On the 8th of November following, in the same court, on the motion of Caleb C. Mitchell and wife (the latter being devisee of one-sixth of the whole estate of the tes-

*Administration Granted—Wrong Exercise of Jurisdiction—Effect.—See the principal case cited and approved in Andrews v. Avory, 14 Gratt. 236, and *foot-note*; Gibson v. Beckham, 16 Gratt. 326; Ballard v. Thomas, 19 Gratt. 21.

†Same—Same—Collateral Attack.—See principal case cited in Andrews v. Avory, 14 Gratt. 236; Patton v. Merchants' Bank, 12 W. Va. 607. See also, *foot-note* to Andrews v. Avory, 14 Gratt. 229; *foot-note* to Baylor v. Dejarnette, 13 Gratt. 152.

‡Administrators—Revocation of Appointment—Discretion of Court.—See principal case cited in Bridgeman v. Bridgeman, 30 W. Va. 219, 3 S. E. Rep. 584.

§See monographic *note* on "Executors and Administrators."

tator), it was ordered that the estate of the said James O'Brien deceased be committed to the appellant, who was sheriff of the county of Henrico, for administration with the will annexed, according to law.

86 *On the 7th of December 1853, the appellee Priddy appeared and moved the court to permit him to qualify as executor of the said James O'Brien deceased, according to the terms of the will. This motion was overruled, and Priddy excepted. He then moved the court to revoke the order committing the estate to the sheriff of Henrico for administration, and to allow him to qualify as administrator; and he exhibited the will of the decedent, showing that his wife, who was a daughter of the decedent, was made a devisee of one full sixth part of the whole estate. He also proved by witnesses that the death of the testator occurred on the 17th or 18th of August 1853; and that four of the legatees named in the will desired that he should be permitted to qualify as executor. On the other hand Mitchell, who contested the motion, proved that Priddy had a claim against the estate the justice of which was contested, and which had not been allowed by the administrator. The court overruled the motion, and Priddy excepted. He then applied to the Circuit court of Henrico for a supersedeas to this order overruling his motion to be permitted to qualify as administrator, and it was allowed. And upon the hearing in the Circuit court, that court reversed the order of the County court, and remanded the cause with instructions to set aside the order committing the estate to Hutcheson, sheriff of Henrico, for administration, and to permit Priddy to qualify as administrator de bonis non with the will annexed. And to this judgment of the Circuit court Hutcheson applied for and obtained a supersedeas from this court.

August and Randolph, for the appellant.
Crump and Davis, for the appellee.

LEE, J. The relation in which a sheriff to whom the estate of a decedent is

87 committed for administration, *stands to the estate has been materially changed in the course of the legislation upon this subject. Under former laws the estate was in effect administered by the court, and the sheriff was but the officer of the court charged with the execution of its orders made in the progress of the administration. See Acts of 1705, ch. 10, § 10, 11; Acts of 1748, ch. 3, § 2; 1785, ch. 61, § 55. At the revisal of 1819, a general provision was introduced, by which the sheriff in such case, without giving any other bond or taking any other oath than those already given and taken, is declared to be the administrator (with the will annexed if there be a will), and entitled to all the rights and bound to perform all the duties of such administrator. 1 Rev. Code 1819, ch. 104, § 67. And the same provision is retained in the present Code, ch. 130, § 10. He thus stands on the footing of any other administrator, subject only to the power reserved to the court to revoke the order committing the estate to him, and allow some other person to qualify as executor or administrator. While his powers continue he may collect the assets, discharge the debtors of the estate, and pay off all claims against it: he may sue and be sued as such administrator; like any other is bound to render an account of his administration, and is entitled to the same allowances for his expenses and services. In short, every right and every duty pertaining to any other administrator is thus devolved upon him; and upon general principles and by all analogy, it should seem that before his office can be taken away from him and given to another, he should have notice of the intended application for that purpose, in order that he may make any proper defense, and may also conform his own arrangements with reference to the expected termination of his powers. For as a part of his duty to defend the estate committed to him, he may and should

88 resist the efforts of *any unfit and unsuitable person to get possession of it, by causing his powers to be revoked and obtaining administration for himself. He is concerned to see that adequate security be given by his successor, and he is better prepared than any other to inform the court as to the amount that should be required; and he should know when his powers terminate and those of that successor come to replace them. If he have no notice of the intended action of the court, he may proceed in utter ignorance of what it may have done, to make arrangements with creditors and others, which, being utterly void because his powers had been revoked, may compromise both him and them, and occasion serious loss and inconvenience to innocent parties.

It is urged that the act of assembly which reserves to the court the power to revoke the administration committed to the sheriff, and to grant it to some other person, contains no provision for a citation or notice to the sheriff when an application is to be made to the court to exercise that power; and that no such citation or notice is necessary, because the sheriff has no rights or interest in the subject, and cannot resist the revocation of his powers and the grant of administration to another person, which the court itself has no discretion to refuse.

It is true there is no provision for any citation or summons before the court shall act. Nor is there any in the case under the fifth section, where administration has been granted to a creditor or some other person, or a will has been admitted to record after a previous grant of administration, and a distributee who shall not have before refused shall apply for administration; and yet in these cases it can scarcely be supposed that a court would be justified in displacing an administrator regularly appointed without his having been first cited or in some way notified to appear and defend his

89 interest. So in a case in which *a surety seeks to be relieved of his

suretyship, he must give the administrator due notice of his intended application to the court, without proof of which the court will not make the preliminary order requiring the administrator to give a new bond. And there can be no reason why a proper notice should not be given in the case of a sheriff administrator. He has, as we have seen, rights and an interest in the subject the same as any other administrator. It is not a matter of course that the court will revoke the grant to the sheriff and allow any other person to qualify as administrator. The words in the act of 1819 are, "The court, however, shall have power, at any time afterwards, to revoke such order" (committing the estate to the sheriff), "and to grant letters testamentary or letters of administration to any person entitled thereto." Those of the present act (Code, p. 542, § 10,) are, "The court may, however, at any time afterwards, revoke such order and allow any other person to qualify as executor or administrator." But these terms "any other person" must necessarily have some limitation, and this is to be found only in the sound discretion of the court, to which must be referred the fitness or suitableness of the party applying, and the time and circumstances of his application; and touching these, the acting administrator should have an opportunity to be heard.

Nor is the case altered by the fact supposed to be proved in this cause, that the order committing the estate to the sheriff, was made some few days before the expiration of three months from the death of the testator. If the order made thus prematurely were ipso facto void, it might be otherwise. I think however that it is voidable only and not void. The fourth section of the act in effect reserves the right of administration to distributees exclusively for thirty days after the death of the decedent; yet if the court should
90 *chance to grant administration to a creditor or some other person before the expiration of the thirty days, it will scarcely be seriously contended that such a grant would be absolutely void; though it certainly would be erroneous and voidable. Whether in either case, the order for administration was made at a proper time or prematurely, is not such a question of jurisdiction as may be raised collaterally in another action or proceeding. The jurisdiction of a County court upon this subject is a general jurisdiction conferred by the statute to grant probat of wills, and to hear and determine suits and controversies testamentary and concerning administrations. Code, ch. 122, § 23, p. 519; ch. 130, § 4, p. 541. It is a court of record, and its judgments or sentences cannot be questioned collaterally, if it have jurisdiction of cases ejusdem generis. Where it has jurisdiction over that class of cases, whether the court erred or not in determining that the facts were proved upon which the power to grant administration in the particular case depended, is not to be enquired into collaterally. It must be supposed to have enquired into and decided upon those facts at the time of making its order, and its decision if erroneous, would be voidable only and not void. Accordingly under the influence of these considerations, it has been held in this court that a grant of administration by the court of a county not authorized by the facts of the case to make such grant (the decedent having had no residence, and having left no estate of any kind in the county by the court of which the grant was made), was not void but voidable only; overruling previous decisions of the General court to the contrary in Barker's Case, 2 Leigh 719; and Case of Robinson's Estate, November term 1828, cited in Barker's Case. Fisher v. Bassett, 9 Leigh 119; Burnley's Reps. v. Duke, 2 Rob. R. 102. See also Schultz v. Schultz, 10 Gratt. 358, 377; Cox v. Thomas, 9 Gratt. 312.

91 *This case is plainly within the principles of the cases just cited. For if a grant of administration by a County court which had no jurisdiction or authority to make such grant upon the facts of the particular case, is yet voidable only because the court had a general jurisdiction in cases ejusdem generis, so the commitment of an estate to the sheriff for administration by a court which not only had jurisdiction in cases of that class, but also had full jurisdiction in the particular case to grant administration to some suitable person, would be but voidable and not ipso facto void even if the court had erred upon the facts in making the order at the time it was passed. And great inconvenience and embarrassment would be occasioned by a contrary doctrine. The acts of the sheriff would be of course invalid. He would incur all the liabilities of an executor de son tort, and innocent persons dealing with him upon faith of the authority conferred by a court of record, and possessing a general jurisdiction over similar cases, and authority to designate an administrator in the very case, might be subjected to great embarrassment and serious loss. While on the other hand no injury can result from treating the authority of the sheriff administrator as voidable only. His acts would be good until it be revoked; there would be a representative of the estate during the whole period; purchasers of the property belonging to the estate would be protected; the debtors to it might safely pay what they owed, and creditors and distributees would have all the security for the proper disposition of the proceeds which the official bond of the sheriff would afford.

Regarding, then, the authority of a sheriff administrator as voidable only and not void, even though prematurely conferred by the court in point of fact, he should have notice of the intended application to revoke it, just as in the case of an appoint-
92 ment of a *creditor as administrator before the expiration of the thirty days within which the right to administer is reserved to distributees exclusively. In either case, if the previous order of admin-

istration be assailed upon the allegation that it was prematurely made, the party should have the opportunity to contest the fact.

I think therefore the County court did not err in overruling the motion of the appellee, as it does not appear that any citation or summons had been issued or served upon the sheriff, nor that he was present in court when the motion was made, nor that he has in any manner waived the benefit of such citation; and in this view it is rendered unnecessary to decide any of the other questions raised in the argument of the cause. I think, however, out of abundant caution it would be proper to amend the judgment by declaring it to be without prejudice to any future motion which the appellee may be advised to make to the same effect upon a proper citation or summons.

I am of opinion therefore to reverse the judgment of the Circuit court, to amend that of the County court in the manner before stated, and as amended, the same to affirm.

MONCURE, J. I think it is at least very doubtful whether the order of the County court of Henrico, committing the estate of James O'Brien to the sheriff for administration, was not a void order, less than three months having elapsed between the death of the testator and the date of the order. When it was made, neither the County court of Henrico, nor any other court of probat, had any power to make such an order; any more than if O'Brien had been then alive. In this respect the case differs from that of Fisher v. Bassett, 9 Leigh 119. There, when the grant of administration on Robinson's estate was made to Scott, some court had power to make
93 the grant; and the *Court of Hustings of the city of Richmond having taken cognizance of the subject and made the grant, the order of that court was considered by this to be voidable only, and valid until revoked or reversed. This case seems to be like that of Wales v. Willard, 2 Mass. R. 120. An act of that state provides that administration shall not be originally granted upon the estate of any deceased person after the expiration of twenty years from his death. The administration in that case was originally granted after the intestate had been dead twenty years. Parsons, C. J., in delivering the opinion of the court, said, "This administration, it was not competent for any judge of probat to grant; but it is a case in which it is expressly provided by the statute from which he derives his authority, that no administration shall be granted. It is not therefore the erroneous exercise of his judgment, but it is an assumption of power against law; and the grant is, ipso facto, a nullity."

But whether this be so or not, I am of opinion that Priddy was entitled to the administration when he applied for it, and that there was no necessity for any notice of the application to the sheriff; but that the order committing the estate to the latter would, by a grant of administration to the former, have been ipso facto revoked. In England, the person entitled to distribution is entitled to the administration; and though the ordinary may appoint another person administrator, yet he can only do so after the person entitled to the administration has refused it. That person must be cited to accept or refuse before there can be any valid grant to another. And non vocatis jure vocandis, is a sufficient ground for revoking a grant to another. In Virginia, the distributee, if a fit person, is also entitled to the administration. But there is this difference between the law of England and the law of Virginia; that by the
94 latter, if no distributee apply *for administration within thirty days from the death of the intestate, the court may grant administration to one or more of his creditors, or to any other person, without first citing the distributees to accept or refuse. Code, ch. 130, § 4, p. 541. The right of the distributees, however, is not lost by such grant to another, but is carefully preserved to them by law; which provides, that "if a will of a decedent be afterwards admitted to record, or if after administration is granted to a creditor, or other person than a distributee, any distributee who shall not have before refused shall apply for administration, there may be a grant of probat or administration in like manner as if the former grant had not been made; and the said former grant shall thereupon cease." Id. § 5. This law, it will be observed, requires no notice or citation to be given to the original administrator; and it is obvious, I think, that one was contemplated. The words, "and the said former grant shall thereupon cease," indicate that the new grant is, ipso facto, a revocation of the old. The original administrator is like a curator; or an administrator durante minori actate, or durante absentia; and his powers terminate on the qualification of the rightful administrator. Surely, if a will be afterwards, admitted to record, and the executor obtain probat, there is no necessity for citing the original administrator, nor expressly revoking his grant of administration. This was decided in the case of Hunt v. Wilkinson, 2 Call 49. The same principle applies to a subsequent grant of administration to the party entitled thereto. The same clause which provides for the case of a subsequent recordation and probat of a will, provides for the case of a subsequent grant of administration. In each case it is declared that the former grant shall thereupon cease; and the clause must have the same construction in regard to each.

I do not think there is any substan-
95 tial difference *between the old law under which Hunt v. Wilkinson was decided, and the new. It is true the old law uses the word "shall," and the new law the word "may;" seeming, at first view, to indicate, that while under the old the duty of the court to grant administration to the distributee was imperative, under the

new it was merely discretionary. But I think no change was designed by the legislature, and that the word "may," in the new law, has the same meaning with the word "shall," in the old. Certainly, the court under the new law has no right to refuse probat to the executor, being a fit person, if a will be recorded; and it can have no more right to refuse administration to a distributee, being a fit person; the same clause of the law providing for each case. The effective words in the old law, that there shall be a grant of administration to the distributee, "in like manner as if the former had not been obtained," are substantially repeated in the new. And there are in the new these additional words, not contained in the old, "and the said former grant shall thereupon cease;" which makes the meaning of the legislature still more plain.

It is provided by § 10, p. 542, that when an estate is committed to the sheriff for administration, "the court may, at any time afterwards, revoke such an order, and allow any other person to qualify as executor or administrator." If the grant of administration to a distributee under § 5, is, ipso facto, a revocation of the original grant to another person under § 4, a fortiori, such grant to a distributee is, ipso facto, a revocation of an order committing the decedent's estate to the sheriff. Formerly, the sheriff, to whom an estate of a decedent was committed, was not a full administrator, but little more than a curator ad colligendum bona defuncti. He was the mere officer of the court, and administered the estate under its order, and on equitable principles.

He has since been declared by
96 *law to be an administrator. But he does not now stand on precisely the same footing with a person appointed administrator under § 4; and may be displaced by the subsequent appointment, not only of a distributee, but of any other person. If there be no good reason for requiring any other administrator to be cited before his grant of administration is revoked, there is certainly less for requiring the sheriff to be cited; he being the officer of the court, presumed to be always in attendance upon it, and to have notice of its proceedings. It is true, the administration of the sheriff continues after his term of office expires; but it rarely happens that administration is granted to another after that period. In this case the application was made at the term of the court next succeeding that at which the estate was committed to the sheriff, and during the latter's term of office; and there can be no doubt but that he had actual notice of the application. I believe it has been the general, if not the invariable, practice of the courts of probat to grant administration in such cases without notice to the sheriff.

It is the duty of the court of probat to take care that a party to whom administration is granted is entitled thereto; and it may, if it see fit, cause the original administrator, or a sheriff committee, or any of the next of kin, to be cited to show cause against it. But it is under no imperative obligation to do so. Any person interested may voluntarily appear and resist the application of a distributee for administration; and will thus become a party to the proceeding and entitled to appeal from the sentence, or obtain a supersedeas thereto. The sheriff in this case might have appeared and become a party; and so might Mitchell and wife. The former did not so appear; no doubt because he did not care for the administration. The latter did appear and become a party; and the application was therefore refused.

97 *The contest in the County court being between Priddy and Mitchell and wife, and not Priddy and the sheriff, I think that Mitchell and wife, and not the sheriff, should have been made parties to the writ of supersedeas; and that the sheriff had a right to have the writ quashed. But he made no motion for that purpose. On the contrary, the case was tried upon its merits in the Circuit court, and was decided in favor of Priddy. And now the sheriff seeks in this court to reverse the judgment of the Circuit court. I think that Priddy is entitled to the administration, being the only distributee who applied, and it not appearing that he is unfit for the office; on the contrary, it appearing that he had the confidence of the testator, in being appointed his executor and otherwise, and was the choice of a majority of the parties in interest. I also think that while the sheriff was an improper party to the writ of supersedeas, his proper remedy was by motion to quash it; and that if there be any error against him of which he has any cause of complaint, or actually does complain, it is only as to costs; which are not sufficient to give this court jurisdiction.

I am therefore for affirming the sentence of the Circuit court.

The other judges concurred in the opinion of Lee, J.

Judgment reversed.

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98 *Clarke & als. v. Reins.

January Term, 1855, Richmond.

1. **Ejectment—Order of Reference—Submission to Arbitration.**—An order of reference is made in a pending action of ejectment, by the terms of which all matters in difference between the parties are submitted to the final determination of the arbitrators chosen. But this order is made in pursuance of an agreement in writing under seal, between the same parties, to refer the single question of the value of the land in controversy; the defendant agreeing to give to the plaintiffs for the land the price fixed upon it by the arbitrators. The order of reference is to be construed with reference to the agreement, and therefore the award, which only fixes the value of the land, is in conformity to the submission.

2. **Specific Performance—Husband and Wife—Refusal of Wife to Execute Deed—Effect.***—A court of equity

*Specific Performance—Title.—In Linkous v. Cooper, 2 W. Va. 70, it is said: "The defendant refuses to

will not decree a specific performance of a contract by a husband and wife for the sale of the wife's land, at the suit of the vendee, the wife refusing to execute the contract.

3. **Same—Same—Life Estate of Husband.**—Nor will the court compel the husband to convey his life estate to the vendee, with compensation for the failure of the wife to convey her interest in the land.

4. **Same—Joint Owners—Case at Bar.**†—The wife being one of three equal joint owners of the land, and they and the husband having united in the sale, though the husband and wife will not be compelled to execute the contract on their part, the other two joint owners will be compelled to convey their undivided interests, upon the payment by the vendee of their shares of the purchase money.

5. **Case Distinguished.**—The case distinguished from Bailey v. James, 11 Gratt. 468.

6. **Decrees—Liability of Married Woman for General Warranty—Statute.**—A decree that a married woman shall convey land with general warranty, though erroneous, is no cause for reversing the decree, as under the statute the warranty would not bind her. Code, ch. 121, § 7, p. 514.

In February 1850 an action of ejectment was instituted in the Circuit court of Henrico by Caroline V. Clarke, Emily W. Harris, David M. Branch and Sarah E. his wife, against Richard Reins, for the recovery of eight half acre lots of land in the town of Sydney, near Richmond. The
99 plaintiffs claimed the lots of *land as heirs at law of Benjamin James Harris deceased. The female plaintiffs were his children. The issue was regularly made up at the May term following.

In December 1850 the plaintiffs and defendant entered into an agreement under seal, in which is recited the pendency of the action of ejectment, and that the parties to the agreement are desirous finally to settle and terminate said suit; and then proceeds: Now, therefore, it is herein agreed that the said parties shall forever end and conclude the controversy in said suit mentioned, in manner and form following, to wit: That the matters in controversy shall be and are hereby referred and submitted to the final award and determination of Robert Edmond and B. W. Haxall, agreed to and chosen by the said parties as their arbitrators, so as the said arbitrators do make their award and determination of and concerning the said controversy for the following end and purpose, to wit: that is to say, that the said arbitrators, after satisfying themselves of the value of said lots above mentioned and numbered, shall affix to and declare in writing, under their hands and seals, the real and actual value of the same, as they in the exercise of their judgments shall think right and proper. And then an umpire was provided for, if they differed in opinion.

And it was further agreed that the plaintiffs should, upon the return of said award, make a full and complete conveyance to the defendant of the said eight lots, and that they should receive from the defendant and he should pay to them the value of the said lots, as it should be ascertained and declared in the manner before mentioned. And it was further agreed that this agreement should be made a rule of court in the ejectment cause; and that the said court should be authorized to enforce its performance as if the same were a judgment obtained in said court.

In January 1851 an order was made
100 in the cause, *by which the parties mutually submitted all matters in difference between them to the final determination of Robert Edmond and Bolling W. Haxall, and agreed that their award, or the award of such person as they should choose for an umpire, thereupon, was to be the judgment of the court; and the same was ordered accordingly.

In February 1851 the arbitrators made up and returned their award under their hands and seals. After referring to the agreement between the parties, and making it a part of their award; and reciting that under the authority of that agreement they had satisfied themselves of the value of the lots mentioned therein, they proceeded to award between the parties, that the said lots were in the judgment of the said arbitrators worth the sum of fifty dollars per lot; and that this sum of fifty dollars per lot was their valuation of the same.

Upon the return of the award the defendant moved the court to enter it as the judgment of the court, which motion was opposed by the plaintiffs, on several grounds of objection taken to the award. The court, however, overruled the objections, and ordered that the award be confirmed, and stand as the judgment of the court.

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take the land unless he can get a good title. The complainant cannot make a good title and is not entitled to a specific execution of his contract. Goddin v. Vaughn, 14 Gratt. 117; McCann v. Janes, 1 Rob. 256; Watts v. Kinney, 3 Leigh 272; *Clarke v. Reins, 12 Gratt. 98.*" See also, in accord, citing the principal case, Middleton v. Selby, 19 W. Va. 174.

Same—Husband and Wife—Mutuality.—In Shenandoah Valley R. R. Co. v. Dunlop, 86 Va. 350, 10 S. E. Rep. 239, it is held: "It is, accordingly, well settled, certainly in this court, that, independently of any statute on the subject, an executed contract of the husband, or of the husband and wife, for the sale of the wife's lands, is not one of which specific performance will be decreed, because, as to the wife, the contract is void, and as to the husband, it cannot be enforced, because to coerce him would operate morally as a constraint upon the wife, and since the contract is not enforceable against them, so neither can it be enforced by them. Watts v. Kinney, 3 Leigh 272; *Clarke v. Reins, 12 Gratt. 98;* Chilhowie Iron Co. v. Gardiner, 79 Va. 305; Cheatham v. Cheatham's Ex'or, 81 *Id.* 395; Luse v. Deitz, 46 Iowa 205; Fry, Spec. Perf., sec. 286; 2 Min. Inst. 785." See also, in accord, citing the principal case, Litterall v. Jackson, 80 Va. 614; Chilhowie Iron Co. v. Gardiner, 79 Va. 311; Graybill v. Brugh, 89 Va. 899, 17 S. E. Rep. 558; Lyman v. Thompson, 11 W. Va. 447. See *foot-note* to Bailey v. James, 11 Gratt. 468; Griffin v. Cunningham, 19 Gratt. 571. See also, monographic *note* on "Husband and Wife."

†**Same—Joint Owners.**—See the principal case cited in Cady v. Gale, 5 W. Va. 565; Watson v. Michael, 21 W. Va. 575.

Reins then instituted a suit in the Circuit court of the city of Richmond, against the parties to the action of ejectment and agreement, setting out the facts, and asking that the said parties might be compelled to make to him the deed mentioned in the agreement; and that he might be quieted in his possession of said lots.

The defendants answered, stating their objections to the award; which were, that it was made without notice to them, and upon the ex parte statements of the plaintiff; though of these facts there was no evidence. They insisted further, that
101 the value fixed *upon the lots was wholly inadequate, being in fact about one-third of their value: And they insisted that it was not a case in which, under the circumstances, a court of equity would enforce a specific execution of the contract.

The cause came on to be heard in January 1853, when the court decreed that the plaintiff should pay to the defendants the sum of four hundred dollars, the amount fixed by the arbitrators as the value of the lots, with interest from the 4th of February 1850, until paid; and that as soon as such payment was made or tendered by the plaintiff, the defendants should execute and deliver to him a good and sufficient deed with general warranty for said lots described in said agreement. From this decree the defendants obtained an appeal to this court.

Gilmer, for the appellants.
Patton and Patton, Jr., for the appellee.

SAMUELS, J. I am of opinion to reverse the decree, and dismiss the bill without prejudice to the rights of the parties to sue at law. There is nothing alleged in the pleadings, or shown by proof, to warrant the exercise of the power to decree specific performance. This would be my opinion if the case stood alone upon that clause of the agreement which is supposed to bind the appellants to convey. The case, however, should not be so regarded; but in passing on it, every part of the agreement should be looked to: we should not disregard any part of it. It is distinctly agreed between the parties, that the action of ejectment between them shall be submitted to the arbitrament of the referees named; that the value of the subject in controversy shall also be ascertained by those referees; that upon the return of the award the appellants should convey to the
102 *appellee the subject of controversy. This part of the agreement is, of necessity, to be understood as meaning that the conveyance shall be executed if the action of ejectment shall be decided by the referees in favor of the plaintiffs therein: for it would be absurd to construe it as meaning that if decided the other way, the parties having no title should sell, and the party having title should buy.

The agreement further provides that the submission shall be made a rule of court, and that the court should enforce the performance of the agreement as if the same were a judgment of the court. This, if it means any thing, means that the purchase money was to be secured by the judgment of the court. The parties, to some extent, put their own construction on the agreement by submitting the ejectment suit to the arbitrators; thereby showing that the decision of that suit was to have its effect upon the agreement. In the ejectment the main question was, who had the right to possession, and incidentally, who should pay the costs of suit. This question is not yet decided; the award returned being upon a subject in no wise involved in the suit. By the express terms of the agreement, the conveyance was to be made upon the return of the award, which has not yet been made. If the parties intended to submit the sole question of value to the arbitrators, and to bind themselves to sell and buy at their valuation, nothing would have been easier than to have so provided in the agreement. If, however, they intended that the question of title should be first settled, that if the appellants had the better title, they should sell to the appellee, the agreement in all its parts should be allowed to stand, and its several provisions be carried into effect. To tear one single provision of the agreement from its context; to give it priority over another to which it was expressly postponed; to make it, in fine, the agree-
103 ment in disregard *of all else therein; to withhold from the appellants the benefit of their better title, if they have it; to compel them to sell a title in litigation, at a price affected by the fact that it was contested, in disregard of the provision for settling the question of title, would be unjust to both parties. I am not aware of any precedent requiring us to treat the agreement in this manner; and I am utterly opposed to making such precedent.

DANIEL, J. If the order of reference of the 2d of January 1851 were alone to be looked to for the terms of the submission, the award would be incomplete; as by the order "all matters in difference between the parties" are submitted to the "final determination" of the arbitrators, whilst by the award nothing is adjudged or ascertained except the value of the lots in controversy. It is most apparent, however, from the award, from the bill, from the answer, and from the petition for an appeal, that the arbitrators and the parties all regarded, and acted upon, the agreement of the day of December 1850, as containing the true terms of the submission.

Treating the agreement, then, as the warrant for the action of the arbitrators, I can discover no plausible reason for saying that they have, in any manner, departed from the authority, or fallen short of a complete discharge of the duty conferred upon and prescribed for them. After reciting the pendency of the action of ejectment, and that it involved the title to certain lots, and expressing the desire of the parties finally to settle the suit, the agreement proceeds, "Now, therefore, it is

herein agreed that the said parties shall forever end and conclude the controversy, in said suit mentioned, in manner and form following, to wit: That the matters in controversy shall be and are hereby referred and submitted to the final award
104 *and determination of Robert Edmond and B. W. Haxall, agreed to and chosen by the said parties as their arbitrators, so as the said arbitrators do make their award and determination of and concerning the said controversy, *for the following end and purpose, to wit: that is to say*, that the said arbitrators after having satisfied themselves of the value of the said lots above mentioned and numbered, shall affix to, and declare in writing, under their hands and seals, the real and actual value of the same, as they, in the exercise of their judgments, shall think right and proper; and if they the said arbitrators do not agree as to the value of the said lots, then the said arbitrators shall call in some disinterested third person, to be by them chosen and elected, who shall with them confer and consult as to the value of the said lots, and, with them, determine the same, and shall declare in writing, under their hands and seals, the said value; to be delivered to the parties hereto, on or before the day of next ensuing."

The words in the first portion of the article would seem to indicate an intent to submit the whole matter in controversy to the arbitrators; but it is obvious that, with the words (which I have italicised), "for the following end and purpose," &c., commences a qualification or restriction, limiting the action of the arbitrators to the single "end and purpose" of ascertaining and declaring the value of the lots. With respect to the title to the lots, the arbitrators had nothing to determine or award. Their office was done, and the object of the first article accomplished, as soon as they fixed and reported the value of the lots; and a subsequent article provided that upon the return of the award, the parties of the first part should convey the lots to the party of the second part, and that the latter should secure and pay to the former the value ascertained by the award. In
105 short, the scheme for *the settlement of the suit was, that the appellants should sell and the appellee should buy the lots at a price to be fixed by disinterested valuers. There is, therefore, I think, no ground for assailing the decree as being founded on an insufficient award.

Nor do I think that the error of the court in requiring Mrs. Branch, a married woman, to execute a deed with general warranty, is of such a nature as to vitiate the decree. The inadvertence is one which it is obvious could work no injury to Mrs. Branch, or any one else; in as much as by the statute, Code, ch. 121, § 7, p. 514, such a deed could not operate any further on her or her representatives than to pass such right, title and interest as at the date of such deed she might have in the estate thereby conveyed. If, therefore, there were no other objection to the decree, I should feel no difficulty in affirming it, after making the proper correction.

In considering the case, however, a more serious question has arisen, which, at the instance of the court, has been fully discussed at the bar; and that is, whether the coverture of Mrs. Branch did not stand in the way of any decree, for a specific performance of the agreement and award against her or her husband, or indeed any of the appellants: It is not necessary to cite authorities to show that no such decree could be made against Mrs. Branch.

The question whether a court of equity will, under any circumstances, decree against a husband the specific performance of a contract on his part to procure the conveyance by his wife of her real estate, is one which cannot be regarded as yet definitively settled in England. In the reports of the earlier cases, numerous precedents may be found in which the power of the chancellor to make such decrees has been asserted and enforced. Thus, the case of Hall v. Hardy, 3 P. Wms. 187, in which, upon a submission of a dispute
106 *touching the fee simple of a parcel of land, the arbitrators awarded that the defendant should procure his wife to join with him in a fine and deed of uses, and thereby convey the premises to the plaintiff and his heirs, the master of the rolls, Sir Joseph Jekyll, decreed a specific performance of the award: prefacing the decree with the remark that there had been a hundred precedents, where, if the husband, for a valuable consideration, covenants that the wife shall join with him in a fine, the court has decreed the husband to do it; for that he had undertaken it and must lie by it, if he does not perform it.

In some of the cases of a later date, however, the propriety of making such decrees has been seriously questioned, and in others, positively denied; as in Emery v. Wase, 8 Ves. R. 505; Davis v. Jones, 4 Bos. & Pull. 267; and Martin v. Mitchell, 2 Jac. & Walk. 413. And whilst it cannot perhaps be said that the English chancery has fully disclaimed the power, it may, I think, be safely affirmed, that the current of professional feeling and sentiment in England is rapidly tending to a conviction of the impolicy, cruelty and unfairness of a rule which constrains the wife indirectly through the sufferings of the husband, to do that which the courts have long since repudiated their right to coerce her to do directly. In speaking of the earlier cases, Mr. Jacob, in a note to 1 Roper on Husband and Wife 547-8, says, "It may be said with respect to most of these cases, that they were decided at a period when the courts exercised a much greater latitude than at present in cases of this kind. Thus it would seem that in some instances the decrees were made against the wife personally. In one case it was decreed that a man should compel his wife and another man's wife to levy a fine, &c. Since the limits of the jurisdiction of equity in the specific performance

of agreements, and the rules as to the
107 disabilities *of coverture have been more clearly settled, these early cases cannot now be received as authorities without some qualifications."

And in the case of Emery v. Wase, Lord Eldon said that the argument showed "the point was not so well settled as it had been understood to be. The policy of the law is, that a wife is not to part with her property but by her own spontaneous and free will. If this was perfectly res integra, I should hesitate long before I should say the husband is to be understood to have gained her consent, and the presumption is to be made that he obtained it before the bargain, to avoid all the fraud that may afterwards be practiced to procure it. The purchaser is bound to regard the policy of the law, and what right has he to complain, if she, who according to law cannot part with her property but by her own free will, expressed at the time of that act, of record, takes advantage of the locus pœnitentiæ; and why is he not to take his chance of damages against the husband?"

Similar views are strongly presented in a note in 1 Roper on Husband and Wife 545; and the annotator adds, "some of the cases seem to have proceeded partly upon the fact of the wife having herself been a party, or having assented to the agreement, or upon the presumption that she had assented. But if it be law that the agreement of a feme covert is void, it is difficult to find any principle upon which her assent or dissent at the time of the contract could vary the case." These views are also adopted in Bright on Husband and Wife, vol. 1, p. 191, to which author, as also to the notes to Emery v. Wase, reference may be had for a statement of the principal English decisions on the subject.

I do not know that the question has ever been distinctly before this court on a bill, filed by a vendee, seeking the specific execution of a contract for the sale, by a husband or by a husband and wife, of the wife's lands.

108 *In the case of McCann v. Janes, 1 Rob. R. 256, the bill was filed by a vendee against a husband on an undertaking by the latter, that he and his wife should make to the plaintiff a good deed for the wife's inheritance in fee; but a specific performance of the agreement was not asked. After setting out the contract, the bill alleged that the defendant had refused to comply, stating, as his excuse, that his wife had refused to join him in the deed. It further alleged that there were children of the marriage, and that the husband was consequently entitled to a life estate; and the prayer was that the defendant should be decreed to convey all his interest in the land to the plaintiff, reserving to the latter his right of action at law against the husband for damages on account of his failure to procure his wife to unite with him in the conveyance.

The Circuit court sustained a demurrer to the bill, and rendered a decree dismissing it. On an appeal, the decree was affirmed by this court. The judge of the Circuit court, in his opinion, assigned two reasons for sustaining the demurrer: 1. That he could not entertain a bill for a specific performance in part, with a right to resort to a court of law for the recovery of damages for the residue: And 2. That a husband could not be decreed to convey a life estate in his wife's lands during her life. No reason was given by this court for affirming the decree; but the reporter, in a note to the case, states that he had been informed by one of the judges that the affirmance was made on the first ground taken in the opinion of the circuit judge.

It will be seen from this statement of the case that it did not present the question under consideration. The failure of the plaintiff, however, to ask a decree for specific execution of the contract, is a strong circumstance to show an acquiescence by the bar in the propriety of the doctrine
109 on the subject, held by this *court in the cases of Evans & wife v. Kingsberry, 2 Rand. 120, and Watts v. Kenney and wife, 3 Leigh 272; in each of which, though the bill was filed by husband and wife for a specific execution against a vendee under a contract with the husband for the purchase of the wife's land, the court considered it necessary to decide what ought to have been the decree if the suit had been brought by the vendee; and in each of which the court, holding that such a decree could not have been properly rendered in favor of the vendee, refused to decree specific performance in favor of the vendors, on the score of want of mutuality. In the last mentioned case Judge Tucker, delivering the opinion of the court, said, "As to compelling the husband to procure a conveyance, the doctrine, never well received, has never been acted upon with us, and seems recently to have been discountenanced in England. Emery v. Wase, 8 Ves. R. 505; 4 Bos. & Pul. 267. It is true that in a recent case it has been said that if the wife assents, the husband will not be permitted to recede. Howell v. George, 1 Madd. R. 1-7. But so easy is it where family convenience and profit concur, for the influence of the husband to withhold the assent of the wife, that practically the doctrine can never be of use."

This opinion was approved by the whole court, as was also that of Judge Green of the like import, in the case of Evans & wife v. Kingsberry. Whilst, therefore, I do not find any precedent in our reports of a direct refusal by this court to decree at the suit of the vendee, the specific performance of a sale by a husband of his wife's estate, yet in the absence of any case or opinion here questioning the propriety of the two last cited decisions, I feel no hesitation in recognizing them as true expositions and ruling adjudications of the law of this case.

It is true that no objection to a
110 specific performance *was made by

the defendants in their answer, on the score of Mrs. Branch's coverture; and it is urged on behalf of the appellee, that this court ought not to proceed on the supposition that she may not be willing to unite in the conveyance. The same feature existed in the case of Emery v. Wase. Yet it was not regarded by the master of the rolls, when the case was before him (5 Ves. R. 847), or by Lord Eldon, on the appeal (8 Ves. R. 505), as a circumstance of any moment.

In that case, as in this, the defendants all united in one answer, in which they resisted the decree, on grounds wholly independent of the coverture of some of the female defendants; yet the court gave the same weight to the objection as if it had been distinctly and formally presented. The appellants all strenuously resisted the decree in the Circuit court, and are all seeking to reverse it here; and little if any chance of benefit to the appellee could be anticipated from sending the case back, in order, by privy examination (if indeed such a practice could in any case be allowed here), to ascertain whether Mrs. Branch will choose to unite in a deed, as there can be little or no doubt as to what her response would be.

It is further urged by the counsel of the appellee, that though this court should be of opinion that the decree was wrong in ordering a full and entire performance of the agreement, still a dismission of the bill would not be the proper or necessary consequence; that in such case the court ought to allow the appellee the election to have a conveyance of so much of the subject he bargained for as is within the reach of the court, with an abatement of the purchase money proportioned to the share or interest of Mrs. Branch.

If the appellee is willing to accept, in satisfaction of the agreement, a deed for the undivided interests of the appellees Clarke and Harris in the lots, with an abatement of the purchase money equal
111 in value to *the entire interest and estate of Mrs. Branch in the subject, I cannot perceive the injustice or inconvenience of allowing him to have such a modified performance of the contract. There is nothing in the proofs to impeach the fairness of the agreement or the award. There is not the slightest reason for imputing fraud or even laches to the appellee. He has promptly done or tendered to do every thing which by the covenant or the award he has agreed, or has been awarded to do. On the other hand, the appellants have wholly refused to conform to the award. They have resisted it on each side of the Circuit court, on grounds of objection which the judge has decided to be insufficient. Like objections have been made here, and have met with the same fate. And nothing stands in the way of affirming, in every thing, the decree for a specific execution, except the want of power in the court to coerce a conveyance of the estate of the married female appellant: a difficulty, suggested here for the first time. In this state of things what show of equity have the appellants for insisting that because they cannot comply with their whole undertaking, they shall also be excused from performing such portion of it as is clearly within their power?

I see nothing in the nature of the contract, and know of no rule of practice, which forbids a termination of the controversy in the mode proposed. On the contrary, it is a familiar practice to make decrees for the partial performance of contracts, with compensation to the injured party, in cases where the measure of compensation is certain or easy of ascertainment. Thus, in Mortlock v. Buller, 10 Ves. R. 292, 316, Lord Eldon says, "If a man having partial interests in an estate, chooses to enter into a contract representing it and agreeing to sell it as his own, it is not competent for him to say after-
112 wards, though he *has valuable interests he has not the entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion in his contract; and if the vendee chooses to take as much as he can have, he has a right to that and to an abatement."

The same doctrine is asserted in Wood v. Griffith, 1 Swanst. R. 43, 54. "The purchaser may insist on having the estate such as it is. The vendor cannot say that he will give nothing, because he is unable to give all that he has contracted to give."

And Judge Story, in the second volume of his Treatise on Equity Jurisprudence, § 779, on the authority of a number of cases which he cites, states the general rule in such case to be, "that the purchaser, if he chooses, is entitled to have the contract specifically performed as far as the vendor can perform it, and to have an abatement out of the purchase money, or compensation for any deficiency in the title, quantity, quality, description or other matters touching the estate."

It is true that he says, "the practice had been extended beyond the true limits to which every jurisdiction of the sort should be confined, as it amounted pro tanto to the substitution of what the parties had not contracted for; and that the tendency of modern decisions is to bring the doctrine within such moderate bounds as convenience and equity indicate as its proper limits." He at the same time, however, cites with approbation the remarks of Lord Langdale in the case of Graham v. Oliver, 3 Beav. R. 124, in which, after admitting the difficulties that existed in the way of carrying the rule to the extent that had prevailed in some of the cases, he vindicates the justice of adhering to it in cases where it can be observed "without any great preponderance of inconvenience."

113 *And a distinction is very properly recognized by the courts between the case of a vendor seeking to compel the vendee to perform, and that of the vendee

asking a performance by the vendor. Though, therefore, the courts have refused, as in Dalby v. Pullen, 3 Sim. R. 29, and in other cases, to compel a vendee, who has contracted for the entirety of an estate, to take undivided aliquot parts of it, it by no means follows that it is improper to compel the vendor to convey such undivided parts, where the vendee is willing to accept them, with a proper abatement of the price, in lieu of the whole estate for which he contracted. On the contrary, in the case of the Attorney General v. Day, 1 Ves. sen. 218, Lord Hardwicke, whilst refusing to compel a vendee who had contracted for an entire estate, to take a moiety (a conveyance of the other by change of circumstances being impracticable), said, "On the other hand, if on the death of one of the tenants in common who contracted for a sale of the estate, the purchaser brings a bill against the survivor, desiring to take a moiety of the estate only, the interest in the money being divided by the interest in the estate, I should think (though I give no absolute opinion as to that) he might have a conveyance of the moiety from the survivor, although the contract cannot be executed against the heirs of the other."

The same principle is fairly to be deduced from the case of Roffey v. Shallcross, 4 Madd. R. 227, and also from a decision of Lord Eldon, in Ex parte Tilsley, reported in the note to that case; and is, I think, fully sustained in Sugden on Vendors, vol. 1, 415–426, 7th Am. ed. as well in the text as in the authorities cited in the notes.

It is suggested that these views are in conflict with the decision of this court in Bailey v. James, 11 Gratt. 468. On an examination of that case it will be seen, that it is wholly different in character
114 from the one *before us: And I mention it only because of the suggestion just mentioned, and for the purpose of saying that I do not mean to call in question the authority of that case by any thing said in this.

I can see, therefore, no objection to allowing the appellee to have a partial performance to the extent and on the terms above indicated. I do not think, however, that he ought to have a conveyance of the life estate of the appellant Branch, unless he is willing to take that together with a conveyance of the undivided interests of the appellants Clarke and Harris in full of his demand. The difficulty of estimating the value of Mrs. Branch's interest, subject to the life estate of her husband, would of itself constitute a serious objection to decreeing compensation for its loss. Evans v. Kingsberry, 2 Rand. 120. Such an estimate would of necessity be of a speculative character; and whilst there are rules for calculating the value of such interests, which have been adopted by the court in cases rendering such calculations necessary, I feel no disposition to multiply, unnecessarily, occasions for a resort to them.

It is true that in a note in 1 Roper on Husband and Wife 549, it is suggested that in cases where the wife has only a partial interest in the estate as jointure or dower, the purchaser might be allowed to take such title as the husband can give, deducting from the purchase money a compensation for the wife's claims. Be that as it may, I have seen no case in which a purchaser from husband and wife of the wife's inheritance has been allowed to take the husband's interest, and compensation for the principal estate, the main and substantial object of the contract, left outstanding in the wife.

On the whole, I think that the decree ought to be reversed, and the cause remanded, with instructions to the Circuit court to allow the appellee the option
115 of *taking a conveyance by the appellants Harris and Clarke, and the male appellant Branch, of their interests in the lots, the appellee paying the full amount of the value awarded, or a conveyance of the undivided shares of Harris and Clarke, with a deduction from the full amount of the value aforesaid, of so much thereof as is equal to the value of Mrs. Branch's undivided share in said lots; and in case the appellee refuses to avail himself of such liberty, to dismiss his bill, with costs, but without prejudice to his legal rights.

ALLEN, P. I concur in the opinion and decree, except so far as it gives to the appellee the right to take a conveyance of the undivided shares of Harris and Clarke, with a deduction from the full amount of the value, equal to the value of Mrs. Branch's undivided share in the lots. I think the contract was entire, and the appellee should be allowed the option of taking a conveyance of Harris and Clarke and the male appellant Branch in satisfaction of the entire contract, or that his bill should be dismissed, without prejudice to his remedy at law.

MONCURE and LEE, Js., concurred in the opinion of Daniel, J.

The decree was as follows:

The court is of the opinion that the decree of the 19th February 1853 is erroneous, and doth adjudge, &c., that it it be reversed with costs, &c. And the cause is remanded to the Circuit court, with instructions to allow the appellee the option of having a decree for a conveyance of the undivided shares of the appellants Harris and Clarke, and of the interest of the appellant David M. Branch in the lots in the bill and proceedings mentioned, on the terms of
116 first paying the sum *of four hundred dollars, the amount ascertained, by the award of the arbitrators in said bill and proceedings also mentioned, to be the value of said lots, with interest from the 4th day of February 1853 until paid, or a decree for a conveyance of the undivided shares, in said lots, of Harris and Clarke only, on the terms of his first paying so much of said sum with its interest as shall remain after first deducting therefrom so

much thereof as the said Circuit court, treating the sum aforesaid as the value of the full estate in said lots, shall ascertain to be the value of Mrs. Branch's undivided share therein. And in case the appellee shall refuse to avail himself of the option so allowed, to dismiss his bill with costs, without prejudice to his legal rights.

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117 *Osborne & als. v. Taylor's Adm'r & als.

January Term, 1855, Richmond.

1. **Wills—Construction by Court—Right of Administrator to.***—Administrator with the will annexed having in his possession slaves of his testator, and being in doubt whether they are emancipated by the will, may come into equity, making the legatees and next of kin of the testator, parties, and ask the court to construe the will: And in this suit, the court, being of opinion that the slaves are emancipated by the will, may decree in their favor, and direct that they be freed.
2. **Same—Emancipation of Slaves†—Case at Bar.**—Testator bequeaths the whole of his slaves, not before disposed of, to trustees for the use of J for her life; and directs that at the death of J the slaves embraced in this clause of his will be emancipated. But should they or any of them prefer remaining in the state, they can do so by choosing masters, to serve during the life of the person chosen, and then they are to have the option of freedom or slavery, by making a second choice. HELD:
   1. **Same—Same—Same.**—The slaves are emancipated; and the condition is repugnant and void.
   2. **Same—Same—Same.**—The slaves born during the life of J are emancipated.
3. **Same—Same—Same.**—The administrator having filed his bill after the death of J, when there were no debts of the testator; and having submitted the slaves to the control of the court; and they having been hired out by him under the direction of the court, during the pendency of the suit; they are entitled to have these hires: And this especially, as though the bill was filed before the act of 1850, Code, ch. 106, § 8, p. 465, it was not decided until after that act went into operation.‡
4. **Same—Construction by Court—Parties.**—All persons having an interest, or color of interest, in the residuum of an estate, must be parties in a suit which the court decides upon the construction of the will affecting that residuum.

118 *Previous to the 2nd day of February 1835, Thomas O. Taylor departed this life, having first made his will, which was duly admitted to probat in the County court of Powhatan. By the first clause of his will, which was wholly written by himself, he directs all his debts to be paid; though he expresses the belief that

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*Wills—Constructions by Court—Right of Administrator to.—See monographic *note* on "Executors and Administrators."

†Emancipation of Slaves—Conditions Subsequent.—In Williamson v. Coalter, 14 Gratt. 403, the court said that the rule established by the principal case and Forward v. Thamer, 9 Gratt. 537, is that where the will actually emancipates, so that the status of the negro is changed from that of a slave to a freedman of color, all provisions imposing conditions and granting privileges, to take effect after that change of condition, are void. In this case, the principal case was distinguished by the majority of the court because, in their opinion, the case at bar made the freedom of the slaves dependent on their own election. But MONCURE, J., in a dissenting opinion, contended that the case at bar was similar to the principal case save that the case at bar was possibly a stronger case in favor of absolute emancipation: and the judge said that, in his opinion, the case at bar should be governed entirely by the rules laid down in the principal case. The principal ease was cited by him at pages 408, 410, 414, 415, 416, 417, 419.

See the principal case cited in Jones v. Jones, 92 Va. 595, 24 S. E. Rep. 255, but distinguished in Bailey v. Poindexter, 14 Gratt. 189. And see *foot-note* to this last case as to the effect of a provision in a will making the emancipation of a slave dependent on his own election.

Same—Increase.—In Wood v. Humphreys, 12 Gratt. 334, JUDGE MONCURE, delivering the opinion of the court, said: "It was decided in Maria v. Surbaugh, 2 Rand. 228, that where a female slave is entitled to freedom *in futuro*, her increase born while she continues in servitude are slaves. That decision has not been universally approved. But it has been recognized and confirmed in many subsequent cases. Isaac v. West's Ex'or, 6 Rand. 652; Erskine v. Henry, 9 Leigh 188; Crawford v. Moses, 10 *Id.* 277; Anderson's Ex'ors v. Anderson, 11 *Id.* 616; Henry v. Bradford, 1 Rob. R. 53; Ellis v. Jenny, 2 *Id.* 597; *Osborne v. Taylor's Adm'r, supra* 117. The principle of that case may now therefore be regarded as the settled law of the land, except so far as it has been changed or modified by the Code, which does not apply to this case. The principle is founded on the rules and policy of the law, and not on the presumed intention of the testator, or other person from whom the right to future freedom is derived. * * * * The court, however, has given effect to this presumed intention wherever any words have been found in the deed or will which could fairly be construed to express it. In Isaac v. West's Ex'or, 6 Rand. 652, the deed was construed as conferring on the slaves a present right to freedom, reserving to the grantor a right to their services during his life, as a condition of the emancipation; and it was, therefore, held that a child born of one of the emancipated females in the interval between the execution of the deed and the death of the grantor, was free from its birth. In Elder v. Elder's Ex'or, 4 Leigh 252; Erskine v. Henry, 9 *Id.* 188; Anderson's Ex'ors v. Anderson, 11 *Id.* 616; Lucy v. Cheminant's Adm'rs, 2 Gratt. 36; and *Osborne v. Taylor's Adm'r, supra* 117, the word 'all,' and other words of like comprehensive import, used in a will in reference to slaves to whom freedom *in futuro* was given, were construed to embrace the increase of the females born between the death of the testator and the period when the slaves were to be free."

‡The act says: "When slaves are emancipated by will, the net proceeds of the aggregate of their hires and profits, with which the personal representative of the testator is chargeable, or so much thereof as may not be required for the payment of debts, shall, unless inconsistent with the manifest intention of the testator, belong to the persons so emancipated, and be apportioned among them as a court of equity having cognizance of the case may deem just."

there are none. By the second, third and fourth clauses, he directs certain of his slaves to be liberated, or at their option to remain in the state and choose masters. The sixth, seventh and eighth clauses of the will are as follows:

Sixthly. The residue of my property, both real and personal, lands, lots and improvements, money, goods and chattels, rights, credits, interests and effects of every description whatsoever and wheresoever being, as well such as I may hereafter acquire, as those which I now possess, with the positive exception of my slaves of every description, I devise and bequeath unto Holden Rhodes and Archer L. Wooldridge, of the county of Chesterfield, and the survivor of them, and the heirs and assigns of such survivor forever, upon the following trust and confidence, nevertheless, that the said trustees, and the survivor of them, and heirs and assigns of such survivor, shall hold all my said property during the coverture of Mrs. Caroline M. R. Johnson, by her husband, Dr. Edward Johnson, in trust for her sole, separate and exclusive use, benefit and advantage, free and exempt from the control, debts, contracts and incumbrances of her said husband; and I request my said trustees to permit all my property aforesaid to be and remain in the possession of the said Mrs. Caroline M. R. Johnson, during her coverture aforesaid, subject, together with all the rents, hires, issues and profits thereof, solely and entirely to her management, control and disposition at all times, unless at any time it shall be necessary to take the same into their possession, in order to prevent
119 *or exclude the control or interference of her said husband; in which event they are hereby authorized to take the same into their possession and under their management, paying and applying the rents, hires, issues and profits to said Mrs. C. M. R. Johnson, or as she shall direct. It is further my will and desire that the said C. M. R. Johnson, during her coverture aforesaid, have power, and she is hereby empowered to sell, exchange, lease, mortgage, encumber and dispose of all and every portion of my property aforesaid; and for that purpose the said trustees and the survivor of them, and the heirs and assigns of such survivor, are hereby authorized and directed, whenever they shall be thereto requested by the said Caroline M. R. Johnson, by any writing under her hand attested by two or more credible witnesses, to make and execute all such deeds as shall be necessary and proper to give due effect to the power aforesaid. And the lands, money and other effects received or accruing from such sale, exchange or other disposition, shall be held, conveyed and assured to the same trusts, and with the same powers, charges, conditions and exemptions as is herein declared in relation to the property of which I shall die possessed. And for greater certainty, I declare it to be my will and desire that the said Dr. Edward Johnson shall have no right, authority or control over any portion of the property herein conveyed to the said trustees, or over any portion of the proceeds which may arise from any sale or other disposition of the property herein conveyed to the said trustees, or over any portion of the rents, hires, issues and profits of such property and proceeds, but that the same, and every part thereof, shall belong to and be solely and exclusively to the use of Mrs. Caroline M. R. Johnson, during her coverture aforesaid. It is further my will and desire that the said Caroline M. R. Johnson be empowered during her said coverture, and she is
120 hereby *empowered by any declaration in writing subscribed by her, and attested by two or more credible witnesses in the nature of her last will and testament, to devise, bequeath, limit, appoint and declare the trusts of all and every portion of the property aforesaid, the proceeds and rents, hires, issues and profits aforesaid, remaining at her death, in such manner, and to and amongst such persons as she shall think proper, provided no child or children of the said Caroline M. R. Johnson be selected, to whom and their descendants no portion of my property, or that which I bequeath to Mrs. Caroline M. R. Johnson, is ever directly or indirectly to go. And the said trustees, and the survivor of them, and the heirs and assigns of such survivor, are hereby requested to do all acts, and execute all such deeds as may be necessary and proper to give effect to such declaration and appointment. In the event of the said Caroline M. R. Johnson's dying in the lifetime of her said husband, without having made such disposition and appointment as aforesaid, then it is my will and desire that all the property, proceeds, rents, hires, issues and profits aforesaid, remaining undisposed of at her death, shall be divided into four equal parts, one of which I hereby give, devise and bequeath to Holden Rhodes and Archer L. Wooldridge of Chesterfield county; one-fourth to Miss Malissa and Virginia Harris, daughters of Dr. Francis Harris of Powhatan county; one-fourth to Miss Maria Branch of Manchester; to them, their heirs and assigns forever; and one-fourth to be divided, as may seem best to my executors, amongst my negroes hereafter mentioned. The fourth given to Miss Branch, I hereby empower my executors to place beyond the control or management of her brother, Christopher Branch.

Seventhly. I devise and bequeath to the aforesaid Holden Rhodes and Archer L. Wooldridge, and the survivor of them, and the heirs and assigns of such
121 *survivor, two slaves named Morris and Ellen, in trust, and with the same conditions and restrictions annexed as is required in the management and disposition of the property devised in item the sixth, with this difference, nevertheless, that Mrs. Caroline M. R. Johnson be allowed to make any disposition of them she pleases, either during her coverture or at her death.

Eighthly. The whole of my negroes not before disposed of or devised, I now devise

and bequeath to Holden Rhodes and Archer L. Wooldridge, and the survivor of them, and the heirs and assigns of such survivor, in trust, for the benefit and use of Mrs. Caroline M. R. Johnson, during her life, with the same restrictions and conditions annexed, as are required in the management and disposition of the property devised in the sixth item in this instrument. At the death of Mrs. Caroline M. R. Johnson, it is my further will and direction that the slaves embraced in this item be emancipated, and one-fourth of the property which Mrs. Johnson may not dispose of at her death, as required in item the sixth, be distributed amongst them as may be deemed most equitable by my executors. But should a part or the whole of the negroes prefer remaining in the state, they can do so by choosing masters to serve during the life of the person or persons chosen, at the death of whom they shall have the option of freedom or slavery, by making a second choice.

The above will and testament may be deficient in technical nicety: my intentions are nevertheless obvious; those I wish to be the sole rule in its interpretation and construction. I have been obliged to mention my negroes in families or collectively, because being unacquainted with the names of some of them, I am unable to particularize.

I hereby constitute and appoint Holden Rhodes and Archer L. Wooldridge, of
122 the county of Chesterfield, *executors to this my last will and testament. In witness whereof, I hereunto set my hand and affix my seal this third day of April one thousand eight hundred and thirty.

The nominated executors and trustees refusing to act, the estate was committed for administration to Benjamin Watkins, sheriff of Powhatan county; and Higgison Hancock was substituted as trustee, and acted as such until 1836, when William M. Watkins was appointed in his place. In 1839 the administration was committed to Hancock.

Mrs. Caroline M. R. Johnson died in 1849, having survived her husband who died in 1841. She made a will by which she disposed of the estate of Thomas O. Taylor to Philip T. Hancock, an infant son of Higgison Hancock, provided neither he nor his heirs or executors should sue her heirs or executors: And a subject of controversy in this suit was the validity of that appointment. Another question was as to the liability of Mrs. Johnson's estate for certain lands and bonds disposed of by her in her lifetime; but neither of these questions was considered by the court, and need not be further noticed.

After the death of Mrs. Johnson, Hancock the administrator de bonis non with the will annexed of Thomas O. Taylor, in November 1849 filed his bill in the Circuit court of Powhatan county, for the purpose of having a construction of the will of Taylor, and directions as to his duties. He set out the provisions of the will, the will of Mrs. Johnson in execution of the power vested in her by the sixth clause of the will of Thomas O. Taylor, a statement of the property of Taylor at his death, and the sale of some of it by Mrs. Johnson. He stated that the slaves directly emancipated by the will of Taylor had been set free before his qualification: That those emancipated at the death of Mrs. Johnson
123 were under his care, hired *out for that year; and he submitted them and their rights, and his own duties in regard to them, to the decision of the court, seeking only to be protected against future complaint from any quarter: And he prayed to be advised what disposition to make of their hires for that year, and what to do with them thereafter. He did not know that there were any debts against the estate of Taylor, but could not admit that there were none. And he was advised that there were questions arising under the will of his testator, which should be settled by the judgment of the court: And he proceeds to state them, and among others, the question as to the effect of the will upon the slaves of the testator.

He further stated that Taylor died unmarried; that he was moreover the only child of his father, who had come to this country many years before, as was supposed, from Great Britain; but that the plaintiff was wholly ignorant as to who were the heirs and next of kin of his testator. And making Benjamin Watkins the former representative of Thomas O. Taylor, and William M. Watkins the trustee, the heirs of Mrs. Johnson, and her devisees under her will disposing of her own property, the legatees under Taylor's will, and the slaves by name, parties defendants, he prayed that the matter of the bill might be fully settled, and such decrees made therein as should be agreeable to equity, and the nature of the case should require.

By an amended bill the next of kin of Thomas O. Taylor on the part of his mother were made parties.

On the motion of the plaintiff, Richard W. Flournoy was appointed guardian ad litem of the slaves, to defend them in this suit; and he filed an answer submitting their rights to the protection of the courts. And the court made an order directing the plaintiff to collect the hires of the slave for that year; and to hire them out from year to year until the further order of the court.

124 *In 1851 many of the next of kin (for they were very numerous) answered the bill. They contested the validity of the appointment made by Mrs. Johnson; and they insisted that the slaves left to Mrs. Johnson for life were not emancipated by the will; there being, as they insisted, an illegal condition attached to the bequest of freedom which avoided it: And they insisted further, that even if the slaves who were alive at the death of Taylor were emancipated, the provision in the will did not include those slaves who were born after the death of Taylor and during the lifetime of Mrs. Johnson.

At the same term of the court the cause came on to be heard, when the court held that the slaves bequeathed to Mrs. Johnson for life became entitled to their freedom at her death; and that the provision authorizing them to choose masters was void; and decreed accordingly. And the plaintiff was directed to hire them out until the further order of the court.

In December 1851 the cause came on to be again heard, when the court declared that according to the true construction of the will of Thomas O. Taylor, Mrs. Johnson had power during her coverture to dispose of the lands of the testator by will; and that such disposition was not invalidated by her becoming discovert; and that the appointment in favor of Philip T. Hancock was valid. And the plaintiff was directed to hire out the slaves for four months from the 1st of January then next.

In the progress of the cause a commissioner made reports as to the hires of the slaves since they had been under the control of the court. These reports showed that of these hires there was deposited in bank by the plaintiff on the 31st of December 1851, seven hundred dollars, produced from the hires of that year; and that there was deposited in March 1852 the further sum of four hundred dollars; and there was in his hands on the 31st of May of
125 that year a further *sum of two hundred and nineteen dollars and seventy-two cents. A second report showed a further sum of one hundred and seventy-three dollars and two cents in the plaintiff's hands on the 31st of December 1852.

The cause came on to be finally heard in January 1853, when it appearing that the plaintiff's powers as administrator, &c., of Taylor had been revoked, and that the estate had been committed to Henry Gordon, sheriff of Powhatan, the court made a decree directing the plaintiff to deliver to Gordon the negroes in his hands belonging to the testator's estate; and that Gordon do cause them to be registered as free in the court of Powhatan county, and to be furnished with certificates thereof. And the said Gordon was authorized to divide the money deposited in the bank equally among the said negroes; and that the amount in the hands of the plaintiff, after defraying some charges mentioned in the decree, should be paid to those of the negroes who had earned it: such payments to be made when they respectively received their certificates of registry. Whereupon the next of kin of Thomas O. Taylor obtained an appeal to this court.

Giles and C. Robinson, for the appellants.
Day, for Johnson's devisees.
Davis, Rhodes and Patton, for the administrator and the slaves.

SAMUELS, J. The appellants' counsel in the argument here insisted, that the slaves were improperly made parties in this case (referring to the case of McCandlish v. Edloe, 3 Gratt. 330), and that a decree of emancipation can be rendered only in a suit brought in forma pauperis for the recovery of freedom; and that, for these reasons, the Circuit court erred in deciding the question as to the condition of the slaves. In answer it may be said that
126 Hancock having the alleged *slaves in his possession, and being unwilling to decide the conflicting claims between them and Taylor's next of kin, might be allowed to file a bill in equity referring the subject to the adjudication of the court, and thereby relieve himself from the responsibility of making a decision. A bill of this nature, in its functions, is a bill of interpleader; the adverse claimants become actors; each, asserting a claim, is, in effect, a plaintiff. A claim to freedom, if merely equitable, has long since been held a proper subject for the cognizance of a court of equity. A mere question of property between adverse claimants could be passed on by a court in a case like this. A right to freedom claimed on one side, and a conflicting right of property claimed on the other, must stand on the same ground; and this especially where if either claim had been asserted in a separate suit, it would have been proper for the cognizance of the court. I am of opinion the slaves should be regarded as plaintiffs asserting their claim to freedom. The defect of the bill is merely in form; the substance is sufficient, as it brings before the court the adverse claims of the parties.

It may be further said that this suit was pending on and before the 1st July 1850, when the Code of 1849 took effect, and the answer of the appellants was filed after that day. It is therein provided, ch. 216, § 2, p. 800, that subsequent proceedings in pending suits shall conform as far as practicable to the provisions of that act; and in ch. 171, § 19, p. 648, 649, it is enacted that when a bill shows on its face proper matter for the jurisdiction of the court, no exception for want of such jurisdiction shall be allowed, unless it be taken by plea in abatement; and the plea shall not be received after the defendant has demurred, pleaded in bar or answered the bill. The bill in this case shows matter proper for the jurisdiction of the court, in this, that Hancock held slaves who claimed their
127 freedom *under an equitable title, and who are claimed as property by Taylor's next of kin, under an equitable title. Hancock had the right to invoke the aid of a court of equity to relieve him from the responsibility of making a decision upon these conflicting claims. The appellants have been content to assert their rights in the suit brought by Hancock, making no objection to the jurisdiction of the court or to the competency of any party or parties; and they should not be permitted to make such objection for the first time in this court.

If however it be conceded that the slaves were not necessary or proper parties, then the case must be considered as if they had been omitted as such. If they had been thus omitted, the omission would not have

precluded the court from decreeing their emancipation in a proper case in which the persons claiming them were parties. This was done in Pleasants v. Pleasants, 2 Call 270 (Tate's edition). The bill in that case was filed against the claimants, but omitted to make the slaves parties; their emancipation was nevertheless decreed. In Elder v. Elder's ex'or, 4 Leigh 252, the bill was filed by a legatee against the executor, omitting the slaves as parties, yet the court decreed the freedom of the slaves.

The objection by the appellants, next in order is, that the slaves, or some of them, are not emancipated by Taylor's will; that even if such of them as were in being at his death were emancipated from and after Mrs. Johnson's death, yet that such of them as were born after Taylor's death and before Mrs. Johnson's death, being the issue of mothers in the condition of slavery, are themselves slaves.

The first branch of this objection is insisted on, because, as is alleged, the slaves were left by the will in the condition of slavery at the death of Mrs. Johnson, with the capacity to become free upon their election to become so; and until the elec-
128 tion shall be made, *they remain in the condition of slavery: And we are referred to the case of Elder v. Elder's ex'or, above cited. This part of the objection is founded on a misapprehension of the will. The counsel construe the will as directing that the slaves shall remain such until they elect to become free; whereas the will, in a substantive clause, distinctly manumits them; and afterwards, in another clause, gives them the election to remain in the state of Virginia, in a condition intermediate between slavery and freedom. The latter alternative is against the settled policy of the law, and has no effect. Forward's adm'r v. Thamer, 9 Gratt. 537. The bequest of freedom is in no wise impaired by the impracticable and repugnant alternative offered to the choice of the slaves. In regard to the issue of the female slaves born after the death of Taylor and before the death of Mrs. Johnson, it is insisted that they are slaves; that they remain in the condition of their mothers at the time of their several births: and the case of Maria v. Surbaugh, 2 Rand. 228, is referred to in support of this branch of the objection. If we concede to the case just cited all the effect which can be claimed for it in cases in which it applies, yet the rule thereby established does not govern a case like this. In our case the testator bequeaths his slaves by the general description, "the whole of my negroes not before disposed of or devised," in trust for Mrs. Johnson's benefit during her life; and declares, that "at the death of Mrs. Johnson, it is my further will and direction that the slaves embraced in this item be emancipated." Such a general description has been frequently held to embrace not only the parent stock of slaves in being at the time of the testator's death, but all increase thereafter born, but born before the emancipation was fully perfected. In Pleasants v. Pleasants, 2 Call 270, (Tate's edition,) the testator said in his will, "my further
129 desire is, respecting my poor *slaves, all of them as I shall die possessed with shall be free," &c. These terms were held to embrace all the slaves whenever born, and to emancipate them, as they arrived at the age fixed by the testator for the purpose. In Elder v. Elder's ex'or, 4 Leigh 252, the terms "the remaining part of my negroes," were held to include the increase of the slaves born after the death of the testator but before the time for perfecting the emancipation directed by the will. In Erskine v. Henry, 9 Leigh 188, the testator gave his slaves to a legatee for life, (as in our case,) and at her death directed "all his negroes to be free and at full liberty." These terms were held to include the increase of the slaves whilst they were in the hands of the life tenant. In Anderson's ex'ors v. Anderson, 11 Leigh 616, the testator directed his slaves to be retained in the condition of slavery for a time, but at certain periods, or on certain events, provided for their emancipation, describing them as "all" his negroes. It was held that the issue born of a mother before the time for her emancipation were emancipated by the will. In Binford's adm'r v. Robin, 1 Gratt. 327, the terms used by the testatrix, "that all my negroes be liberated," were held to include not only slaves in possession, but also a reversionary interest in slaves depending upon a life estate; and this, although the life estate did not expire until after the death of the testatrix, and the portion falling to her estate was then for the first time set apart upon partition with other parties interested. In Lucy v. Cheminant's adm'r, 2 Gratt. 36, the testatrix bequeathed "all the rest of her slaves" to two for their lives, and to the survivor for life; and on the death of the survivor directed that "said slaves be set free." It was held that all the slaves, including those born during the life estate, were emancipated. These cases establish the rule which must govern this case; and we must hold that all the slaves in
130 being at Mrs. *Johnson's death, belonging to Taylor's estate, are emancipated by his will.

It is said by the appellants' counsel, that although all the slaves in being at the time of Mrs. Johnson's death be emancipated from that time, yet they were held in slavery and hired out for some time after their right to freedom accrued; and that the appellants, the next of kin, are entitled to the hires as part of Taylor's estate not disposed of; there being no creditor to claim them or any part of them. To sustain this position we are referred to Pleasants v. Pleasants, 2 Call 270; Paup's adm'r v. Mingo, 4 Leigh 163; Peter v. Hargrave, 5 Gratt. 12. These cases settle the law as it formerly stood, against the right of freedmen to recover hires of a person holding them in slavery. The judges of this court, from time to time, whilst acquiescing in the de-

cisions referred to, and admitting the expediency and policy on which they were founded, have nevertheless admitted that it would be but natural justice to allow hires to freemen wrongfully held in slavery. Recognizing the cases cited as furnishing the rule in any case in which they apply, it must still be observed that the case before us presents features not found in any other case. In each one of the cases cited the hires claimed had accrued whilst the freemen were detained in slavery by the claimant, either in his own right or in autre droit. In our case the hires did not accrue whilst the slaves were held by the administrator, representing the estate. On the contrary, those hires accrued whilst the slaves themselves were under the control of the court, where they had been placed by the administrator. That court took upon itself the duty of executing the trust theretofore confided to the administrator; and although the administrator was directed by the court to perform the duty of hiring out the slaves, still, in obeying the order of the court, he was acting merely as
131 the officer of the court; his *official authority or responsibility as administrator was in no wise involved in the hiring of the slaves; the court had assumed his place and authority. In the progress of the suit it was ascertained that no cause had existed which should have prevented the administrator from setting the slaves at liberty upon the death of Mrs. Johnson. He should therefore have done so, and the freedmen would have enjoyed the fruits of their own labor. On general principles of equity it was the duty of the court, as far as practicable, to place every one in the condition in which he was intended to stand according to the true meaning of the will. Although the time for an exact execution of Taylor's will had passed, yet no reason can be shown why it should not be executed as nearly as practicable. To give the freedmen their hires accrued after they should have enjoyed their freedom will be clearly within the testator's meaning. By giving them freedom he gave the right to enjoy the fruits of their own labor. The court, by giving them the hires under its control will, to that extent, give effect to the will. No considerations of inexpediency or impolicy intervene to prevent this disposition of the fund. The next of kin have never had possession of the slaves, and have had no reason to rely upon the hires as a source of revenue. They have incurred no expense in rearing and supporting them. The difficulty of settling an account of expenses on the part of the owners or claimants and of hires on the part of the slaves does not exist. In fine, none of the reasons which led to the decisions in the cases cited, exist in this case.

If necessary for the decision of this case, it might be a question how far the assent to the legacy for life of the slaves to Mrs. Johnson enured to the benefit of the slaves who were to be manumitted at her death; whether the assent to the legacy for life should be regarded as an assent to
132 the ulterior disposition of the *property. See Bishop's ex'or v. Bishop, 2 Leigh 484; Lynch v. Thomas, 3 Leigh 682; Nicholas v. Burruss, 4 Leigh 289. In the opinion of a majority of the court, it is not necessary for the decision of this case to pass on the question. I content myself, therefore, with a reference to these cases on the subject.

Regarding the case as standing upon the law existing at the date of Taylor's will, I should have no hesitation in deciding that the freedmen, under the circumstances of this case, are entitled to their own hires. The law since that time, however, has been so changed as to leave less room for doubt. The Code of 1849, ch. 106, § 8, p. 465, by giving a new capacity to freedmen improperly held as slaves under the circumstances of this case, has removed perhaps the only reason not yet considered, for the decisions heretofore made. In Pleasants v. Pleasants, before cited, at the date of the will and at the death of the testator, manumission was not permitted by law: yet the testator, anticipating a change in the law, gave directions for the emancipation of his slaves when the law should permit it to be done. When, therefore, the law subsequently permitted freedom to be given by the master and accepted by the slave, it was held that the slaves were free. In our case, the will gives freedom, which contains in itself the right to enjoy the fruits of their own labor. The capacity of the freedman is a subject within the scope of legislative authority; and when that capacity is enlarged by subsequent laws, so as to give them a right to their own hires accrued whilst improperly held in servitude, we should do no more than was done in Pleasants v. Pleasants, if we carry the law into effect. In that case the incapacity prevented the slaves from receiving freedom at all; yet when it was removed, the grant became effectual. In our case, as is said, the incapacity was confined to the claim of profits only; this incapacity
133 *being removed, no reason exists to withhold the hires from the freedmen against the intention of the testator Taylor. I think the Circuit court did right in decreeing the freedom of the slaves, and in giving them their own hires.

I am of opinion, moreover, that the court should not have decided the question of succession to the residue of Taylor's estate, (other than slaves,) without having before it all parties who are interested in the question. That residue is claimed on behalf of Mrs. Johnson's estate, and it has, in part, been decreed to the estate; it is claimed by the appellants, the next of kin; and it appears in the record, that Philip T. Hancock has such interest, or color of interest, as to make him a necessary party; a part of the real estate having been decreed to him, although he is no party to the suit. The residuary legatees named at the foot of the sixth clause of Taylor's will, including the emancipated slaves, have also such in-

terest or color of interest in the residue above mentioned, as to make it proper they should be parties to any proceeding for the final adjudication of the conflicting claims thereto.

Thus I am of opinion to affirm so much of the decree as gives freedom to the slaves, and gives them their hires; and to reverse so much of the decree as disposes of any part of Taylor's estate, real or personal, (other than slaves,) with costs to the appellants against Mrs. Johnson's estate; and to remand the cause, with directions to allow the defendants or any of them to file a cross bill, if they shall be advised to do so, to bring more distinctly before the court the subject and questions in controversy, and to cause Philip T. Hancock to be made a party.

LEE, J., concurred in the opinion of Samuels, J., except as to the hires of the negroes. He thought that this case was not to be distinguished from the cases which had been decided in this court. He
134 did *not think that the act of 1849 applied to the case: Doubted if that act applied to wills made before its passage; but if it could do so in any case, it could not in this, in which the bill was filed before the act was passed.

DANIEL, J., concurred in the decree to be rendered, except as to the hires of the negroes before the act of 1849.

ALLEN and MONCURE, Js., concurred in the opinion of Samuels, J.

The decree was as follows:

The court is of opinion there is no error in so much of the decree as gives effect to the emancipation of the slaves, as provided for in the will of Thomas O. Taylor, nor in so much of the decree as gives to the emancipated slaves the hires accrued after the death of Mrs. Johnson. It is therefore adjudged and ordered that to that extent the decree be affirmed. But the court is further of opinion that the Circuit court erred in deciding upon the rights of parties to the residue of Taylor's estate, real and personal, (other than slaves,) without having Philip T. Hancock as a party before the court, he having such interest, real or apparent, therein as to make him a necessary party. It is therefore adjudged, &c. that so much of the decree as is declared to be erroneous be reversed and annulled, (with costs to the appellants against Mrs. Johnson's estate,) and cause remanded, with directions to cause Philip T. Hancock to be made a party, and to give leave to the defendants, or any of them, to file a cross bill, if they shall be advised to do so, for the purpose of bringing more distinctly before the court the nature and extent of the subjects in controversy, and for further proceedings.

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135 *Moore & als. v. Brooks.

January Term, 1855, Richmond.

Wills—Construction—Case at Bar.*—Testator gives his estate to his wife during her life; and at her death it is to be equally divided amongst all his children. And the shares of his two daughters, M and B, to be held by them during their natural lives and no longer, and then equally divided between their heirs lawfully begotten. And at his wife's death he directs his lands to be sold and the proceeds divided as aforesaid. HELD:

Same—Same—Words of Limitation.—The words "heirs lawfully to be begotten" are words of limitation; and M and B took the whole interest in their shares of the estate.

Josiah Robertson died in 1810, having made his will, which was duly admitted to probat. By his will he gave to his wife Catharine Robinson, the whole of his estate, for her life or widowhood; she paying his debts. The second clause of the will is as follows:

"At the death or intermarriage of my dear wife, it is my will, that my then remaining estate be subject to equal distribution between all my children; and it is my express desire, that the parts of my estate which shall go to my two daughters Mary Murphy and Caroline Brooks, shall be held by them during their natural lives, and no longer, and then equally divided between their heirs lawfully begotten."

By a subsequent clause he directs that on the death or marriage of his widow, the property shall be sold, and the proceeds be equally divided among his children.

Mrs. Robinson seems to have married again about the year 1817, when the property was divided among the children; they all being then of age and the daughters widows, and preferring to take it in kind. Mrs. Brooks received on that division a small tract of land and a negro woman, who afterwards had several children.

136 *Caroline Brooks died in 1850, leaving one son and four daughters, who were married. She left a will, by which, after directing the payment of her debts, she left the balance of her estate to her five children; directing that the shares of the daughters should be secured against the control of their husbands and their creditors. Her son William H. Brooks qualified as administrator with the will annexed.

William H. Brooks being about to sell some of the property, all of which was derived from the estate of Josiah Robertson, for the payment of the debts of his testatrix, the daughters and their husbands filed

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*Wills—Construction.—In the principal case the testator gave his estate to his wife during her life, and at her death it is to be equally divided amongst all of his children and the shares of his two daughters were to be held by them during their natural lives and no longer, and then equally to be divided between their heirs lawfully begotten. It was held that the words "heirs lawfully to be begotten" were words of limitation and the daughters took the whole interest in their shares of the estate. For the above proposition the principal case is cited and approved in Tinsley v. Jones, 13 Gratt. 299, and *note*; Hall v. Smith, 25 Gratt. 73, and *note*; Walker v. Lewis, 90 Va. 581, 19 S. E. Rep. 258; Whelan v. Reilly, 5 W. Va. 365; Glinn v. Glinn, 1 Va. Dec. 458; Milhollen v. Rice, 13 W. Va. 531; Chipps v. Hall, 23 W. Va. 518; 519. See also, *foot-note* to Callis v. Kemp, 11 Gratt. 78.

a bill to enjoin the sale, upon the ground that Caroline Brooks their mother took but a life estate in the property, under the will of her father; and that her children were entitled to the fee. The injunction was granted, but was afterwards dissolved. Whereupon they applied to this court for an appeal, which was allowed.

Stanard and Bouldin, for the appellants:

The sole question in this case is, whether or not the rule in Shelley's Case is applicable to the bequest in favor of Mrs. Brooks in the will of her father Josiah Robinson. This rule is now abolished in Virginia. It is founded on feudal reasons having no existence in this country; and it has been sustained upon legal partialities and presumptions, repudiated by us as early as the period of our independence. Here the law has no partiality for the eldest son, but all the children are equally its favorites; and equality is the established rule of policy and justice.

This case has been decided in the court below, upon the strictest interpretation of the rule contended for in England, without regard to the changes in our institutions and in the policy of our laws. But even in England, and in relation to real estate, this strictness has not been maintained
137 without a severe struggle, a *struggle which is still continued. There this contest has been going on ever since the announcement of the rule in Shelley's Case. By one party almost any words are held to take a case out of the operation of the rule, whilst almost none will effect this object in the estimation of others. Thus the addition of the word heirs to heirs, the words for the life of the first taker "and no longer or not otherwise;" to one for life and to the heirs of his body "equally to be divided," have been the objects of controversy, and upon which the greatest judges of England have differed in opinion.

For some time before the decision of Jesson v. Wright in the house of lords, 2 Bligh's Par. Cas. 1, the weight of the decisions was against the strict application of the rule. That decision is supposed by Jarman and others to have overthrown the long line of cases opposed to it, among them, Doe v. Laming, 2 Burr. R. 1100, and Doe v. Goff, 11 East's R. 668. But Sir Edward Sugden, who argued the case at great length, did not question the authority of these cases, but attempted to distinguish it from them. Jesson v. Wright, in the house of lords, is in fact the decision of Lords Eldon and Redesdale, who, though they came to the same conclusion, arrived at it by different processes of reasoning founded on different principles; and from that decision we appeal to the same case decided by Lord Ellenborough and Justice Bayley in the King's bench, 5 Maule & Selw. 95.

The case of Jesson v. Wright has not settled the rule in England, as is admitted by Jarman, vol. 2, p. 216; and he refers to Wilcox v. Bellaers. This case occurred soon after the decision of Jesson v. Wright; and both Sir Thomas Plumer and Lord Lyndhurst thought the rule declared in Jesson v. Wright so doubtful that they would not compel a purchaser to take a title dependent upon it. 11 Cond. Eng. Ch. R. 266.

That case was again doubted in Right
138 v. Creber, 5 Barn. & Cress. *866, and in North v. Martin, 6 Sim. R. 266; and Hayes, p. 47, 7 Law. Libr. a great advocate of the rule declared in that case, admits that the question is still unsettled.

But Jesson v. Wright was a case of real estate; whilst in our case the whole subject is personal; for the land is directed to be sold at the death of testator's wife, and the proceeds of the sale to be divided: And this rule has not been applied to personal estate. Jarm. Powell on Devi. 638, 22 Law Libr. Indeed Roper in his work on Legacies, p. 1523-4-5, lays it down as a law of property, that the rule in Shelley's Case does not apply to such cases.

But if this feudal dogma is to be applied in England, this is not the case in Virginia under our decisions. The cases here have generally arisen upon limitations over; but there are a few which brought up the question directly. One of the first of these is Bradley v. Mosby, 3 Call 44. This is like Archer's Case, 1 Coke's R. 66; and it was held that the first taker took but a life estate, and that the words "heirs of her body" were words of purchase. The other cases directly on the rule in Shelley's Case, are Warners v. Mason & wife, 5 Munf. 242; Self v. Tune, 6 Munf. 470, which is a direct authority for us in this case; Tidball v. Lupton, 1 Rand. 194; and Pryor v. Duncan, 6 Gratt. 27; in which last case it was held that the manifest intention of the testator should take the cause out of the operation of the rule. We also refer to McNair's adm'r v. Hawkins, 4 Bibb's R. 390; Prescott v. Prescott's heirs, 10 B. Monr. R. 56; Shelton v. Henderson & wife, 9 Gill's R. 432; Carlton v. Price, 10 Georgia R. 495; and McClure v. Young, 3 Rich. Equ. R. 559.

Hughes, for the appellee, submitted a printed argument:

A life estate in the lands, or free-
139 hold, is expressly *given to Mrs. Brooks, and in the same will the estate is limited immediately to her heirs lawfully begotten. The appellee insists that this devise is subject to the well known rule in Shelley's Case, and in effect gave to Caroline Brooks a fee simple title to the land. The rule itself, it is presumed, will not be questioned, but only its application to the devise in the present case. Neither is it a question, as it seems to be supposed, whether the rule will yield or bend to the intention of the testator. The rule is stern and inflexible, and unyielding even to the strongest and most obvious intention, if the case is within its operation. Hayes' Essay on the Principles of Expounding Dispositions of Real Estate, p. 96, 21 Law Libr. "It can never be a question (says the author),

whether the rule is to be applied or not. We might as well ask whether the testator intended to contravene the rule against perpetuities. It will no more yield to individual intention than any other fundamental law of property. The rule admits of no exception." Same work, p. 48; 2 Jarm. on Wills 241-2; 4 Kent's Com. 226, referring to Hargrave's Law Tracts 575-7; Thomas' Coke 376 b, note P; Jones v. Morgan, 1 Bro. C. R. 206; Fearne on Rem. 188-9. But whether a given case is within the influence of the rule has not always been free from difficulty, nor have the decisions upon the subject been uniform. But it seems to be now well settled that the first thing to be ascertained is, in what sense did the testator use the words employed in the devise? Did he use them in their usual and proper acceptation, or in some other sense? And if in some other, in what other sense did he so use them? When the testator's meaning is ascertained, it is at once seen whether the rule applies. As the difficulty in every case must exist at this point, it can only be removed by applying the ordinary rules of construction, which ought readily to lead to a proper solution. In the case
140 under consideration *the only question must be, in what sense did Josiah Robertson use the word "heirs" in the devise to Caroline Brooks? Did he use the word in its proper and legal signification, denoting thereby those who would succeed to her estate in case of intestacy, and making her the stock or terminus by whom the succession should be regulated? Or did he mean particular individuals, or class of individuals? And if so, who were meant, or what class did he mean? If he meant the former, the rule in Shelley's Case applies irrespective of any intention he might have had to the contrary. If he meant the latter, the rule has nothing to do with the case.

In applying the rules of construction to ascertain the sense in which the testator used the word "heirs," the first rule to be observed is, that he is presumed to have used the word in its proper and well defined acceptation, denoting thereby the whole line of the legitimate heirs of Caroline Brooks, to the exclusion of none; and this presumption is quite sufficient, unless it plainly appears in the context that the word was used in a restricted sense; which must be so obvious as to preclude all claim to its use in its proper and technical sense. To repel this presumption the meaning must not be vague and conjectural, but clear and unequivocal. If authority is wanted in support of this familiar proposition, we may refer to the opinions of Lords Eldon and Redesdale in Jesson v. Wright, 2 Bligh 1; 2 Jarm. on Wills 280; Hayes' Essay above cited, Prop. xv. At page 100, Mr. Hayes remarks, "Every sound principle demands that the context should not merely show that heirs of the body (the words he was considering) are employed in a sense different from their legal and proper sense, but distinctly indicate in what other sense they are employed." Apply this test to the will of Josiah Robertson, and there will be found no language in the context
141 sufficient *to repel the presumption that he used the word "heirs" in its proper sense; still less is there any thing to show in what other sense he did use it. If he did not mean that the estate should go to all the heirs of Caroline Brooks at her death as her own estate would go under the statute of descents, we are left wholly to conjecture as to his meaning. There is nothing to show that he alluded to particular individuals, or to any class of them, and in the absence of a clear indication in this particular, the rule of construction forces the conclusion that he used the word "heirs" in its proper and technical sense —that he was pointing to no particular individuals; but regarding her as ancestor, stock or terminus to regulate the succession, he intended the estate at her death to pass to all who might be heirs to her as such stock or terminus, provided only they be legitimate. When we look to what might have been the consequences of a different interpretation, the mind becomes satisfied of the testator's meaning. Suppose we regard the testator as meaning children by the word "heirs," they must be such children as should be living at her death, and at that time coming under the description of "heirs." This would not embrace grand children; and therefore, if one or more of her children had died in her lifetime, leaving children, such must necessarily be excluded. Nay, if all her children had died in her lifetime leaving children, none of them could have taken. This is obvious when it is observed that if the children of Caroline Brooks take as purchasers, they take remainders under the will of Josiah Robertson contingent upon their being the "heirs" of Caroline Brooks, that is, of their being alive at her death, and the persons designated by law as her heirs. The testator could not have intended to use the word "heirs" in a sense which might lead to such consequences. Attach any other meaning to the word "heirs" in this
142 *will, except its appropriate meaning, and we encounter similar consequences.

The only expressions in the will which can be appealed to as affording any evidence of an intention of the testator to use the word "heirs" in a sense different from its proper and technical sense, are the words "during her natural life and no longer," and the words "equally divided," &c. The words "during her natural life and no longer," serve only to mark with more emphasis that the testator intended but a life estate to the first taker. It is conceded that but a life estate was intended to be given to Caroline Brooks, and it is only in cases where but a life estate is so given that the rule in Shelley's Case applies. The words "no longer" have even less force than the words "non aliter" "only," "without impeachment of waste," &c., if, indeed, all such expressions had not been discarded and overruled in the case of Jes-

son v. Wright, 2 Bligh 1, and treated as "petty distinctions," wholly insufficient to change the meaning of the word "heirs." Jarm. 337 (2 vol.) says, "it would be idle to attempt to distinguish Backhouse v. Wells, 1 Equ. Cas. Abr. 184, pl. 27, from Roe v. Grew, 2 Wils. 322, on the ground of the words "only," "without impeachment of waste," &c. They merely show the testator meant to confer an estate for life and nothing more, which sufficiently appeared from the express limitation for life. See the remarks of the same author at p. 246, also Robinson v. Robinson, 1 Burr. R. 38, 2 Ves. sen. 225. The words "equally divided," superadded to the limitation to "heirs," whatever force they might have had at one time, or may now have in England, can have little or no force in this country. The importance attached to them in England was because they indicated a manner of taking inconsistent with the devolution of an estate tail (or an estate in fee in many cases), growing out of their law of primogeniture, which does not
143 exist here. *Here our laws require an equal division among heirs in equal degree, and a declaration to that effect by a testator is consistent with the manner of taking as "heirs."

If the conclusion is right that Caroline Brooks took an estate tail in the land, it is unnecessary to say much in regard to the interest she took in the slaves. It follows necessarily that she took the absolute interest in the personal property. The words "heirs lawfully begotten," used in the will of Josiah Robertson, being some restriction upon heirs generally, have been decided to pass an estate tail in lands. Nanfan v. Leigh, 2 Marsh. 107, Co. Litt. 20 b, Hargrave's note 2. The general rule that where the words would give an estate tail when applied to real estate, they will give the absolute interest when applied to personal property, will not perhaps be questioned. Indeed, the questions seem to be regarded in England as identical. 2 Jarm. on Wills, ch. 44, and the cases there referred to. Browncker v. Bagot, 19 Vesey 574.

ALLEN, P. This case brings again before the court the question, so often discussed here and in England, as to the operation of the rule in Shelley's Case, that where an estate of freehold is limited to a person, and the same instrument contains a limitation, mediate or immediate, to the heirs of his body, or to his heirs, the ancestor takes the whole estate comprised in the terms, ether as a fee tail or a fee simple. In this case there is no limitation over on the failure of issue; and the only question arising on the will is, whether the testator, in reference to the devise or bequest to his daughters Mary Murphy and Caroline Brooks, used the words "heirs lawfully begotten" in their legal, primary and proper sense, or whether he used them as descriptive of some other class of objects. In the view I take of this case, the inter-
144 pretation of the will *is not affected by the character of the property. If, as applied to real estate, the clause would have created an estate tail in the daughters, in such case the full and entire interest in personalty would pass to the legatee; as an estate tail in personal property gives the absolute dominion.

When a testator uses a term having a well known legal meaning, he is to be understood as having used it in that sense, unless the context shows that he used it in a different sense. Unless that is apparent, the rule is inflexible; and though the testator may have supposed that the first taker would take an estate for life only, and perhaps so intended as then advised, yet it does not follow if he had been aware of all the consequences of a change in the term used, that he would have made it. The will bequeaths the property to his daughters, to be held by them during their natural lives and no longer, and then to be equally divided between their heirs lawfully begotten. If the words "during their natural lives and no longer," and "then equally divided between their heirs," are to be construed as modifying the words "heirs lawfully begotten," and as describing another class, and to imply children, who were to take as purchasers, then if the daughters had died leaving grand children, they would have been excluded. But giving the term heirs its legal and proper sense, all the descendants of the daughters would be embraced. So that it is at least conjectural, if we are to look to intention alone, in what sense the testator meant to use the term. It therefore would seem that the better plan is to give such words their plain, legal effect, and to reject mere loose expressions, from which to infer an intention that they were used as descriptive of a different class of objects.

The words here relied on as modifying the words "heirs lawfully begotten,"
145 do not indicate such intention *so clearly as to justify the conclusion contended for. "During their natural lives and no longer," is no more than to show what appears in all these cases, that he meant to confer an estate for life; and it is to this class of cases that the rule in Shelley's Case applies: and the words "equally divided between their heirs," are, as it seems to me, entitled to but little weight in fixing upon the word "heirs" the meaning contended for. In England they were entitled to more consideration, as indicating an intent that the estate should not pass according to the law of descents. With us, where estates tail are converted into estates in fee simple, and the doctrine of primogeniture is abolished, and the general sentiment is in favor of an equal division amongst those standing in the same relation, the inference would be that the testator, by the use of these words, intended that they should take as heirs rather than in any other character. But upon this question the authorities are numerous both in England and in Virginia; and they have been conflicting and inconsistent. It is conceded

in the argument, and the cases show, that such expressions as "share and share alike," or "as tenants in common," &c., have controlled the word "heirs." The whole question was elaborately discussed and carefully considered in the case of Jesson v. Wright, 2 Bligh's P. R. 1, upon appeal to the house of lords.

The devise was to W for life, and after his decease, to the heirs of his body, in such shares and proportions as W by deed, &c., should appoint; and for want of such appointment, to the heirs of the body of W, "share and share alike as tenants in common." And if but one "child," the whole to such only child; and for want of such issue, to the devisor. The court held that an estate tail vested in W by this devise, reversing the decision in King's bench, and overruling all that class of cases which had given to such words the
146 *effect of modifying and controlling the meaning of the technical word "heirs." Lord Redesdale said, "That the general intent should overrule the particular, is not the most accurate expression of the principle of decision. The rule is that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise."—"It has been argued that heirs of the body cannot take as tenants in common; but it does not follow that the testator did not intend that the heirs of the body should take, because they cannot take in the mode prescribed. This only follows, that having given to heirs of the body, he could not modify that gift in the two different ways he desired, and the words of modification are to be rejected."

Several cases have occurred since the case of Jesson v. Wright; and though in some instances the principle of that case may not have been followed out, yet the weight of authority is in favor of the rule there enounced. The cases on this subject are reviewed in 2 Jarm. on Wills 271, ch. 37; and he concludes that the doctrine of Jesson v. Wright has prevailed, and stands on the soundest principles of construction. Hayes on Estates Tail 100, 7 Law Libr. 54, sustains the same proposition. See also to the same effect Powell on Devises 464, ch. 23, 22 Law Libr. 245.

The words in the will under consideration are not so strong as in the case referred to. There the heirs of the body could not take as tenants in common, and the court was compelled to reject the words of modification. In this case the words of modification are not inconsistent with the operative words of the bequest or devise, because the property passing by descent to the heirs, would be equally divided if they all stood in the same degree of relationship.

It is contended, however, that this is no longer an open question in Virginia; and that the precise question
147 *has been adjudged in at least one case, and the principle affirmed in others. Bradley v. Mosby, 3 Call 44, is relied on as having in effect settled the principle that the word "heirs" should, in a will like this, be treated as descriptive of another class, the children of the first taker. In that case there was a limitation by deed of slaves to the donor's daughter for life, and after her death to the heirs of her body, to the only proper use and behoof of such heirs, "their executors, administrators and assigns." The court, consisting of Judges Pendleton, Lyons and Roane, was divided; each judge giving a different construction to the will. Pendleton founded his opinion upon the supposed distinction between words which create an express estate tail, and such as create an estate tail in lands by implication and construction, to favor the intention to provide for the issue; and maintained that the latter ought not to be applied to personals to defeat the intention. But the rule in question is not confined to cases in which the words, if applied to real estate, would create an express estate tail; it applies also to cases in which an estate tail would arise by implication, with the exception of those cases in which words expressive of a failure of issue are in gifts of personal but not of real estate, confined to issue living at the death; questions depending not so much upon the sense in which the word "heirs" has been used by the donor, as upon the fact whether the limitation over is too remote. Powell on Devises 632 (mar.) 22 Law Lib. 338; 2 Jarm. on Wills 489, ch. 44. In the case of Lampley v. Blower, 23 Atk. R. 396, referred to by Judge Pendleton, Lord Hardwicke said, that a gift to A and her issue would vest the whole interest in A if it had stopped there; but held that the bequest over, in case either of the legatees died without leaving issue, which in regard to personalty, in legal construction means is-
sue living at the death, explained
148 issue in the body *of the devise to be used in the same sense. Judge Roane rested his opinion exclusively upon the words giving the property to the heirs of the first taker, to the only proper use of such heirs, their executors, administrators or assigns, as showing "there was no eye of entail;" for it could not go from one heir of the body and his executors and administrators to another heir and his executors and administrators; for which he cites Hodgeson v. Bussey, 2 Atk. R. 89; Theebridge v. Kilbourne, 2 Ves. R. 233, which in a great measure turned upon the import of those words. Lyons, judge, held that the words would have given an estate tail in lands, and therefore they gave the absolute property in slaves. The case therefore decided no principle applicable to the will now under consideration; and the opinions of Judges Roane and Pendleton were founded, the first upon expressions not found in his will, and the last upon the idea of a distinction between cases in which the words when used in reference to realty would create an express estate tail, and those in which an estate tail would be created by implication: a distinction it appears that does not exist except in certain

cases where words expressive of issue receive a different construction as applied to real and personal estate; as in the case of the phrase "leaving no issue;" in respect to which it has been held that it means an indefinite failure of issue where real estate is the subject, but in reference to personal estate, it means a failure of issue at the death. Forth v. Chapman, 1 P. Wms. 663.

Warners v. Mason & wife, 5 Munf. 242, turned upon the question whether the limitation over was too remote. The testator devised land to his son during his natural life, and then to his heirs lawfully begotten of his body, "that is, born at the time of his death or nine calendar months thereafter;" and for want of such heirs, then to his nephews, one to set a price and
149 *give or receive such price from the other: This was held to be a good limitation over. No opinion was given by the court, but it is manifest the court held that the testator looked to the period of the death of his son, and not to an indefinite failure of issue, because he speaks of heirs born at the son's death; and the remainder was to persons in being who were the objects of his bounty. These superadded words to the words "heirs lawfully begotten," demonstrating that the testator did not contemplate an indefinite failure of issue.

Pryor v. Duncan, 6 Gratt. 27, was decided upon the ground, that although the words "heirs lawfully begotten," were used in one clause, the whole context showed that the words were not used in their legal and primary sense, but were descriptive of another class of persons fully pointed out in a following clause, as the children of the first taker. He lent the slaves to his daughter during her natural life, and to her heirs, &c. Her interest was to cease, and his executors to take possession, if she concealed or attempted to alienate the slaves; in such case, after her decease they and their increase to be divided among her "children," if any living; otherwise to be divided among the testator's children (naming them), and their heirs. Thus showing, from the indifferent use of the words "heirs" and "children," by the restricted power over the property, and by the bequest over if no "children" living at her death, that he used the words "heirs lawfully begotten" in the sense of "children."

The last case to which the counsel of the appellant referred is the case of Self v. Tune, 6 Munf. 470. By deed slaves were given to a daughter of the donor and her husband, for and during their natural lives; and after the decease of both, the slaves and their increase "to be equally divided among the heirs of her body:" and in default of such heirs, to return and be
150 equally *divided between the donor's son and other daughter, and their heirs. The court, in the brief opinion pronounced by Judge Roane, says, If these words "heirs of her body" had stood alone in the limitation after the death of the daughter and her husband, her title would have been absolute; as in that case they would have been words of limitation: But the addition of the words "equally to be divided between them," compelled the court to construe them as words of purchase, and as a description of the persons who were to take."

The cases of Wilson v. Vansittart, Amb. R. 562; Doe ex dem. Long v. Laming, 2 Burr. R. 1100, and cases of that description, where words of that and the like character were held to modify the words "heirs of the body," were overruled by Jesson v. Wright, and the cases which have followed it. Powell on Devises 466, 22 Law Libr. 249; 2 Jarm. on Wills 286, ch. 37; where all the cases are collated.

The case of Self v. Tune forms one of a series decided about the same time upon the construction of the rule in Shelley's Case, and what would amount to a good limitation over. These are the cases of Timberlake v. Graves, 6 Munf. 174; Gresham v. Gresham, Id. 187; James v. McWilliams, Id. 301; Cordle's adm'r v. Cordle, Id. 456; and Didlake v. Hooper, Gilm. 184. The authority of these last cases has been shaken, if not overthrown, by the subsequent cases of Bells v. Gillespie, 5 Rand. 273; Broaddus v. Turner, Id. 308; Griffith v. Thompson, 1 Leigh 321; Callava v. Pope, 3 Leigh 103; Deane v. Hansford, 9 Leigh 253; Nowlin v. Winfree, 8 Gratt. 346. Which latter cases have, it is believed, been more in conformity with the English cases and the earlier cases in this court. The precise question decided in Self v. Tune did not arise in any of the latter cases; though the general principles on which the latter cases proceed may not be precisely in conformity with the doctrine of that case.
151 *In Deane v. Hansford, 9 Leigh 253, Judges Parker and Brockenbrough observed, that as Timberlake v. Graves was followed in quick sucession by the other cases named, they should be considered as settling the law in cases exactly resembling them; more especially as in devises made since the act of 1819 took effect, the statutory rule will prevail. But Brockenbrough said that if Timberlake v. Graves stood alone, he would have concurred in overruling it. In conformity with this suggestion, perhaps if Self v. Tune stood alone, it should be recognized as ruling a case exactly resembling it, although it might be considered as having been erroneously decided. But besides being in some degree shaken by the general doctrines advanced in the later cases, the principle of the case is, as it seems to me, in conflict with the two cases of Goodwin v. Taylor, 2 Wash. 74, and Wilkins v. Taylor, 5 Call 150. The testator, in the first case, gave to his daughter the interest of a sum of money for life; at her death he gave the interest one-fourth to each of his grand children, and at their decease, the principal and interest to be disposed of by them to their heirs, "in such proportions" as they by their wills respectively may direct: and in case of the death of Sarah (one of said grand children)

without issue, her part was bequeathed over. There is not an express gift to the grand children for life, but the interest alone was given to them, with the power to dispose by will: and in regard to Sarah, there was a gift over if she died without issue. The will gave power to dispose of the subject to their heirs in such proportions as they by their wills may direct. The court held that the grand children took the whole estate. In the case of Wilkins v. Taylor, which arose on the same will, in reference to the share of Sarah, it was held to be a limitation after an indefinite failure of issue, and void. The power to dispose of the
152 principal to their heirs *in such proportions as they by their wills might direct, tends more strongly to indicate that the testator intended that the heirs should not take in the regular course of descent, than the words "equally to be divided" in the present will. On the contrary, the words "equally to be divided" would, under our law, rather indicate that they should take as heirs. I do not think that the will in this case shows that the testator used the words "heirs lawfully begotten," in any other than their ordinary sense. That he designed "children" by the use of these words, is entirely conjectural; and under a certain state of facts, such a construction would have been more likely to violate than to subserve the intention of the testator. I also think that the authorities in this court are not in harmony with each other, and that it would be more in conformity with the spirit of the later as well as of the earlier cases in this court, and the true doctrine in regard to the rule in question, to hold that the superadded expressions do not indicate clearly an intention to use the terms as descriptive of any other class than the heirs. I think therefore that the decree should be affirmed.

MONCURE and LEE, Js., concurred in the opinion of Allen, J.

DANIEL and SAMUELS, Js., dissented.

Decree affirmed.

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153 *Harvey & al. v. Epes.

January Term, 1855, Richmond.

1. **Hire of Slaves—Removal from County Contracted for—Case at Bar.**—Contractors on a railroad hire slaves for a year to work on the road in the county of A. They take them to the county of C, and employ them on the road in that county; and whilst there they take sick and die. HELD:

   1. **Same—Same—Effect.**—This removal of the slaves from the county of A, and working them in the county of C, is not of itself a conversion of the slaves to their own use by the contractors, whereby they became immediately responsible to the owner for the value of the slaves in the event of their death, whether occasioned by such wrongful act or not.

   2. **Same—Same—Death of Slaves Occasioned by Removal—Conversion***—But if the death of the slaves was occasioned by the wrongful act of removing them and working them in the county of C, then the said act, in connection with the death of the slaves, was a conversion of them by the contractors to their own use, and made them liable for the value of the slaves, either in case or trover: And the slaves having died whilst they were employed in C, the burden of showing that their death was not occasioned thereby, devolves upon the contractors.

   3. **Same—Same—Same.**—Whether the removal of the slaves to the county of C was or was not a conversion, depending upon whether or not it occasioned their death, the implied waiver of the owner of the slaves, of the obligation by the contractors to work them in the county of A, cannot be inferred from facts which transpired before the death of the slaves.

   4. **Same—Same.**—The acceptance by the owner of the slaves of the hires up to the time of their death, having been after the institution of the action to recover their value, and whilst the said action was vigorously prosecuted, was not a waiver in law of the conversion.

2. **Instructions—Fact Assumed by Court—Previous Instruction on Same Point—Effect.**—Several instructions are given to the jury, in the last of which a fact is assumed which was properly for the determination of the jury. The previous instructions, however, had submitted that fact to the consideration of the jury, so that there could be no doubt on their minds as to the meaning of the court in the last instruction. The law having been correctly stated, judgment will not be reversed.

154 *3. **Same—Partly Erroneous—Court Need Not Modify.**†—Parol evidence having been introduced on a trial, some of which is legal and other parts illegal, it would be improper for the court to instruct the jury, in general terms, to disregard all parol evidence tending to alter, vary, explain or add to, the written contracts between the parties introduced in evidence. Nor is the court bound to point out to the jury such of the evidence as would thus affect the contracts; but this is to be done by the party asking for the instruction.

This was an action on the case in the Circuit court of Amelia county, by Frances Epes against Robert Harvey and James Hunter, partners, and contractors on the Richmond and Danville railroad. The declaration contained two counts.

***Trover—Possession in Third Party.**—In Longfellow v. Lewis, 15 Fed. Cas. 837, it is said: "To maintain trover, the plaintiff must ordinarily have a right to the present possession of the goods, but an intervening right, by way of lien, will not deprive the general owner of this remedy against the wrongdoer. 2 Greenl. Ev. § 640, *note* 2; Gordon v. Harper, 7 Durn. & E. (Term R.) 9; Nicolls v. Bastard, 2 Cromp. M. & R. 659; Rugg v. Barnes, 2 Cush. 591; *Harvey v. Epes, 12 Gratt. 153.*"

See monographic *note* on "Trover and Conversion" appended to Eastern Lunatic Asylum v. Garrett, 27 Gratt. 163.

†**Instructions—Partially Erroneous—Court Need Not Modify.**—See *foot-note* to Kincheloe v. Tracewells, 11 Gratt. 587. Further upon the question of instructions, see principal case cited in Gas Co. v. Wheeling, 8 W. Va. 321; Harvey v. Skipwith, 16 Gratt. 405. See also, *foot-note* to Levasser v. Washburn, 11 Gratt. 572; monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192.

The first count set out that on a certain day in 1849, the defendants hired of the plaintiff until the 25th of December 1849 then next ensuing, two negro men slaves, the property of the plaintiff, to be worked and employed by the said defendants upon such part only of the Richmond and Danville railroad as might be located in the county of Amelia. Which said slaves were accordingly put into the possession of the defendants for the purpose aforesaid; and the defendants were bound to use and employ said slaves upon such part only of the said railroad as lies wholly in the county of Amelia; and not to use and employ said slaves in any other county upon the line of the said railroad. Yet the defendants, well knowing the premises but disregarding, &c., on the day of 1849 carried the said slaves to the county of Chesterfield, and out of the county of Amelia, and used and employed them as laborers on the line of said railroad without the county of Amelia, and within the county of Chesterfield. And that they continued to use and employ the said slaves on the said railroad in the county of Chesterfield until they sickened and died. The second count was in trover for the conversion of the said slaves to the defendants' use.

There was a demurrer to the first count of the declaration; which was over-
155 ruled. The defendants then *pleaded "not guilty;" and, that the plaintiff agreed and consented subsequent to the contract for hire, that the said slaves might be taken to the county of Chesterfield, and used and employed on the said railroad: And issues were made up on these pleas.

On the first trial of the cause the jury could not agree, and were discharged. On the second trial the defendants filed two bills of exception to opinions of the court given upon the trial. The first bill of exceptions was as follows:

Be it remembered, that upon the trial of this cause, the plaintiff, to sustain the issues on her part, introduced Archer Jones, a witness, whose testimony tended to prove, that in the early part of the year 1849, she hired three slaves to the agent of the defendants, to be worked on the Richmond and Danville railroad, with the express agreement that they were to be worked only in the county of Amelia, and were to be attended by Dr. Cheatham, a physician residing in said county. That as she did not know the defendants, it was agreed that the agent of the defendant, John T. Foster (who made the contract), should execute his bond for the hires, with his father as security. That his sister, the plaintiff, did not hear, until after the Easter holiday, in the latter part of March of that year, that the slaves were in Chesterfield; and he, at her instance, wrote to Foster, complaining of it; and complained, on several other occasions, but at what time he does not recollect. He did not recollect whether he made such complaint after the 10th May. He might have done so, but could not say that he had. He received the bond, dated the 13th January, some time after the contract, when, he could not say with accuracy, and carried it to his sister, Mrs. Epes, who said she would not receive it, as by the contract, she was to have the Fosters' bond, and that she did not know the contractors.

That the first time he saw J. T. Fos-
156 ter, the *agent of the defendants, after he received said bond, he told him that his sister would not have the first bond, and he said he would give another bond, if Jones would let the slaves work in Chesterfield county. That he told him he would consult E. G. Booth, a brother in law of his sister, on the subject. That he did see and consult him, and soon after saw said Foster, and refused to agree that they should be so worked; and that when witness read the endorsement on the first bond, bearing date 9th May 1849, he refused positively to agree to the same. That neither he nor his sister would have accepted the guarantee of J. T. Foster, but desired the security of J. W. Foster's name, who was the father of said J. T. Foster. That the said J. T. Foster told him to keep the said bond, and meet him next day at Dennisville, the residence of his father, and he would fix the matter to his satisfaction; and also promised that the slaves should be removed on the next Monday to the county of Amelia. That he met the said Foster the next day, as agreed, and received the bond, signed by J. T. Foster and J. W. Foster, and dated 10th May 1849, as follows:

On or before the first day of January next, we, John T. Foster and John W. Foster, promise and oblige ourselves, &c., to pay to Mrs. Frances Epes the sum of two hundred dollars, for the hire of three negro slaves, named Lewis, Oliver and Alfred, to work on the Richmond and Danville railroad, for the present year. Said slaves to be returned at Christmas next, well clothed with the customary clothing, and furnished with a hat and blanket, subject however to the deduction of any extra clothing charged by the contractors, and also the doctor's bill, at three dollars each.

Given under our hands and seals this 10th day of May 1849.

John T. Foster. (Seal.)
John W. Foster. (Seal.)

157 *And signed the assignment on the bond of the 13th of January 1849, which assignment bears date 10th May 1852.

Bond, Assignment, &c.

$200

On or before the first day of January next, we, Robert Harvey, James Hunter, H. L. Brooke and W. Goddin, promise and oblige ourselves and our heirs to pay to Mrs. Frances Epes the sum of two hundred dollars, for the hire of three negro slaves named Lewis, Oliver and Alfred. Said slaves to be returned at Christmas next, well clothed with the customary clothing, and furnished with a hat and blanket.

As witness our hands and seals this 13th day of January 1849.

Robt. Harvey. (Seal.)
James Hunter. (Seal.)
Henry L. Brooke. (Seal.)
W. Goddin. (Seal.)

Endorsement.

Amelia C. H. May 9, 1849.

I am hereby bound to Mrs. Frances Epes, for the payment of one hundred and ninety-one dollars of the within bond, after within subscribers being sued to insolvency—the said Foster having the privilege to work the hands in Chesterfield county.

J. T. Foster.

I assign the within bond to J. T. & J. W. Foster, for value received, without recourse.

Archer Jones,
May 10, 1849. For Frances Epes.

That he was never authorized to agree that the slaves should be carried out of Amelia, and never agreed that they
158 should. That he knew his sister *was opposed to it, and would not have agreed that they should be. That two of said slaves died during the year, while at work in Chesterfield—the same for which this suit is brought—one a very likely man, about thirty-five years old, and the other a likely boy, about eighteen. After he received the bond of the 16th of May 1849, he informed his sister of it, and she said it was satisfactory.

And the plaintiff introduced another witness, Matthew Bland, whose testimony tended to prove that he was at Mrs. Epes' when Foster and Jones came there, and heard the contract made between Mrs. Epes and Foster, for the hire of the slaves. That it was agreed that the slaves should be worked in Amelia county, and that Mrs. Epes refused to give Mr. Foster permission to have them worked in Chesterfield. That after the contract was made, but in the course of the same conversation, he heard Foster say that they were about to build or were building shanties in the county of Amelia. That the contract was made with Mrs. Epes herself by the said Foster. That some time afterwards, he received a letter from Mr. Jones to T. W. and J. T. Foster, about the slaves working in Chesterfield, and thinks he sent it to said Foster, but by whom he did not recollect.

The defendants then introduced the testimony of J. T. Foster, which tended to prove that he was employed by the defendants in January 1849, to hire negroes for them, to work on the Richmond and Danville railroad. That the defendant told him the hirelings would be worked a portion of the time in the county of Amelia. That hearing from Mr. Booth, a brother in law of the plaintiff, that Mr. Jones, her brother, had some slaves to hire out for her, he went to his house in Nottoway county, and from his house both went over to plaintiff's house in same county, and but three miles from said Jones'. There he saw the slaves,
159 *and hired them from Jones, who acted for his sister. That the plaintiff expressed a wish that the slaves would be worked only in Amelia, and he replied they would be worked a portion of the time in Amelia. Witness denied that he agreed to work them only in Amelia. Shortly after, he took possession of the slaves and carried them to Chesterfield, and put them on the line to work where the other hands were working on the railroad, and sent the plaintiff the bond of the 13th January 1849. That the contract of hiring was made with Mr. Jones, and not with Mrs. Epes. That on the 9th of May, he met with said Jones at Amelia court, who told him his sister, the plaintiff, was not satisfied with the bond, as she knew nothing of the parties, and desired other security. He complained also of the negroes being kept at work in Chesterfield. The witness then said, to satisfy Mrs. Epes, he would become the security, upon certain conditions. That he and Jones stepped into Mr. Eggleston's store. He wrote on the back of the bond of the 13th January, the endorsement of the 9th of May, read it to Jones and handed it back to him, who took it and seemed to be satisfied. The next day the said Jones came to Dennisville, where he lived, and said his sister would be better satisfied with a bond executed by J. T. Foster and his father, and asked Mr. J. W. Foster to join his son in a new bond, who consented. The bond of the 10th May was then executed, and handed to said Jones, who thereupon, as agreed, assigned the first bond to said J. T. and J. W. Foster, and before this suit was brought. That on the 16th day of January 1850, he received of the defendants the hires for the slaves, as per statement endorsed upon the bond of the 13th January 1849, which amount was paid over by his father to E. G. Booth, the agent of the plaintiff, and one of her counsel in this suit, since the institution of this suit and since the trial had in October 1851.
160 *And the defendant then introduced John W. Foster, who stated, that on the 10th day of May 1849, the bond of that date was delivered to Archer Jones, the witness, having been first read to him. That said Jones asked him to join his son in said bond, remarking that his sister was a woman, and you know very particular. That his son, John T. Foster, had requested him, the evening before, as he returned from Amelia court, to join him in said bond to Mrs. Epes, and he had consented to do so. That on that occasion, nothing was said about where the slaves were to be worked, or about restricting their being worked in any particular place, except what appears on the face of the bond of the 10th May 1849.

Further testimony in the cause tended to prove, that the work on the line of the railroad had not progressed so far as Amelia county; and Robert T. Brooke, a witness for the defendants, stated that he was the general agent of the defendants, in Richmond, to keep their books, give bonds for hires, and manage their general concerns. That he filled up the bond of the 13th January 1849. That as far as he knew, no

authority was ever given to the agents for hiring, to hire slaves to be worked in Amelia. That some had been so hired, but none of the hirings so made were confirmed, but of two slaves, and they were sawyers.

The defendants further introduced the following agreed statement:

The plaintiff by her attorney admits that the following facts were proved in this case by Dr. William B. Ball, namely, that the neighborhood of the places in the county of Chesterfield, where the slaves mentioned in the declaration, died, is a healthy neighborhood, and as healthy as the adjoining counties. That the said slaves were attended by the witness, and received all necessary and proper attention. That they

161 died of pneumonia, a disease which was very prevalent at the *time throughout the county; and that all necessary and proper comforts were provided for the said slaves.

And the plaintiff then recalled the witness Jones, who stated that he had never agreed, as the witness Foster had testified, that the slaves should be carried to Chesterfield, but, on the contrary, expressly refused. That his sister, and not he, made the contract with Foster.

And thereupon, the defendants, by their counsel, moved the court to give the jury the following instructions, namely:

1. If the jury shall believe, from the evidence, that there was no special contract that the slaves hired from the plaintiff should be worked alone in the county of Amelia, the defendants are not responsible for the loss of the said slaves, by reason, simply, that they worked in Chesterfield county.

2. If the jury believe, from the evidence, that there was a special contract between the plaintiff and defendants, that the slaves, which are the subject of controversy, were hired to the defendants, to be worked by them on the Richmond and Danville railroad in the county of Amelia, and that the said slaves were worked by the defendants on the said Richmond and Danville railroad in the county of Chesterfield, but were not thereby subjected to any greater labor, nor exposed to any greater risk whatever than if the said slaves had been worked in the said county of Amelia; and that while so worked in the said county of Chesterfield the said slaves sickened and died, but not in consequence of being so worked in the said county of Chesterfield, nor in consequence of any neglect or want of due care and attention on the part of the defendants, then the jury should find no damages by reason of such sickness and death of the said slaves.

Which instruction the court refused to

162 give, but instructed the jury, that if they should believe from *the evidence, that there was a special contract between the plaintiff and the defendants, that the slaves, which are the subject of controversy, were hired by the plaintiff to the defendants, with an express stipulation and agreement, that they were to be employed by them on that part of the Richmond and Danville railroad, which runs through the county of Amelia only, and that they were not to be worked on said road out of said county, and that the defendants did carry them beyond the limits of said county of Amelia into the county of Chesterfield, and there worked them on said road, that such carrying them beyond the limits of the county of Amelia, and working them in the county of Chesterfield, was, of itself, a violation of their contract, and a conversion of the said slaves to their use, by reason of which they became immediately responsible to the plaintiff for the value of said slaves, in the event of their death.

3. If the jury believe, from the evidence, that there was a special contract of hire between the plaintiff and defendants, that the slaves, which were the subject of controversy, should be worked on the Richmond and Danville railroad in the county of Amelia, and the said slaves were worked on the said railroad in the county of Chesterfield, where they sickened and died, yet the plaintiff cannot recover under the first count in her declaration in this case, unless the plaintiff shall also prove, to the satisfaction of the jury, that such sickness and death of the said slaves was occasioned by their being worked in the county of Chesterfield, or by the carelessness, negligence, or ill usage of the defendants.

4. If the jury believe, from the evidence, that there was a special contract of hire between the plaintiff and the defendants, whereby the defendants were required to work the slaves, which are the subject of controversy in this case, in the county

163 of Amelia; *that after the making of such contract, the said slaves were worked in the adjoining county of Chesterfield, where they sickened and died, and that the plaintiff, by her agent, after she was informed that the said slaves were working in the said county of Chesterfield, and before they died, took from third persons a new bond for the hires of the said slaves, without their regarding or stipulating that the said slaves should be worked only in the said county of Amelia, and assigned to such third person, without recourse against her, the bond which had been taken of the defendants for such hire, and which was paid by the defendants to her assignees before the institution of this action (and which new bond expressed that the said slaves might be employed on the said railroad without restriction as to the county in which they were to be employed, and was accepted and retained by the plaintiff until after the deaths of the said slaves, and until the institution of this suit), such acts of the plaintiff amounted to a waiver of the second count in her declaration in this case, no other act of conversion being proved than the working of the said slaves in the said county of Chesterfield.

Which instruction the court refused to give; but in the place thereof, gave the following instruction:

If the jury should believe, from the evidence in the cause, that the witness, Archer Jones, acted as the agent of the plaintiff, and changed the original contract in such a way as to permit the defendants to work said slaves out of the county of Amelia, and within the county of Chesterfield, and took the new bond, executed by John T. Foster and John W. Foster, in pursuance of the change of the original contract, and in substitution thereof, then the defendants had a right to work the said slaves on the line of the Richmond and Danville railroad, although it might be out of the county of Amelia.

164 *But on the other hand, if the jury should believe, from the evidence, that there was no change of the original contract, then the plaintiff has a right to recover in this action—and that the fact that Mrs. Epes, by herself or her agent, received and held the bond of John T. and John W. Foster for the hire of said slaves, does not of itself prevent her from relying upon the original contract of hire between herself and the defendants.

5. If the jury believe, from the evidence, that there was a special verbal contract, that the slaves in the declaration mentioned should not be worked out of the county of Amelia, and that after she knew of their being put to work in the county of Chesterfield, the plaintiff received the bond of J. T. and J. W. Foster, dated 10th May 1849, as security for their hires, that such acceptance of the bond was in law a waiver of the conversion consequent upon the working of the slaves out of Amelia county, previous to that time.

6. If the jury believe, from the evidence, that the plaintiff has received hires for the said slaves up to the period of their deaths, such reception of payment for hires amounts in law to a waiver of the conversion, even though the jury may believe that there was a special verbal contract that said slaves should not not be worked out of the county of Amelia.

Which two last named instructions the judge refused to give, for the reason that the matters embraced therein had already been embraced by the former instructions, and had already been decided on.

And to the opinions of the court refusing to give the second instruction as prayed, and giving the instruction given in lieu thereof, and refusing to give the fourth instruction as prayed, and giving the instruction given in lieu thereof, and refusing to give the fifth and sixth instructions, the defendants, by their counsel, excepted.

165 *The defendants then moved to exclude from the jury all parol evidence tending to alter, vary, explain or add to the written contracts between the parties, as evidenced by the bond of the 13th of January 1849, and the endorsements thereon of the 9th and 10th of May, and by the bond of the 10th of May 1849. But the court overruled the motion, and the defendants again excepted, setting out the evidence as in the first exception.

There was a verdict and judgment for the plaintiff for twelve hundred dollars: And the defendants thereupon applied to this court for a supersedeas, which was allowed.

Giles and R. T. Daniel, for the appellants.

John Y. Gholson and James H. Gholson, for the appellee.

MONCURE, J. The first count of the declaration seems to be good, in substance at least if not in form; and I think the demurrer thereto was properly overruled. Indeed there is no complaint of error in the judgment in that respect.

The first and main question in this case arises on the instruction given to the jury in lieu of the second instruction asked for by the plaintiffs in error. Their liability for the value of the slaves in controversy under the first count of the declaration, depends upon whether the death of the slaves was occasioned by any default of the plaintiffs in error, the hirers of the slaves. If it was so occasioned, they are so liable; if it was not, they are not. Upon this subject I presume there can be no doubt; and this appears to have been the opinion of the Circuit court in giving the third instruction asked for by the plaintiffs in error. But that court, in giving the instruction which was given in lieu of the second instruction asked for, seems to

166 *have been also of opinion that if the slaves were hired with an agreement that they were to be employed only on that part of the Richmond and Danville railroad which runs through the county of Amelia, and if the hirers in violation of the agreement carried the slaves beyond the limits of the county of Amelia into the county of Chesterfield, and there worked them on said road; then that such violation was a conversion of the said slaves to the use of the hirers, and rendered them liable for the value of the slaves under the second count of the declaration (which is a count in trover), whether the death of the slaves was occasioned by such violation or not. I will now proceed to enquire as to the correctness of this opinion.

To sustain an action of trover, the plaintiff must have a general or special property in the subject of the action, and a right of possession over it at the time of the conversion. Saund. on Plead. 869. A man who has delivered goods to a carrier or other mere bailee, and so parted with the actual possession, may maintain trover for a conversion by a stranger; for the owner has still possession in law against a wrong doer; and the carrier or other mere bailee is no more than his servant. Id. 873. But where property is bailed for a term, the bailor, having no right of possession, cannot maintain trover against a stranger for converting the property during the term. Id. 879. And this is the case though the conversion consist in an absolute sale of the property under an execution against the bailee. Gordon v. Harper, 7 T. R. 9; Brad-

ley v. Copley, 50 Eng. C. L. R. 865. A bailee for a term, as for instance a hirer of a slave for a year, has an estate in the property during the term, and that estate must be determined before an action of trover can be brought against him in regard to the property. If the action be brought against him for an act done during the term, such act, to sustain the
167 *action, must have the double effect of putting an end to the bailment, and converting the property. It is not every violation of the contract by the bailee which will have that effect. A mere nonfeasance will not have it. Nor, it seems, will any misuser or abuse of the thing bailed in the particular use for which the bailment was made. Swift v. Mosely, 10 Verm. R. 208. But there are some acts which, being done by the bailee, will have that effect. The wilful destruction by him of the thing bailed will have it. So also if the bailee use the thing for a purpose or in a manner not authorized by the terms of the bailment, and such misuser be the cause or occasion of its loss, he will be liable in trover for its value. Such was the decision of this court in Spencer v. Pilcher, 8 Leigh 565. There the slave was hired in the county of Wood for agricultural purposes. In violation of the contract, he was carried by the hirer on a dangerous voyage, in the course of which he was drowned; and the hirer was held to be liable in trover for his value. But such liability was expressly put upon the ground that the loss of the slave was occasioned by the violation of the contract, and not upon the ground that such violation would have made the hirer liable for the loss, whether so occasioned or not. The instruction of the court below, which was sustained in that case, was, "that if the jury are satisfied from the evidence that sending the slave on the voyage was a manifest abuse of the right temporarily acquired by the hiring, and that he was lost to the plaintiff in consequence thereof, such abuse is equivalent to a wrongful or injurious conversion, and may sustain the count for trover."

It has been decided in England, in several cases, that an absolute sale of property by the hirer during the term of the hiring, is such an act of conversion as makes him liable in trover for its value. Loesch-
168 man *v. Machin, 3 Eng. C. L. R. 359, decided by Abbot, C. J., at nisi prius in 1818, is the leading case of that class. It was followed by the Court of common pleas in Cooper v. Willemott, 50 Id. 672, decided in 1845. Tindal, C. J., was of opinion that the bailment in Loeschman v. Machin, was determined by the demand. But supposing it not to have been so determined, he said he could not get over the authority of that case, and was not prepared to dispute the position taken therein. It was also followed by the Court of exchequer in Bryant v. Wardell, 2 Welsb. Hurls. & Gord. 478, decided in 1848; and in Fenn v. Bittleston, 8 Eng. Law & Equ. R. 483, decided in 1851. The doctrine, though recent in its origin, and though its introduction was strenuously resisted, may now be considered as firmly established in England. But it seems to rest on the ground that a sale of property by a bailee is equivalent to its destruction, so far as his liability is concerned; and so comes within the principle laid down in Co. Lit. 71 a (3 Thomas' Coke 372), that if one lends oxen to another to plough his lands, and he kills them, the owner may have trespass or trover at his election; that such a sale operates like a disclaimer of tenancy at common law; that it disables the bailee from returning the property at the end of the term; and though it does not amount to an actual destruction of the property, yet it is so entirely inconsistent with the terms of the bailment that it puts an end to it, causes the possessory right to revert to the bailor, and entitles him to maintain an action of trover. See the judgment of the court delivered by Parke, B., in Fenn v. Bittleston, supra.

The doctrine of the case of Loeschman v. Machin has been followed in some of our sister states, as for instance in New Hampshire, Sanborn v. Colman, 6 New Hamp. 14; and Vermont, Swift v. Mosely, 10 Verm. R. 208. But it has not been
169 followed in North Carolina. *Andrews v. Shaw, 4 Dev. R. 70; and Lewis v. Mobley, 4 Dev. & Bat. 323. In the former case the hirer of a slave for a year sold it; and trover was brought against him by the owner during the year. Ruffin, C. J., said, "Loeschman v. Machin is a nisi prius decision of C. J. Abbot, and is not satisfactorily reported."—"If it is meant in that case to say that a bailee upon hire for a determinate period forfeits his interest by abuse to the article, or by a wrongful sale, so that a purchaser from him gets nothing, I think it is not law. I do not know of any such doctrine of forfeiture as applied to personal chattels." He thought the case came within the principle of Gordon v. Harper, and judgment was given for the defendant. In the case of Lewis v. Mobley, a tenant for life of a slave sold it absolutely, and after his death the remaindermen brought trover against the purchaser. Gaston, J., in delivering the opinion of the court, said, "To maintain the action it is indispensable that the plaintiff should show a conversion by the defendant of property whereunto the plaintiff, at the time of that conversion, had a present right of possession. It is certain that an action could not have been brought for this alleged conversion during the life of William Kemp (the tenant for life), because the right of possession had not then accrued to the ultimate proprietors. Gordon v. Harper, 7 T. R. 9; Andrews v. Shaw, 4 Dev. R. 70. And it follows as clearly, we think, it could not lie after the death of William Kemp, when the right of possession accrued, because there was no act of conversion thereafter."

In Virginia the doctrine has not directly come in question, so far as it is applicable to the hire of a slave or other property for

a year, or other term. In Poindexter v. Davis, 6 Gratt. 481, a tenant for life of a slave had sold it to a person who, believing he had an absolute interest in the slave, removed and sold it out of the state.

And the question arose whether the
170 *tenant for life or the purchaser from him was liable to the forfeiture imposed by the act 1 Rev. Code, ch. 111, § 48, p. 431. The whole court was of opinion that the absolute sale by the life tenant was not void, but valid to the extent of his interest in the slave. Judge Baldwin said, "It passes to the vendee, as effectually as a rightful alienation, the title of the vendor, and none other; and in no wise divests that of the remainderman or reversioner. It was not the design of the legislature to adopt, in regard to slaves, the common law doctrine of forfeiture by wrongful alienation of tenants for life; which sprang from principles of the feudal law, and was applicable only to conveyances of lands by feoffment, fine or recovery, which had the effect of discontinuing the estate of him in remainder or reversion." Id. 497. Judge Allen said, "The bill of sale, though absolute on its face, was not void, because it purports to convey a greater interest than the grantor owned. It operated to vest the grantee with such title as the grantor could part with, and made him the owner of a life estate." Id. 505. In Philips v. Martiney's ex'or, 10 Gratt. 333, this court decided that where a tenant for life of a slave sold it absolutely, and after the death of cestui que vie, the remainderman brought trover against the representative of the tenant, they could not maintain the action, not having had the right to the possession of the slave at the time of the sale. And the case of Lewis v. Mobley, supra, was cited and relied on by the court. So far, therefore, as our own decisions go, they tend to show that an absolute sale of personal property by a termor during the term does not work a forfeiture of the term, but is valid to the extent of the vendor's interest; and therefore does not amount to a conversion of the property for which trover can be maintained. There would seem to be no difference in this respect between a

hiring for a year and for a term of
171 years, or even for *life. There may be a difference between a limited interest created by contract and one created in any other way, arising from the privity of contract existing in the former, and not in the latter case. But it is unnecessary to decide the question in this case (as there was no sale of the slaves in controversy), and I therefore express no opinion upon it.

Thus the law seems to stand in regard to the destruction or sale of property by the hirer thereof, during the term of the hiring. No case in England, so far as I am informed, has gone to the extent of deciding that any misuser of property short of its destruction or sale, or at least an attempt to sell it (as in the case of Loeschman v. Machin) by a bailee upon hire during the term, will amount to a conversion for which trover will lie. And I am not aware of more than one or two cases in the United States which have gone to that extent; though dicta to that effect are to be found in many cases. There are passages in Story on Bailments which tend to support that view, and were much relied on by the counsel for the defendant in error in the argument of this case. Section 413 contains a passage of this kind. The writer is there treating of the hire of things; and after giving several instances in which a thing hired for one purpose cannot be used for another, he uses this general language: "And it may be generally stated, that if the thing is used for a different purpose from that which was intended by the parties, or in a different manner, or for a longer period, the hirer is not only responsible for all damages, but if a loss afterwards occurs, although by inevitable casualty, he will generally be responsible therefor. In short, such misuser is deemed at the common law a conversion of the property for which the hirer is generally held responsible to the letter to the full extent of his loss." The word "generally," which is twice used in

this passage, is indefinite; and it does
172 *not appear what cases, in the writer's view, would fall within the general rule, and what within the exceptions. If he merely intended to say that the hirer is responsible for the loss when it is occasioned by the misuser, though inevitable casualty be the proximate cause of the loss, no fault can be found with the position. Spencer v. Pilcher was a case in which, while misuser was the occasion of the loss, inevitable casualty was the proximate cause of it. If the slave in that case had not been wrongfully carried on a dangerous voyage, he would not have been drowned: though having been so carried, there was thereafter no want of due care on the part of the hirer, and the drowning was purely accidental. That kind of inevitable casualty is no excuse to a wrong doer, who cannot apportion his wrong by saying, that the property might have been lost in some other way if it had not been misused. But if the writer intended to say that every such act of misuser by a hirer, whether it be the cause or occasion of the loss of the property or not, is a conversion thereof, and works a forfeiture of his interest therein, I do not think his position is sustained by authority, or by reason. The cases which he cites in support of the passage do not sustain it in this view. Among them are three Massachusetts decisions, which were much relied on in the argument, especially the first of them, viz: Wheelock v. Wheelwright, 5 Mass. R. 104; Homer v. Thwing, 3 Pick. R. 492; and Rotch v. Hawes, 12 Id. 136. Wheelock v. Wheelwright was a special action on the case for the value of a horse hired to be rode four and a half miles, and to be returned by 7 o'clock P. M.; but which was rode nine miles, and died at 10 o'clock P. M. in the possession of the hirer. The facts were agreed, and among them, that the defendant did not ride the horse immod-

erately, or neglect to feed, or cover him properly with clothes. The court was of opinion that the case agreed had negatived *the gravamen alleged in the declaration, and that the plaintiff could not recover in that action. But the court proceeded further to say, "the defendant, by riding the horse beyond the place for which he had liberty, is answerable to the plaintiff in trover," &c. This is not a part of the decision of the court. Though I do not mean to say it would have been an erroneous decision, if the action had been trover. The hirer retained and used the horse after the period for which it was hired, as well as for a longer journey; and so was like any other wrong doer having no interest in the property which is the subject of the wrong. Homer v. Thwing was an action of trover against an infant for the conversion of a horse, and was similar in its facts to Wheelock v. Wheelwright, on the authority of which it was decided. The observations last made in regard to that case apply also to this. Rotch v. Hawes was also an action of trover for the conversion of a horse. The action was not sustained, because the owner received payment of hire for the whole distance traveled, and thereby ratified the act of the hirer in going further than the original contract allowed. Though the court took occasion to say, "there can be no question but that the plaintiffs' action would be maintained if they had relied upon the original contract. They might have elected and insisted that the defendant converted the horse by going beyond the journey agreed upon." The observations above made in regard to Wheelock v. Wheelwright apply also to this case. It is unnecessary to notice any of the other authorities cited by Story in support of the passage above quoted, as none of them seem to go so far as the three cases on which I have just commented.

In the last edition of his work on bailments, § 413 is followed by § 413 a, b, c and d, which are not in the first edition, and which show that the general rule as laid down in § 413, is by no means settled, and at *all events is subject to material qualifications and exceptions. In § 413 a, he remarks, "But although this is the general rule, a question may arise how far the misconduct or negligence or deviation from duty of the hirer will affect him with responsibility for a loss which would and must have occurred even if he had not been guilty of any such misconduct, negligence or deviation from duty." And after giving, in that and subsequent sections, various instances in illustration of this remark, he concludes, § 413 d, with this observation: "The question, therefore, in the present state of the authorities, must still be deemed open to controversy. Whenever it is discussed, it will deserve consideration, whether there is or ought to be any difference between cases where the misconduct of the hirer amounts to a technical or an actual conversion of the property to his own use, and cases where there merely is some negligence or omission, or violation of duty in regard to it, not conducing to or connected with the loss."

I think the doctrine laid down by Story in § 413, receives no support from any thing to be found in Jones on Bailments. There is a passage on p. 121, which, taken by itself, seems to tend that way. "A borrower and a hirer (he says) are answerable in all events, if they keep the things borrowed or hired after the appointed time, or use them differently from their agreement." But this passage must be taken in connection with what he says elsewhere, and especially at p. 70, where he says, "If the bailee, to use the Roman expression, be in mora, that is, if a legal demand have been made by the bailor, he must answer for any casualty that happens after the demand, unless in cases where it may be strongly presumed that the same accident would have befallen the thing bailed, even if it had been restored at the proper time; or, unless the bailee have legally tendered the thing, and the bailor *have put himself in mora, by refusing to accept it: this rule extends of course to every species of bailment." In fact there is nothing said in the work about the action of trover, or any difference between the extent of liability in that form of action, and in a special action on the case or upon the contract of bailment. In the passage above quoted, the writer is referring to a liability which may be enforced in the latter form of action; and the words "all events," and "casualty," contained in those passages, are to be construed as events and casualties occasioned by the wrongful act of the bailee.

Nor is the doctrine sustained by any of the other authorities cited by the counsel for the appellees. Duncan v. The South Carolina Railroad Co., 2 Richardson's R. 613, was an action of covenant. McLaughlin v. Lomas, 3 Strobhart's Law R. 85, seems to have been a special action on the case, and not trover. Mullen v. Ensley, 8 Humph. R. 428, was a suit in chancery. The Mayor, &c., of Columbus v. Howard, 6 Georgia R. 213, was an action on the case, and the declaration contained a count in trover. In all these cases the recovery was sustained upon the ground that the death or injury of the slave (which was the subject of controversy therein respectively) resulted from his being used for a different purpose from that intended by the parties, or else that the loss ensued from gross negligence, or other violation of the contract of hiring on the part of the hirers. In most or all of them, the doctrine laid down by Story is repeated, or referred to by the judges or some of them; but it is obvious that none of the cases rest upon that doctrine.

The only case I have seen which seems fully to sustain it is Horsley v. Branch, 1 Humph. R. 199, founded on the authority of a former decision of the same court, in

Angus v. Dickinson, Meigs' R. 459, which I have not seen.

176 *Upon the whole, I am of opinion that in the case of a bailment upon hire for a certain term (whatever may be the law in regard to a deposit, a mandate, or other gratuitous bailment, or any bailment during the mere pleasure of the bailor, as to which it is unnecessary to express any opinion), the use of the property by the hirer during the term, for a different purpose or in a different manner from that which was intended by the parties, will not amount to a conversion for which trover will lie, unless the destruction of the property be thereby occasioned; or, at least, unless the act be done with intent to convert the property, and thus to destroy or defeat the interest of the bailor therein. Whether, if the act be done with such intent, but do not occasion the destruction of the property, it amounts to a conversion, is a question not necessary to be decided in this case. Without intending to express an opinion upon it, I will consider it as answered affirmatively, for the purposes of this case.

The hirer may be restricted in the use of the property by the terms of the hiring, and will be liable for all damages arising from a violation of his contract, on the same principle, and to the same extent, on which a party to any other contract is liable for its violation. An express provision in the contract that the bailment shall be determined by a violation of any its terms by the bailee, would doubtless be valid. But a bailment upon hire is not conditional in its nature, any more than any other contract; and, in the absence of an express provision to that effect, the bailee will not, in general, forfeit his estate by a violation of any of the terms of the bailment.

If any violation of the contract by the hirer, with the exceptions before mentioned, would work a forfeiture of his interest, and be a conversion of the property, it is strange that no case to that effect can be found in any of the English reports. The only

177 case I *have seen in those reports, in which such a doctrine seems to have been contended for, is Lee v. Atkinson, decided in 8 Jac. 1, and reported in Yelv. R. 172, and Cro. Jac. 236. There, A hired a horse to B for two days, and to go to a certain place. B was riding the horse to another place, when A attempted to take him away. B brought trespass against A, who pleaded justification. But the plea was not sustained. The reason assigned for the judgment was, that "the plaintiff had a good special property for the two days against all the world; and although the defendant pretends that the plaintiff misbehaved himself in riding to another place than was intended, yet that is to be punished by an action on the case, but not to seize the gelding." It may be said that A had no right to unhorse B by violence, even though the bailment had been determined; and therefore it was unnecessary to decide whether or not it was determined by the wrongful act of B. I refer to the case only as tending to show the opinion of the court on the subject at that early day, and in the only case in which it seems to have come under judicial consideration in England, even incidentally.

The exceptions to the general rules (that for an injury to hired property during the term, trover cannot be maintained by the bailor), seem to rest upon the ground that the bailment is determined by the voluntary act of the bailee. If he destroys the property, of course he determines the bailment. His duty is to take due care of the property during the term, and return it to the bailor at the expiration thereof. By destroying, he disables himself from returning it. There seems to be no difference, in this respect, between its willful destruction by him, and a destruction arising from his using it in a manner or for a purpose not authorized by the contract. In either case it may be said that the bailment is determined by his voluntary

178 *act. If he sells the property absolutely, he also disables himself from returning it, and renders it difficult for the bailor to regain possession at the expiration of the term. If he attempts to sell it, or exercises any other act of absolute ownership over it, his act is so entirely inconsistent with the terms of the bailment, and so subversive of the rights of the bailor, that it may have the effect of determining the bailment. It may operate like a disclaimer of tenancy at common law, and deprive the bailee of the protection of the bailment in an action of trover for the conversion of the property. But if he merely use the property in a manner or for a purpose not authorized by the contract, and without destroying it, or without intending to injure or impair the reversionary interest of the bailor therein, such misuser does not determine the bailment, and therefore is not a conversion for which trover will lie. The bailee does not thereby violate any possessory right of the bailor, nor disable himself from delivering the property to the bailor at the end of the term. He is entitled to the exclusive use of it during the term, and intends only to use it during that period. He does not disclaim the title of the bailor. He is not like a wrong doer having no interest in the property, and who is guilty of a conversion if he take or detain it for the use of himself or another; "for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places." Alderson, B., in Fouldes v. Willoughby, 8 Mees. & Welsb. 54. In such a case the wrongful act is conclusive evidence of an intention to convert, as a man is presumed to intend the natural and necessary consequence of his act. No such conclusion can be drawn from the mere misuser of property by a hirer during the term. The act of misuser, to be a conversion, must occasion the loss of the property,

179 *or be done with the actual intent to

convert it. A contrary doctrine would be attended with very harsh and unjust consequences. A man hires a slave for a year, to work in one county, and employs it on the first day of the year, in an adjoining county. According to the doctrine in question, he thereby forfeits his interest, and may be immediately sued for the slave, or its value. Or, if he is permitted to retain possession of the slaves until the last day of the year, when it dies, he will, according to that doctrine, be liable for the value of the slave, though employed every other day of the year but the first, in strict pursuance of the terms of the contract, and though its death may not have resulted, directly, or indirectly, from any violation of the contract. The same principle would apply to any term of hiring. And if we suppose a case of hiring for a term of years, or for a lifetime, the injustice of the doctrine will be still more apparent. Its injustice, however, is sufficiently apparent in its application to the very common case in Virginia of the hiring of a slave for a year. While such a doctrine would do great injustice to the hirer, it is not necessary for the protection of the rights of the owner of the slave. The parties may make the contract conditional, if they choose, and reserve to the owner the right to resume possession for any violation of its terms by the hirer. In the absence of such a condition, a court of equity would doubtless interpose to protect the rights of the owner, if the safety of his slave were likely to be endangered by a violation of the contract by the hirer. The owner has ample, and often concurrent, remedies to recover any damage he may sustain from any violation of the contract or any breach of duty on the part of the hirer in respect to the slave.

Let us now apply what has been said, to the case under consideration. The
180 hirers in this case did not *willfully destroy the slaves; nor is it pretended that in employing them in the county of Chesterfield, instead of the county of Amelia, they intended to convert the slaves to their own use, or to injure or impair the reversionary interest of the owner. Then, if such employment of the slaves in Chesterfield instead of Amelia, was a violation of the contract, the liability of the hirers for the value of the slaves by reason of such violation, depends upon whether the death of the slaves was thereby occasioned or not; and is precisely the same under the second as under the first count of the declaration. It makes no difference, in principle, that the slaves died while they were employed in the county of Chesterfield; though it is a very important circumstance for the consideration of the jury in determining whether the death of the slaves was occasioned by the supposed violation of the contract. If the slaves had been employed but a short time in Chesterfield, and then carried to Amelia and employed there until their death, it might have been an easy matter to have determined whether their death resulted from their temporary employment in Chesterfield. But having been employed only in Chesterfield, and died there of pneumonia, it may be very difficult to show that their death would have happened if they had been employed only in Amelia. The burden of satisfying the jury of this fact devolves on the hirers, as the loss happened while their supposed wrongful act was in operation and force, and may have been occasioned by that act. Though difficult, it may not be impossible, to bear this burden. The nature of the disease of which the slaves died; its prevalence in the neighborhood of the place where they would have been employed in Amelia; the proximity of that place to the place of their death; would be material circumstances for the consideration of the jury, and might of themselves, or in connection with
181 *others, satisfy them that the slaves would have died if there had been no such violation of the contract as the instruction supposes. The case, in principle, very much resembles several stated in the sections in Story on Bailments, before referred to; and especially the case of Davis v. Garrett, 6 Bing. 716, 19 Eng. C. L. R. 212, referred to in § 413 d, and cited at length in note 5 to that section. That was a special action on the case to recover damages for the loss of a cargo of lime. The plaintiff put the lime on board the defendants' barge to be conveyed from Medway to London. The master of the barge deviated unnecessarily from the usual course, and during the deviation a tempest wetted the lime, and the barge taking fire, the whole was lost. The objection taken was that there was no natural or necessary connection between the wrong of the master in taking the barge out of its proper course and the loss itself; for that the same loss might have been occasioned by the very same tempest, if the barge had proceeded in her direct course. Tindal, Ch. J., said, "We think the real answer to the objection is, that no wrong doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst this wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up, as an answer to the action, the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction, if he could show not only that the same loss might have happened, but that it must have happened, if the act complained of had not been done; but there is no evidence to that extent in the present case."

I am therefore of opinion, that the Circuit court erred in giving the instruction in question to the jury. It was argued by the counsel of the defendant in error, that the instruction as given was true, as a
182 general *proposition at least; that if there are exceptions to it, the evidence stated in the bill of exceptions does not show that his case is one; that if it be not one, the plaintiffs in error could not have been injured by the instruction; that it was

incumbent on them as the exceptants, to set out in the bill of exceptions sufficient evidence to show that they may have been injured by the instruction; and that therefore the court did not err in giving it. The proposition is not stated in the instruction as a general one merely. Nor could it have been so stated with propriety. The true rule on the subject is not, properly speaking, a general rule subject to exceptions, but is a simple rule to this effect, that if hired property be used by the hirer for a purpose or in a manner not authorized by the terms of the hiring, and the loss of the property be occasioned by such misuser, he is liable in trover for its value.

It was the province of the jury to determine from the evidence, whether the death of the slaves was occasioned by the supposed violation of the contract or not. There may have been little evidence before them tending to show that the death of the slaves was not so occasioned. It cannot perhaps be said that there was none. The plaintiffs in error may at least have supposed there was enough to entitle them to the instruction which they asked for, and which expounded the law in their view of it. But according to the view which the court took of it, in the instruction given, it was immaterial whether the death of the slaves was occasioned by the supposed violation of the contract or not. That instruction closed the door to the admission of other evidence on the subject, and it would have been vain to have offered it. We cannot therefore presume that there was no other, and that the plaintiffs in error were not injured by the instruction. See Wiley v. Givens,
183 6 Gratt. 277. I think *the court, instead of that instruction and the instructions numbered two and three, moved for by the plaintiffs in error, ought to have given an instruction to the jury to the following effect: "That if there was a special contract between the plaintiff and the defendants, that the slaves which are the subject of controversy were to be employed on that part of the Richmond and Danville railroad which runs through the county of Amelia only; and if the defendants did carry them beyond the limits of said county into the county of Chesterfield, and there employ them on said road; such wrongful act was not, of itself, a conversion of the said slaves to their use. But if the death of the slaves was occasioned by the said wrongful act, then the said act, in connection with the death of the slaves, was a conversion of them by the defendants to their use, and made them liable, under either count of the declaration, for the value of said slaves: And if such death occurred while the said wrongful act, by which it may have been occasioned, was in operation and force, the burden of satisfying the jury that it was not so occasioned, devolves on the defendants."

I think there is no other error in the judgment. It would have been improper to have given the instructions numbered four and five, because it belonged to the jury to determine from all the evidence, whether the supposed conversion, in the working of the slaves out of Amelia county, was waived or not; and also because, whether that act was a conversion or not, depended upon whether it occasioned the death of the slaves or not; and a waiver of the supposed conversion could not be inferred from facts which transpired, if at all, before the death of the slaves.

It would have been improper to have given instruction number six, because the evidence shows that the amount of hires for the slaves up to the period of their deaths was received by the agent of the de-
184 fendant in *error since the institution of this suit, and since the first trial had therein. The inference of a waiver of the supposed conversion, which might have been drawn from a reception of the amount of hires, had that fact stood alone, is repelled by the additional fact of the pendency and prosecution of the suit at the time of such reception.

The objection made to the instruction given in lieu of number four, is, that it assumes the fact (of which the determination belonged to the jury), that by the original contract, the slaves were to be worked only in the county of Amelia. If this instruction had stood alone, the objection made to it might have been valid. But it must be taken in connection with the other instructions; and so taken, there can be no doubt, and could have been none on the minds of the jury, as to the meaning of the court. The question, whether by the original contract the slaves were to be worked only in Amelia, was expressly referred to the decisions of the jury in the other instructions at the same time given; and it would have been plainly repugnant to those instructions if the court had told them that such was in fact the original contract. The plaintiffs in error in number four moved for an instruction based upon the assumption of this fact, or the belief of it by the jury. The court declined giving that instruction, but gave one based on the same assumption, pro hac vice. The instruction given is to be understood as if after the words "changed the original contract," the words "supposing it to be as stated in instruction number four," had been inserted therein.

In regard to the instruction mentioned in the second bill of exceptions, some of the parol evidence was certainly admissible, and therefore it would have been improper to have excluded all. It would have been just as improper to have instructed the jury in general terms to disregard all parol
185 evidence tending to alter, *vary, explain or add to the written contracts mentioned in the said bill of exceptions. Nor was the court bound to sift the mass of evidence in the case, and determine which would alter, vary, explain or add to the written contracts, and which would not. It was the duty of the parties moving the instruction to point out the particular evidence objected to; and not having done so,

the court, on that ground, was justifiable in refusing to give the instruction.

I am for reversing the judgment, setting aside the verdict, and remanding the cause for a new trial to be had therein.

DANIEL, J. The main enquiry here has been as to the correctness of the instruction given by the Circuit court in lieu of instruction number two, asked for by the plaintiffs in error.

The instruction given has manifest reference to the instruction asked for, and the true meaning of the former appears only on the reading of the two competing propositions together.

The instruction which the court was asked to give was, that if the jury believed, from the evidence, that there was a special contract between the plaintiff and the defendants, that the slaves which are the subject of controversy were hired to the defendants to be worked by them on the Richmond and Danville railroad, in the county of Amelia, and that the said slaves were worked by the defendants on the said Richmond and Danville railroad, in the county of Chesterfield, but were not thereby subjected to any greater labor, nor exposed to any greater risk whatever, than if the said slaves had been worked in the county of Amelia, and that while so worked in the said county of Chesterfield the said slaves sickened and died, but not in consequence of being so worked in the said county of Chesterfield, nor in consequence of any
186 neglect or *want of due care and attention on the part of the defendants, then the jury should find no damages by reason of such sickness and death of said slaves.

This instruction the court refused to give; but instructed the jury, that if they should believe, from the evidence, that there was a special contract between the plaintiff and the defendants; that the slaves which are the subject of controversy were hired by the plaintiff to the defendants, with an express stipulation and agreement that they were to be employed on that part of the Richmond and Danville railroad which runs through the county of Amelia only, and that they were not to be worked on said road out of said county, and that the defendants did carry them beyond the limits of said county of Amelia into the county of Chesterfield, and there worked them on said road, that such carrying them beyond the limits of the county of Amelia, and working them in the county of Chesterfield, was of itself a violation of their contract, and a conversion of the said slaves to their use, by reason of which they became immediately responsible to the plaintiff for the value of said slaves, in the event of their death.

It will be seen that the instruction, as given, has no express reference to the time, place or circumstances of the death of the slaves, but in terms rests the responsibility of the defendants, for the value of the slaves, under the supposed breach of contract, on the event of the death of the slaves, generally. But when we see, on looking to the evidence, that it distinctly states the fact that the slaves died during the year for which they were hired, in the county of Chesterfield, whilst there employed in the service of the defendants, and that the instructions asked for are based on the jury's finding that they did so die, there can be no difficulty in understanding the court as meaning to say, that if the jury be-
187 lieved there was such a contract *as that supposed in the instructions, and a breach of it by carrying the slaves to Chesterfield, and there working them, followed by the death of the slaves, occurring whilst so at work in Chesterfield, then the plaintiff in the action was entitled to recover of the defendants the value of the slaves.

Does not the instruction thus understood, propound the law correctly? I think it does. I do not think there can be any doubt of the truth of the proposition stated as a general rule, that where the hirer of property uses it for a purpose or in a manner different from that provided for in the contract of hiring, and the property is lost in such user, the hirer is at once answerable for the loss; that the letter to him may treat such misuser and loss as a conversion of his property, and have immediate resort to his action of trover, even before the term for which the property was hired, has expired by efflux of time: And that no care or diligence on the part of the hirer to save the property from loss during such illegal use or employment, can be set up as a bar to the recovery of the full value of the property. See Story on Bailment, § 413; Spencer v. Pilcher, 8 Leigh 565; Homer v. Thwing, 3 Pick. R. 492; Wheelock v. Wheelwright, 5 Mass. R. 104; Rotch v. Hawes, 12 Pick. R. 136; Angus v. Dickerson, 1 Meigs' R. 459; Mayor, &c. of Columbus v. Howard, 6 Georgia R. 213; McLauchlin v. Lomas, 3 Strobh. R. 85; De Tollemere v. Fuller, 1 Const. Court S. Car. 117.

The case last cited is very similar in its features to the one under consideration. In that case the defendant hired sundry slaves; and among them was one, who, by the terms of the contract, was to remain on the farm as a nurse and cook. The defendant sent her to Charleston to attend a sick lady. Whilst there, engaged in that service, she took the small-pox and died. The defend-
ant was warned by plaintiff's agent
188 *of the dangers to which the slave was exposed, but did not send her away. He was held liable for the loss, on two grounds: First, for negligence in not sending the slave away after being warned of her danger; and secondly, on the ground, as stated by the court, that "where property is bailed for a particular purpose, and it is used for a different purpose, the bailee is liable, even if it appear that he has used due care and attention, the legal presumption being that the loss happened in consequence of this misuser."

It is said, however, that though the rule

be as I have stated it, it is nevertheless subject to qualifications and exceptions, which the judge ought to have announced in the instructions.

It is true, that in Story on Bailments, § 413 a, it is said that a question may arise how far the misconduct or negligence or deviation from duty of the hirer will affect him with responsibility for a loss which would and must have occurred, even if he had not been guilty of any such misconduct, negligence or deviation from duty. As for example, suppose a cargo of lime is put on board of a vessel on freight to be carried from A to B, and the master should unnecessarily deviate from the voyage, and afterwards a storm should arise, and the lime should be wetted, and the vessel should thereby take fire and the whole be lost; according to the general rule, the loss must be borne by the owner of the vessel; for although the tempest might properly in one view be deemed the proximate cause of the loss, yet, according to the doctrine of Pothier, the deviation would be the occasion of the loss; and at the common law, the loss would be held sufficiently proximate to the wrongful act of the deviation, and to be properly attributable to it, so as to support an action by the shipper. But suppose the deviation, although voluntary, were for so short a time or under such circum-
189 stances as that the vessel must *have been overtaken by the same tempest, and the same accident must have occurred, the question would then arise whether the owner would be liable for the loss.

And in the following section, the author puts another case of goods shipped on board of a ship on freight for the voyage, to be carried under deck, and, by the misconduct of the master, stowed on deck; then he says, if the goods are lost by reason of such wrongful stowage on deck, as by a sea which sweeps the deck, there can be no doubt the owner of the ship is responsible for the loss. But suppose the ship should by inevitable casualty founder at sea in a heavy gale, and the whole cargo, under deck as well as on deck, should thus be lost, the loss being in no degree attributable to the stowage, then the question would arise whether the owner of the ship is responsible for the loss.

Upon the supposition that these questions ought to be decided favorably to the ship owner, and that such decision would rule in actions of trover (about which I do not deem it necessary to express any opinion), it must be conceded that it would be easy to suppose cases in which the principle might be extended to the relief of a hirer of slaves. As where slaves should be hired to work in a specified branch of the business, in a mine or manufacturing establishment, and they should be put to another service in the same mine or manufacturing establishment, and some casualty should occur involving all, in whatever service there employed, in one common fate, there the rule suggested by the questions of Story (if law) might apply. But could such a rule have any manner of application to a case like the one under consideration?

The views or intimations of Story on the subject are evidently suggested by the remarks of Chief Justice Tindal in the case of Davis v. Garret, 6 Bing. R.
190 *716; 19 Eng. C. L. R. 212; to which he refers. That was the case supposed by Story, of the cargo of lime shipped and lost, during a deviation of the ship, in a storm, by being wetted and setting the ship on fire. The chief justice, after stating the case, and making a partial answer to the objection put, of there being no necessary connection between the wrongful deviation and the loss itself, proceeds: "But we think that the real answer to the objection is, that no wrong doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up, as an answer to the action, the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could show not only that the same loss might have happened, but that it must have happened if the act complained of had not been done."

It is obvious, from the very nature of the rule sought to be deduced from this opinion, that it can apply only to a very limited class of cases; and we should have to pass beyond the range of all experience with respect to the nature of disease, even in supposing a case for the defendants, which, consistently with the facts proved, could satisfy the requirements of the rule. It being proved that the slaves died, in the county of Chesterfield, of pneumonia, there contracted, in order to liken the case to those inevitable casualties on which the rule is sought to be founded, it would have to be supposed that at the time when the slaves died of the disease in Chesterfield, it was prevailing at every point of the work in the county of Amelia at which they could have been employed according to the terms of the contract, infecting and destroying all within its range. For if a single point at which the slaves could under the
191 contract have been at work in *Amelia, be left out of such supposed case, as one not visited by the disease, who could undertake to say that they might not have been at that point? Or if any be supposed to have escaped the fatal influence of the disease, who could say that these slaves might not have been equally fortunate?

Whilst therefore I do not desire to be understood as affirming the impossibility of imagining a state of proofs which, consistently with the evidence set out in the bill of exceptions, could bring the case within the influence of the supposed qualification of the rule which the defendants desired to be declared in the instructions, I feel no hesitation in expressing the opinion that said evidence was not only wholly insufficient for the purpose, but did not conduce to such a result.

It was proved that the slaves died, during the year, while at work in the county of Chesterfield, of pneumonia, a disease which was very prevalent throughout that county at the time of their death. That during their sickness they were attended by a physician, and received all necessary and proper attention, and were provided with all necessary and proper comforts, and that the neighborhood of the places in the county of Chesterfield where the slaves died is a healthy neighborhood, and as healthy as the adjoining counties. It is obvious, I think, that there is nothing in this evidence, taken as a whole, or in any portion of it, taken by itself, which tends to prove that the slaves must or even probably would have died, if they had not been carried to Chesterfield. It asserts positively that they died of pneumonia, and that pneumonia was prevailing extensively at the time in Chesterfield. The fact that the negroes were properly attended to and provided for, whilst it exonerates the defendants from any imputation of neglect after the slaves sickened of the disease, does not tend to any
192 result favorable to the *defendants.

It does not in the slightest degree conduce to show that the slaves must have sickened and died of pneumonia if they had been permitted to remain in Amelia. Nor is there any such tendency in the evidence with respect to the general health of the neighborhood of the places in which the slaves died. There was evidence to show that pneumonia was prevailing in Chesterfield, and none to show that it was prevailing in Amelia: And proof that the two counties stood on an equal footing in regard to health generally, has no tendency to establish the fact that the slaves must have become the victims of pneumonia if they had staid in Amelia.

With these views of the case, I cannot perceive how the defendants could have sustained any injury from the instructions of the court. No matter how true may be the proposition of law for which they contend, they cannot complain of the failure of the court to propound it to the jury, inasmuch as they have failed to show that there were any facts in the cause, or evidence tending to prove the facts calling for the application of such a proposition. It was not necessary for them to set out all the evidence in the case in their bill of exceptions, but it was incumbent on them to set out enough to show that they might have sustained injury from the ruling of the court. The court is bound, at the instance of either party, to instruct the jury as to so much of the law, and only as to so much, as governs the case presented by the evidence. Each party has a right to have the jury pass on any evidence which by rational deduction may lead to the finding of the facts that would make out this case or maintain his defense; but neither has a right to complain because of the court's refusing to declare abstract propositions of law ruling a supposed state of facts which no jury could find without indulging in mere random surmises and unfounded speculations. The *Circuit court having
193 stated the general rule governing the case which the evidence proved or tended to prove, was not bound to go farther and state all exceptions to the rule that might obtain in every possible phase of the case that it might be within the range of human testimony to present.

The probable if not the inevitable consequence of giving such an instruction as the defendants in the action say ought to have been given, would have been a misleading of the jury. They could not well have come to any other conclusion than that the judge believed there was something in the case to which the instruction could be applied. Confidence in this supposed belief might have been substituted by the jury in the place of their own views of the evidence, or otherwise they might have supposed that they had a license to go into uncontrolled guess and conjecture as to what might have been the possible fate of the slave had they remained in Amelia.

I can see no error in the course of the Circuit court in regard to this instruction; and concurring as I do in the conclusions of the majority of the court here, in relation to the other causes of error assigned, am for affirming the judgment.

ALLEN, LEE and SAMUELS, Js., concurred in the opinion of Moncure, J.

The judgment was as follows:

The court is of opinion, that if the facts were as supposed in the instruction given by the Circuit court in lieu of instruction number two, moved for by the plaintiffs in error, their wrongful act of carrying the slaves, which are the subject of controversy, beyond the limits of the county of Amelia, and working them in the county of Chesterfield, was not of itself a conversion of the said slaves to their use, by reason of
194 *which they became immediately responsible to the defendant in error for the value of said slaves in the event of their death, whether occasioned by such wrongful act or not. But the court is further of opinion, that if the death of said slaves was occasioned by the said supposed wrongful act, then the said act, in connection with the death of the slaves, was a conversion of them by the plaintiffs in error to their use, and made them liable, under either count of the declaration, for the value of said slaves: and if such death occurred while the said supposed wrongful act, by which it may have been occasioned, was in operation and force, the burden of satisfying the jury that it was not so occasioned devolves on the plaintiffs in error. The court is therefore of opinion, that the Circuit court erred in giving the said instruction, and ought, instead of that instruction and instructions numbered two and three moved for by the plaintiffs in error, to have given an instruction to the jury to the foregoing effect.

The court is further of opinion, that there

is no other error in the judgment of the Circuit court.

It would have been improper to have given the instructions numbered four and five, because it belonged to the jury to determine not only from the facts therein stated, if proved, but from all the evidence, whether the supposed conversion, and the working of the slaves out of Amelia county, was waived or not; and also because, whether that act was a conversion or not, depended upon whether it occasioned the death of the slaves or not, and a waiver of the supposed conversion could not be inferred from facts which transpired, if at all, before the death of the slaves.

It would have been improper to have given instruction number six, because it appears from the evidence that the reception of the amount of hires for the slaves up to the period of their death was during the pendency of this suit; and the inference of a waiver of the supposed conversion,
195 which might have been drawn *from a reception of the amount of hires, had that fact stood alone, is repelled by the additional fact of the pendency and vigorous prosecution of the suit at the time of such reception.

The objection made to the instruction which was given in lieu of number four, is that it assumes the fact, of which the determination belonged to the jury, that by the original contract the slaves were to be worked only in the county of Amelia. If this instruction had stood alone the objection might have been valid. But it must be taken in connection with the other instructions; and so taken, there can be no doubt, and could have been none on the minds of the jury, as to the meaning of the court. The instruction is to be understood as if after the words "changed the original contract," the words "supposing it to be as stated in instruction number four" had been inserted therein.

In regard to the instruction mentioned in the second bill of exceptions. Some of the parol evidence was certainly admissible; and therefore it would have been improper to have excluded all. It would have been just as improper to have instructed the jury in general terms to disregard all parol evidence tending to alter, vary, explain or add to the written contracts mentioned in the said bill of exceptions. Nor was the court bound to sift the mass of parol evidence in the case, and determine which would alter, vary, explain or add to the written contracts, and which would not. It was the duty of the parties moving the instruction to point out the particular evidence objected to; and not having done so, the court, on that ground, was justifiable in refusing to give the instruction.

Therefore, the judgment is reversed with costs to the plaintiffs in error, the verdict is set aside, and the cause is remanded for a new trial to be had therein; on which the instructions of the court (should instructions be sought by the parties) are to conform to the foregoing opinion and judgment.

196 *Wootton v. Redd's Ex'or & als.

January Term, 1855, Richmond.

1. **Wills—Rule of Construction—Intention of Testator.***—In expounding a will the court will make the amplest allowance for the unskillfulness and negligence of the testator; technical informalities will be disregarded; the most perplexing complication of words and sentences will be carefully unfolded; and the traces of the testator's intention will be diligently sought out in every part of the instrument; and the whole carefully weighed together.

2. **Same—Construction—Evidence—Surrounding Facts and Circumstances.**†—To aid in ascertaining the true construction of the will, evidence may be received of any facts known to the testator which

*__Wills—Rule of Construction—Intention of Testator.__—In the construction of wills, the main object is to find out the true intention of the testator which must govern with absolute sway, if it is clear, and no rule of law is thereby violated. See cases cited in *foot-note* to Tebbs v. Duval, 17 Gratt. 349, among others the principal case. See the principal case also cited in Williamson v. Coalter, 14 Gratt. 399; Walker v. Webster, 95 Va. 378, 28 S. E. Rep. 570. In addition, see Kennon v. McRoberts, 1 Wash. 96, 102, 1 Am. Dec. 428; Wyatt v. Sadler, 1 Munf. 537; Calloway v. Langhorne, 4 Rand. 181; Land v. Otley, 4 Rand. 213; Hill v. Huston, 15 Gratt. 350; McCamant v. Nuckolls, 85 Va. 331, 12 S. E. Rep. 160; East v. Garrett, 84 Va. 523, 9 S. E. Rep. 1112; Hurt v. Brooks, 89 Va. 496, 16 S. E. Rep. 258; and cases cited below.

This intention will be collected from the whole will, taken together as a consistent whole formed of all its parts. See principal case cited among others in *foot-note* to Cheshire v. Purcell, 11 Gratt. 771; Bradley v. Zehmer, 82 Va. 689. See also, Simmerman v. Songer, 29 Gratt. 9, and *foot-note*; East v. Garrett, 84 Va. 523, 9 S. E. Rep. 1112. But conjecture cannot be permitted to usurp the place of judicial conclusion, nor to supply what the testator has failed to indicate. The intention must be collected from the words of the will, for the object of the construction is not to ascertain the presumed or supposed intention, but the expressed intention of the testator; that is, the meaning, which the words of the will, correctly interpreted, convey. See principal case cited in Sutherland v. Sydnor, 84 Va. 882, 6 S. E. Rep. 480; Waring v. Bosher, 91 Va. 289, 21 S. E. Rep. 464; Coffman v. Coffman, 85 Va. 465, 8 S. E. Rep. 672; Magers v. Edwards, 13 W. Va. 830. See also, Hatcher v. Hatcher, 80 Va. 169, 171; Burke v. Lee, 76 Va. 386; Stokes v. Van Wyck, 83 Va. 724; Wildberger v. Cheek, 94 Va. 524, 27 S. E. Rep. 441. But, in order to obtain this intention, the court will make ample allowances for the unskillfulness and negligence of the testator; technical informalities will be disregarded; and the most perplexing complications of words and sentences will be carefully unfolded. Senger v. Senger, 81 Va. 702 (dissenting opinion of FAUNTLEROY, J.); French v. French, 14 W. Va. 477, both citing the principal case.

†__Same—Construction—Evidence—Surrounding Facts and Circumstances.__—To ascertain this intention, the judicial expositor is permitted to place himself, figuratively speaking, in the very shoes of the person whose will he is called upon to construe; thus extrinsic evidence of the surrounding facts and circumstances is always admissible in order that he

may reasonably be supposed to have influenced him in the disposition of his property; and as to all the surrounding circumstances at the time of making the will.

3. **Same—Same—Same—Declarations of Intention.**‡—But declarations of the testator as to his intention to make a particular bequest, or that he has made such a bequest, is not competent evidence, except where the terms used in the will apply indifferently and without ambiguity to each of several different subjects or persons; when evidence may be received as to which of the subjects or persons so described was intended by the testator.

4. **Same—Rule of Construction—Words Used.**§—In construing a will effect must be given to every word, if any sensible meaning can be given to it, not inconsistent with the general intention apparent on the whole will taken together. Words are not to be rejected or altered unless they manifestly conflict with the intention of the testator, or unless they are absurd, unintelligible or unmeaning, for want of any subject to which they can be applied.

5. **Same—Same—Description in Will Satisfied—Effect.**—Though it may be possible the testator intended to give more, yet if there be a subject found to satisfy the description in the will, the court can neither enlarge nor extend it.

6. **Same—Same—False Description.**‖—But where the subject is sufficiently and clearly ascertained, though there be added particulars of description which are found to be false or mistaken, effect will be given to the devise notwithstanding; and the false and mistaken particulars of description will be rejected.

7. **Same—Same—Description in Will Satisfied—Effect.**¶—But if such particulars of description are restrictive in their character; if they serve to narrow and limit the extent of the subject pointed out by the previous words, they never can be rejected.

And if there be a subject which satisfies the
197 whole description taken *together, evidence is inadmissible to show that the testator intended a greater or different subject.

8. **Same—Same—Words of Will Describe Nothing—Effect.****—If the words of the will describe nothing; or if with the aid of the surrounding circumstances they are insufficient to determine the testator's meaning, so that it may be ascertained with legal certainty what is the exact subject devised, the devise is void for uncertainty.

9. **Same—Construction—Case at Bar.**—Testator says, "Second—I give and devise to my daughter L all that part of my Marrowbone lands whereon I now live in the county of Henry, beginning on my spring branch at the bridge, running up the ditch of said branch to the head of said branch; thence with the line heretofore deeded by me to the said L and her husband W, to the Order line, to her the said L and her heirs forever." Testator owned other Marrowbone lands on which he did not live. Previous to making his will he had conveyed to L and her husband a part of the tract on which he lived, which was divided from what he retained, by a line which commenced at the mouth of the spring branch, and ran with it to the bridge, in a lane; thence with the lane fence a few rods to another fence; thence with this last fence to a horse lot, and thence direct to the Order line, which was the outer line of his tract. This fence ran in the direction of the branch, and some fifty yards below the spring ran close to or across the branch, but it left the spring outside about ten yards. The slip of land embraced between the branch and the fence was about nine acres. Although if the devise had stopped with the word "Henry," it might have been sufficient to pass the whole tract on which the testator lived, yet the language is capable of being restricted by the addition of boundaries. And as the surrounding circumstances did not show with legal certainty whether the whole or what part of the land was intended to be passed by the devise, it was void for uncertainty; unless it might be held to refer to the nine acres between the spring branch and the fence.

John Redd was a wealthy farmer living in the county of Henry. He seems to have had nine children, all of whom were married in his lifetime; and to whom he seems to have given property at different times. He owned a large body of lands lying on both sides of Marrowbone creek; there hav-

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may, as near as possible, place himself in the very situation of the person whose language he is called on to interpret. See principal case cited in Hooe v. Hooe, 13 Gratt. 247, and *foot-note*; Hatcher v. Hatcher, 80 Va. 171; Dixon v. McCue, 14 Gratt. 550; Burke v. Lee, 76 Va. 389; Senger v. Senger, 81 Va. 703 (dissenting opinion of FAUNTLEROY, J.); Wildberger v. Cheek, 94 Va. 524, 27 S. E. Rep. 441; French v. French, 14 W. Va. 477, 495 (citing also Waller v. Waller, 1 Gratt. 454); Atkinson v. Sutton, 23 W. Va. 200 (citing also Magers v. Edwards, 13 W. Va. 822); Couch v. Eastham, 29 W. Va. 788, 3 S. E. Rep. 26. See also, *foot-note* to Midlothian Coal Co. v. Finney, 18 Gratt. 304.

‡**Same—Same—Same—Declarations of Intention.**—As to when declarations of intention are admissible as an aid in the interpretation of wills, see *foot-note* to Midlothian Coal Co. v. Finney, 18 Gratt. 304, where the question is discussed at some length, and principal case cited. See the principal cited on the subject in Senger v. Senger, 81 Va. 695; *foot-note* to Skipwith v. Cabell, 19 Gratt. 758; French v. French, 14 W. Va. 507. See also, Roy v. Rowzie, 25 Gratt. 599, and *foot-note*.

§**Same—Rule of Construction—Words Used by Testator.**—See principal case cited and approved in Walker v. Webster, 95 Va. 379, 28 S. E. Rep. 570.

‖**Same—Same—False Description.**—On this subject, see the principal case cited in Preston v. Heiskell, 32 Gratt. 48, 60, and *foot-note*; Savings Bank v. Stewart, 93 Va. 452, 25 S. E. Rep. 534.

¶**Same—Same—Description in Will Satisfies—Effect.**—If there be found a subject which satisfies the disposition of the property as contained in the will, evidence cannot be received to show that the testator intended a greater or a different subject, or estate. Burke v. Lee, 76 Va. 389, citing the principal case.

****Same—Same—Obscurity of Will Impenetrable—Effect.**—In Magers v. Edwards, 13 W. Va. 829, it is said: "But if after exploring throughout the entire will, aided by all the facts known to the testator, and all the circumstances surrounding him, when he made his will, the court cannot penetrate through the obscurity, in which the testator has involved his intention, the failure of a supposed intended testamentary disposition is the inevitable consequence; and the heirs or distributees must in such case take; for they cannot be disinherited but by necessary implication. See opinion of JUDGE LEE in *Wootton v. Redd's Ex'or et als., 12 Gratt. 205, 206.*"

ing been about fifteen hundred acres on the west side of the creek, on which he lived, and between five and six hundred acres on the east of the creek. All these lands were called his Marrowbone lands; though that on the east was called Wash's place,
198 or the quarter; and that *where he lived, the home place. One part of the home place was called Crouch's field. A public road passed through the land on the west of the creek, and nearly parallel to it, throwing about one-third of the tract between the road and the creek. The dwelling-house was west of the road, and the granary was between the road and the creek. The land on the west and east of the creek was cultivated separately, under separate overseers, and with separate hands.

In 1836 John Redd made a will, by which he devised to his daughter Lucy D. Wootton all that part of his Marrowbone lands in the county of Henry on which he lived, contained within certain specified boundaries. These boundaries included the southern part of the tract on the west of the creek, extending north to Crouch's field, and embracing the mansion-house of the testator, amounting to upwards of nine hundred acres. He gave to his son Edmund B. Redd about two hundred and thirty acres of the home place; and the remainder, including Crouch's field, was directed to be sold.

In 1838 John Redd seems to have made another distribution of property amongst some of his children. At that time he executed a deed by which he conveyed to John T. Wootton and Lucy D. his wife about five hundred acres of the land left to her by the will of 1836. The boundaries of this land separating the land conveyed from the land reserved, are described in the deed as follows: "Beginning at the mouth of my spring branch where it enters into Marrowbone creek; up the said branch to the bridge on the public road; thence running along the road a few rods to where the cross fence joins the lane fence that divides that part of the land that I now convey from the balance of the tract; thence along the said fence to my horse lot near Jarrett Patterson's; thence a direct line to my line formerly known as Harmer's, &c.
199 Order line; *thence," &c. tracing the outer boundaries of the tract to the creek, and down the creek to the beginning. The Jarrett Patterson here spoken of, was the overseer of John T. Wootton, living on the land conveyed to Wootton and wife, and of which he had been previously put into possession.

The spring which was the source of the spring branch, was about one hundred and twenty-five yards south of the mansion-house, and was that from which water was taken for use at the house. The branch ran from thence nearly east to Marrowbone creek. From its mouth to the bridge was seventy-three poles; and from the bridge to the spring was two hundred and seventeen poles; and from the spring to the nearest point in the line of the deed to Wootton and wife was one pole and twenty-one links. Between the spring branch and the fence described in the deed there was a slip of land of about nine acres, a part of it marshy, and a part rugged; and the whole of little intrinsic value. The fence seems to have crossed the branch about one hundred yards below the spring, and to have run for some fifty yards on the north of the branch, and then recrossed it. This, however, it was said was occasioned by the filling up of the natural channel of the creek, so as to divert the water to the south side of the fence; the natural channel being on the north side. The line from the horse lot to the order line was about one hundred and twenty poles. From the spring to the Order line was still further.

In 1850 John Redd departed this life, having made a will and several codicils thereto, which were duly admitted to probat. This will was dated on the 17th of May 1843. By the first clause, he states that he has made advancements to his son Waller Redd equal to his share of the testator's estate; and therefore he gives one dollar to Waller Redd's daughter. The second clause of his will is as follows:
200 "I give and devise to my daughter Lucy D. Wootton all that part of my Marrowbone lands whereon I now live in the county of Henry, beginning on my spring branch at the bridge; running up the ditch of said branch to the head of said branch; thence with the line heretofore deeded by me to John T. Wootton and the said Lucy D. Wootton to the Order line, to her the said Lucy D. Wootton and her heirs forever." The language of this devise to the word "beginning," was copied from the will of 1836.

After some other devises to two sons, he gives to his son Edmund B. Redd about eighteen acres of land, specifying the boundaries. This land adjoined the land on which the testator lived, but it was insisted by Lucy D. Wootton that it was not a part of what was called his Marrowbone lands. He also gave to him another tract of one hundred and twenty acres not connected with the lands on which he lived. And he then directed all the residue of his estate, real and personal, to be sold on a credit of twelve months, and the proceeds to be divided into eight parts, one of which he gave to each of his children then living, and to the descendants of other children who were dead. By a codicil to his will he gave to Lucy D. Wootton one thousand dollars. By his will he appointed his son John G. Redd and his sons in law James M. Smith and John T. Wootton his executors; and by a codicil made in 1845, he says that John T. Wootton having died, he appoints his son in law Peter H. Dillard one of his executors: And the three qualified as such; though John G. Redd seems to have died shortly afterwards.

The surviving executors having advertised the lands, including the home place, to be sold, Lucy D. Wootton in January 1851, filed her bill in the Circuit court of

Henry county, in which she set out the will and codicils of John Redd, and in
201 sisted that under the *second clause of the will, all the testator's Marrowbone lands on the west side of the creek, were given to her; and she prayed that the sale of these lands might be enjoined. By an amended bill she made all the devisees parties. Dillard, one of the executors, answered, expressing the belief that it was the intention of the testator to give to the plaintiff the whole of the tract on which he lived; and that he had done so by his will. Smith, the other executor, denied that such was the intention of the testator, or the effect of his will. He insisted that the testator only gave to the plaintiff the slip of land lying between the fence mentioned in the deed and the spring branch; and he said that he had always been willing she should take that into her possession. William O. Fontaine was the only adult devisee who answered the bill: He took the same grounds as the executor Smith.

Several witnesses were examined, who expressed the opinion from conversations with the testator, that he considered the spring branch as the line between himself and John T. Wootton and wife, under the deed made to them: But it was proved that he had cultivated a small slip of ground south of the creek after the execution of the deed. The result of the other evidence has been already given, or it will be found stated in the opinion of Judge Lee.

The cause came on to be heard in May 1852, when the court held, that under the second clause of the will of John Redd, the plaintiff could only claim the land lying between the fence and the spring branch; and dissolved the injunction, and dismissed the bill. Whereupon the plaintiff obtained an appeal from one of the judges of this court.

The case was elaborately argued by John T. Wootton and Patton, for the appellant, and Bouldin and Robinson, for the appellees; but the questions raised, and
202 *the authorities cited, are stated by the judge, and need not be repeated.

LEE, J. The questions for the determination of the court in this cause, relate to the construction and legal effect of the second clause of the will of John Redd deceased. The will bears date on the 21st of February 1843; and the clause in question is in the following words:

"Second. I give and devise to my daughter Lucy D. Wootton, all that part of my Marrowbone lands whereon I now live, in the county of Henry, beginning on my spring branch at the bridge; running up the ditch of said branch to the head of said branch; thence with the line heretofore deeded to John T. Wootton and Lucy D. Wootton, to the Order line, to her the said Lucy D. Wootton and her heirs forever."

At the date of the will the testator owned about fifteen hundred acres of land situate on both sides of the creek named, of which between eight and nine hundred acres lay on the west side of the creek, and between six and seven hundred on the east side. The testator resided on the west side; and it appears that the land on the eastern side was tended and cultivated separately from that on the western side, with a different overseer and a distinct set of hands. Near the mansion-house of the testator was a spring from which flowed the branch referred to in the will as the "spring branch," emptying into Marrowbone creek. Running across that portion of the land lying on the west side of the creek in a direction nearly parallel to that of the creek, was a road designated the "Marrowbone road," which divided the land on that side into two parts, one of which, that bordering on the creek, was about a third of the whole on that side. This road crossed the spring branch upon a bridge at a point which would appear to be some eighty or
203 *ninety poles from its mouth, and this "Pole bridge," as it is called, is designated in the will as the place of beginning of the land devised to Mrs. Wootton. Some years previously to the making of this will, the testator had owned somewhere in the neighborhood of five hundred acres more of land on the west side of the creek, and constituting a part of his then mansion-house tract; being the upper portion upon the creek. By a will made in 1836 he had given to his daughter Mrs. Wootton, (wife of John T. Wootton,) a considerable portion of this land on the west side of the creek, being the upper portion thereof commencing on the creek at the upper corner at or near the ford of the creek which is designated as that near Dr. George Hairston's; thence running down the creek to the ford used in passing from the testator's house to his plantation on the eastern side of the creek called Dillon's; thence leaving the creek by several courses bearing in a northwesterly direction to the back line; and thence with the exterior lines to the beginning; containing between nine hundred and a thousand acres of land, and embracing the mansion-house, the spring, and the appurtenances. Subsequently, by deed dated on the 21st of April 1838, the testator conveyed to John T. Wootton and wife part of the land which he had thus given to Mrs. Wootton by the will of 1836, of which part, supposed to be about five hundred acres, it is recited in the deed that he had already placed John T. Wootton in possession. The land thus conveyed to Wootton and wife is described as beginning at the mouth of the spring branch on Marrowbone creek; thence up the branch to the bridge on the public road; thence along the road a few rods to where the cross fence joins the lane fence that divides the part conveyed from the balance of the tract; thence along the said fence to a lot designated; thence a direct line to the line known as "Harmer's, &c. Order line;"
204 thence *with the exterior lines of the tract to Marrowbone creek; and thence down the creek to the place of beginning. The fence referred to in this deed as the

division line, begins at the line fence a few rods from the Pole bridge across the spring branch before referred to, and runs up the branch to a point at which it crosses its modern channel at a distance of about one hundred yards below the spring. Between this fence and the branch below the point of intersection, and bounded on the south-east by the lane fence, there is embraced a small piece of land ascertained to be about nine acres.

The appellant contends that under the terms of the will the whole of the lands owned by the testator lying on the west side of Marrowbone creek, was devised to her, (excepting a small piece of about eighteen acres devised to the testator's son Edmund B. Redd,) the quantity being about eight hundred and fifty acres by one survey, and about eight hundred and sixty-five by another. The appellees insist that what is described by those terms is the strip above mentioned of nine acres, and that this strip only passes by the devise. Or if it do not satisfy the terms of the description, then that the subject is so vaguely and imperfectly described that the devise is void for uncertainty.

That the clause in question is involved in some doubt and obscurity, will be apparent when it is considered that the testator has used a form of expression which may import the whole of the tract on which he resided, lying west of Marrowbone creek, or a part of that tract only, according to the force and effect of the particulars of description or boundary which he has superadded; and when it is ascertained that the supposed boundaries of themselves embrace nothing; that they constitute no diagram; that in effect they form but one irregular line the termini of which, the Pole bridge at one extremity and the intersection
205 with the *"Order line" at the other, are nearly one mile apart. But however great may be the doubt and obscurity which rest upon the subject, and however difficult may be the task of eviscerating the intention of the testator, still if it can be ascertained by any legitimate means, it must be held sacred, and full effect must be given to it.

In performing the duty of expounding a will, the court will make the amplest allowance for the unskillfulness and negligence of the testator, technical informalities will be disregarded, the most perplexing complications of words and sentences will be carefully unfolded, and the traces of the testator's intention will be diligently sought out in every part of the instrument, and the whole carefully weighed together.

Nor in the performance of this duty will the judicial expositor be confined to its mere contents. For an investigation into the state of facts under which the will was made will often materially aid in elucidating the scheme which the testator had in mind for the disposition of his estate. Hence he will endeavor to place himself in the situation of the person whose language he is called on to interpret; and as this can only be done by the aid of extrinsic evidence, such evidence may be resorted to for the purpose of showing the situation of the testator and the state of his family and of his property at the time of making his will. And, generally, evidence may be received as to any facts known to the testator which may reasonably be supposed to have influenced him in the disposition of his property, and as to all the surrounding circumstances at the time of making the will. Wigram on Admission of Extrinsic Evidence in Aid of the Interpretation of Wills, p. 11, et seq.; Proposition 5, p. 51. Ibid. p. 57; Smith v. Bell, 6 Peters' R. 68, 75; Doe v. Martin, 1 Nev. & Mann. 524; Shelton v. Shelton, 1 Wash. 53, 56; Kennon v. McRoberts, Ibid. 96, 102;
206 *Ellis v. Merrimack Bridge, 2 Pick. R. 243; Brainerd v. Coudry, 16 Conn. R. 1. But if after exploring throughout the entire contents of the instrument, aided by a knowledge of all the facts known to the testator and of all the circumstances surrounding him at the time of making it, the judicial expositor is unable to penetrate through the obscurity in which the testator has involved his intention as to a material fact, the failure of the intended testamentary disposition is the inevitable consequence. Conjecture cannot be permitted to usurp the place of judicial conclusion, nor to supply what the testator has failed sufficiently to indicate. The law has provided a definite successor to the estate in the absence of a testamentary disposition, and the heir is not to be disinherited unless by express words or necessary implication. 1 Jarman on Wills 315; Wigram on Ex. Ev. Prop. 6, p. 11; 1 Greenleaf's Ev. § 287, n. 1.

The parties in this case have taken much testimony as to the situation of the testator and his family and property, and of other facts and circumstances surrounding him at the time of making his will, with a view to elucidate his intention and the scheme which he had framed for the disposition of his property. That all the evidence of this character may properly and legitimately be considered in passing upon the construction of the will, cannot be doubted. But there is another kind of testimony also offered, which comes in a more questionable shape, and to which exception has been taken. With a view to show that it was the intention of the testator in the second clause of his will to give to her all of the land which he owned on the west side of Marrowbone creek (excepting the small piece devised to Edmund Redd), the appellant has taken the depositions of various witnesses to prove declarations made by the testator, that he had given that part of his lands to her
207 by his will, *or that it would be hers at his death, or that he intended to give it to her at his death, or other statements of the like import. The proofs of this character are, however, far from being satisfactory. Some of the witnesses by whom they are made are effectually discredited. Others appear to differ as to what

the testator stated he intended for Mrs. Wootton. For example, the witness Patterson states that he understood the testator to say she would get the land down to the mouth of Crouch's branch; thence up the branch and crossing the road to the "Order line;" and that the place called "Crouch's field" was to be sold along with the land on the opposite side of the creek called "Wash's place" or "the quarter." And yet Crouch's field constituted a considerable portion of the mansion-house tract on the west side of the creek, which is now claimed by the appellant. But if the testimony of this character were sufficiently clear and explicit, I should think it not entitled to any consideration. It is well settled that such evidence is inadmissible to make out a testamentary gift. A party seeking to maintain a devise, must show it by a will in writing; and it would be wholly inconsistent with this rule, where a testator has failed to make a perfect and explicit disclosure of his scheme of disposition in his will, to permit its deficiencies to be supplied by parol proofs of declarations of the testator, or other similar evidence of actual intention. The enquiry is not what the testator meant to express, but what the words which he has used do express; and to such an enquiry evidence of instructions given by the testator for his will, or of his declarations as to what were his intentions in the disposition which he had made, or as to the disposition which he intended to make of his property, is obviously inapplicable; and the authorities against its admissibility are numerous and decisive. Wigram, Prop. 6, p. 83, 89, 97; Bennet v. Davis, 2 P. *Wms. 316; Strode v. Lady Falkland, 3 Chy. R. 98; Brown v. Selwin, Cas. Temp. Talbott 240; Lord Walpole v. Earl of Cholmondeley, 7 T. R. 138; Newburgh v. Newburgh, 5 Madd. R. 364; Goodringe v. Goodringe, 1 Ves. sen. 231; Murray v. Jones, 2 Ves. & Beame 313; Preedy v. Hottom, 4 Adolp. & Ell. 76; Hiscocks v. Hiscocks, 5 Mees. & Welsb. 363; Miller v. Travers, 8 Bing. R. 244; Jackson v. Sill, 11 John. R. 201. The only exceptions to the rule are certain special cases in which it is found that the terms used apply indifferently and without ambiguity to each of several different subjects or persons. In such cases evidence will be received to prove which of the subjects or persons so described was intended by the testator. Wigram, Prop. 7, p. 101; p. 183, pl. 215.

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Laying aside then all these declarations of the testator, and other similar evidence of actual intention, as contradistinguished from the surrounding circumstances, we must endeavor, with the aid of the latter, to place ourselves in his situation, and thus interpret the language he has used. We must declare, if we can, what intention he has expressed with sufficient legal certainty, not the intention which he may have entertained, but which he has failed sufficiently to manifest. Guy v. Sharp, 1 Myl. & Keen 589, 602; Martin v. Drinkwater, 2 Beav. R. 215.

In the construction of wills it is a well settled rule that effect must be given to every word of the will, if any sensible meaning can be assigned to it not inconsistent with the general intention on the whole will taken together. Words are not to be changed or rejected unless they manifestly conflict with the plain intention of the testator, or unless they are absurd, unintelligible or unmeaning, for want of any subject to which they can be applied. Gray v. Minnethorpe, 3 Ves. jr. R. 103; Constantine v. Constantine, 6 Ves. R. 100; Doe ex dem. Baldwin v. Rawding, 2 Barn. & Ald. *441, 451; Chambers v. Brailsford, 2 Meriv. R. 25; Doe v. Lyford, 4 Mau. & Sel. 550. And though it may be possible the testator intended to give more, yet if there be a subject found to satisfy the description, the court can neither enlarge nor extend it. Doe ex dem. Chichester v. Oxenden, 3 Taunt. R. 147; Doe ex dem. Oxenden v. Chichester, 4 Dow. Parl. R. 65; Jackson v. Sill, 11 John. R. 201.

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But where the subject is sufficiently and clearly ascertained, though there be added particulars of description which are found to be false or mistaken, effect will be given to the devise notwithstanding; and these false or mistaken particulars of description will be rejected. Here the maxim "falsa demonstratio non nocet cum de corpore constat" properly applies. Thus, where a testator devised "all that his farm called Trogue's farm, in the parish of Darley, now in the occupation of A. Clay;" but two certain closes which were part of Trogue's farm were not in the occupation of the person named. Yet it was held that the devise embraced the whole of Trogue's farm, and was not affected by the mistaken terms of description superadded; which might accordingly be rejected. Goodtitle v. Southern, 1 Mau. & Sel. 299. So where a testator devised to his wife his farm at Bovington, in the tenure of John Smith, &c., a portion of the farm was excepted out of the lease to Smith, but it was held that the words "in the tenure of John Smith," were but additional terms of description of a subject already sufficiently designated, and being mistaken, might be rejected. So that the whole of the farm was held to have passed by the devise. Goodtitle v. Paul, 2 Burr. R. 1089. So where there was a devise of all of a farm and lands called Colt's Foot farm now on lease to Mary Fields at the yearly rent of one hundred and fifty pounds, a close of seven acres, part of Colt's Foot farm, but excepted out of Mary Fields' lease, was held to *have passed. Down v. Down, 7 Taunt. R. 343. So where a testatrix devised all her Briton Ferry estate, which was afterwards described as "situate, lying and being in the county of Glamorgan in the principality of Wales." A part of the Briton Ferry estate was in fact situate in the county of of Brecon; yet held that the whole passed. Doe v. Earl of Jersey, 1 Barn. & Ald. 550.

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A similar decision was made in a case in Maryland, in which a testator devised a

tract of land by name, but which he went on to describe as lying in a particular county. This was deemed but a mistaken description, and it was held that the whole tract passed though part lay in another county. Hammond v. Ridgly, 5 Harr. & John. 245. See also Hastead v. Searle, 1 Ld. Raym. 728; Wrotesley v. Adams, Plowd. 187, 191; Goodright v. Pears, 11 East. 57.

The doctrine of these and similar cases the counsel for the appellant seek to invoke into this case. They maintain that as the particulars of description in the nature of boundaries contained in the devise to her constitute together but one irregular line, the termini of which are nearly one mile a part, describe nothing, embrace nothing, they must be disregarded. It is argued with great force that if such particulars giving a false or mistaken description of the subject, would not defeat the devise, still less should they do so, if they give no description, if they amount to nothing more than an abortive and ineffectual effort to describe something which it is impossible for them to describe. It is therefore insisted that these particulars of boundary should be wholly rejected as unmeaning and insensible, and that the subject of the devise should be ascertained from the previous description, which they allege is sufficient to identify it as the "home place" of the testator, or the whole of his Marrowbone lands lying on the west side of the creek.

211 *But in order to bring this case within the influence of the principle asserted in the cases above cited, and the other cases to be found to the same effect, and to reject the particulars of boundary found in the devise, it must appear that the other words of the clause give a clear, certain and unambiguous description of the subject devised; and that the particulars given are but words of suggestion and affirmation superadded as further descriptive of a subject already and efficiently indicated. If on the other hand, such particulars are restrictive in their character, if they serve to narrow and limit the extent of the subject pointed out by the previous words, they never can be rejected. And if there be a subject found which satisfies the whole description taken together, evidence cannot be received to show that the testator intended a greater or different subject. If this were permitted, it would be in effect to make a will for a testator by parol when the law requires that it shall be evidenced by writing. And it would be dangerous to permit words of restriction used in a will intended to narrow or curtail the dimensions of the subject pointed out, to be rejected, and allow the party to claim under the general terms of the devise discharged of the restriction. The effect might be to impute to a testator a meaning which he never intended, and to make him thus give the whole when it was his wish and intention to give part only. Thus for example, in this case, if the testator's mansion-house tract, instead of lying wholly within the county of Henry, had lain partly in that county and partly in Pittsylvania, and he had omitted the name of the county in this clause of his will, so that it read "I give to my daughter Lucy D. Wootton all that part of my Marrowbone lands whereon I now live in the county of ." Here would be an imperfect, incomplete description, creating an ambiguity patent on the face of the will. Nor could the blank be filled

212 by *evidence. Hunt v. Hort, 3 Bro. C. C. 311; Miller v. Travers, 8 Bing. R. 244; Wigram, p. 88, pl. 121. The superadded words, however, could not be regarded as merely words of description of a subject already sufficiently described. They would plainly appear to have been intended to be words of restriction, and to reject them would be to give the whole of the lands in both counties, when it was the testator's intention to give the part lying in one only. Numerous cases in which words of description found in a devise were yet held to be restrictive, and therefore such as were not to be disregarded are to be found in the reported decisions. Thus in Woodden v. Osbourn, Cro. Eliz. 674, the words "in Cokefield" were held to be restrictive, and to limit the devise of all the testator's Hayes land to such as he had in Cokefield, though it appeared that he had other lands called Hayes lands in Cranfield. In Parkin v. Parkin, 5 Taunt. R. 321, the devise was of all the lands, tenements, &c., of the testator in the township of Thurgoland, "then in his own occupation." At the time of making his will the testator was seized of a messuage and five acres of land in the township of Thurgoland, which were then in his own occupation. He was also seized of an inn and nine acres of land in the same township, but which were not at that time occupied by him. Held, that the words of occupation were clearly restrictive, and that the inn and nine acres did not pass by the devise. So where a testator reciting that he was seized of divers freehold lands in Islington, and certain copyholds, "and all which lands, &c., were subject to a mortgage thereof made by him," (which he described), gave and devised all his said freehold and copyhold lands and hereditaments. At the date of the will the testator owned twenty-one acres of freehold lands in Islington, which were not embraced by the mortgage mentioned in the will; and it was held that the words refer-

213 ring to the *mortgage were to be regarded as restrictive, so that the twenty-one acres did not pass by the devise. Pullin v. Pullin, 3 Bing. R. 47. In Jackson v. Sill, the words "which I now occupy," annexed to a devise of lands, were held to be restrictive, and not such terms of additional description as could be rejected; and it was accordingly held that a tract of land of ninety acres, which the testator had leased to another person before making his will, did not pass by the devise. So in another case, the words "on which I now live," annexed to a devise of lands, received

a similar construction, and were held to exclude a lot of sixteen acres not adjoining and which had been on lease to others. Jackson v. Moyer, 13 John. R. 531. Other cases are to be found in which under different forms the same principle is asserted and enforced.

We come then to the question whether the words of local description in the nature of boundaries found in the devise in this case are terms of additional description merely superadded where the subject of the devise had been already clearly and unmistakably indicated, as the whole of the lands on the west side of Marrowbone creek? Or were those words intended to be restrictive in their character, so as to limit the devise to a portion of those lands, and if so, to what portion? And here the enquiry at once suggests itself, why should the testator, if he had intended to give the whole of the lands on the west side of the creek, have added any boundaries at all? The obvious and plainest mode of making such a devise would have been to give all the lands on the west side of the creek, or in the form adopted by the testator, to stop at the end of the words "whereon I now live," and the addition of boundaries was wholly unnecessary. But this he has not done. He has adopted a form of expression, "all that part of my Marrowbone lands," which, whilst it might import all the lands on
214 the west side *of the creek if it had stopped with the words "whereon I now live," may and must import a part of those lands only, if the words of description superadded operate to restrict it to a part. And we are not without a history of the particular form of expression used. The words of the devise were copied from the will of 1836 down to the word "beginning," inclusive, and then different boundaries were inserted in place of those found in that will. By the will of 1836 the testator did not give the whole of the mansion-house tract or the lands lying on the west side of the creek to the appellant, but gave a part only: for the boundaries given excluded all that portion lying north of Crouch's branch and of a line running from the public road where it crossed the branch to the "Order line," being about four hundred and five acres. So that we see the boundaries which followed the same form of expression in the will of 1836 were intended to restrict the general description to that portion of the land on the west side of the creek lying south of Crouch's branch and the line above specified. It is true those boundaries are replaced by different boundaries in the will of 1843; but when the testator used the same form of expression in the latter though giving different boundaries, it may not be unreasonable to infer that he intended the boundaries to perform a similar office to that for which they had served in the will of 1836, and restrict the devise to a part of the mansion-house tract. It will be seen too that when the testator speaks of the whole of a tract, he says "a tract," and gives a general designation of the land intended, without attempting to give the exterior boundaries. Where, however, he speaks of part of a tract, he uses the expression "that part," and then goes on to describe the part intended by boundaries or some specific local demarcation. This would seem to have been his mode of thought upon the subject, and it may almost
215 be regarded *as a law of the will. It tends to show that when the testator uses the expression "a part of his lands," he has in mind a part to be circumscribed by metes and bounds, not the whole of a tract to be designated by general terms of description.

Again. If the testator intended to give the whole of the lands on the west side of the creek, why not commence the boundaries at some point on the creek, or at the terminus of some one of the exterior lines? Why commence in the middle of a line at a point some eighty or ninety poles from the creek? If on the other hand, he intended to give only the nine acres lying between the line of his deed to Wootton and wife and the spring branch, then he commenced his description at the point at which he naturally would and ought to commence it. For it is at that point that the line of the deed deflects from the course of the spring branch and runs along the lane to the cross fence, and thence with that fence as stated in the deed, so as to form a diagram with the spring branch, embracing the nine acres, the apex of which is at the point designated as that of the beginning.

It is to be observed too that in the fifth clause of his will the testator gives to his son Edmund Redd a part of his land lying on the west side of the creek, which he described by specific boundaries. This, though perfectly consistent with the devise to Mrs. Wootton, if it be restricted to the nine acres, is yet irreconcilable with it if it is to be regarded as a devise of all the lands on the west side of the creek. It is true that irreconcilable devises may occur in a will, so that all cannot stand together, and that in such a case, where the repugnancy plainly appears, the prior devise must yield to that which is posterior in local position so far as may be absolutely necessary to give effect to the latter, but no further.

But where the enquiry is as to what is
216 embraced in the prior devise, *a subsequent devise may be properly looked to as tending to show the true subject of the former devise; for it will not be supposed that the testator intended to give by the posterior devise what he had already given by the former. It is said, however, that the land devised to Edmund Redd was not a part of the Marrowbone lands. But it is nowhere shown to be a separate and distinct tract. The proofs are, I think, rather the other way. Perkins says expressly that he believed it was a part of the Marrowbone tract on which the testator lived; and Patterson, Dillon and Dupuy seem to regard all the testator's lands on the west side of the creek as part of his home place or Marrowbone lands. It is so laid down on the

plat of Wingfield; on that of Graves it is not so represented. The argument indeed is that by the terms "Marrowbone lands," all the testator's lands on both sides of the creek were included; and that by the words "all that part of my Marrowbone lands whereon I now live," was meant that portion of them lying on the west side of the creek, and not a part of the latter.

With regard to the meaning thus assigned to the terms "Marrowbone lands," I will here remark that whilst such a form of expression is frequently, perhaps most usually employed to denote the lands on both sides of the water course named, yet it is not of necessity used in that sense only. From the situation of lands on one aside relatively to a water course and to some other stream uniting wih the former upon which they may chance also to lie, or from some other local circumstance or because they had acquired some other notorious name and designation, it might very well happen that the lands on the other side only would take the name of the particular water course. And the question is, in what sense did the testator use the terms? What lands did he intend to designate by the words "Marrowbone lands?" The proofs tend rather
217 *to show that it was his habit to apply those terms to the mansion-house tract, the lands on the west side of the creek, whilst he spoke of the lands on the opposite as "Wash's place or the quarter," and some times as "Ellis'."

But is is said there was no inducement to give Mrs. Wootton the nine acres; that it was of little value to any one, and of no peculiar value to her; and that in point of fact when he made his will, the testator regarded it as already hers, because he believed the spring branch was the line between his land and that conveyed to Wootton and wife. I do not think it satisfactorily proven that such was the testator's impression. It is true some of the witnesses testify to their having heard him speak of the spring branch as the line, or say that the lands south of the spring branch belonged to Wootton and wife. Others say that he recognized the fence as the line; and it is proved that he had a part of the strip between the fence and the branch in cultivation. It may be that in speaking of the branch as the line or of the land south of the branch as the land of Wootton and wife, he intended only to give a general idea of the course of the division line, without designing to state with precision the exact line named in the deed which he knew run so near the branch.

In the original bill filed by the appellant there is no suggestion of any such belief or impression having been entertained by the testator; and whilst it is admitted that the fence was the line, it is not intimated that any other had been recognized by him. The line is described minutely and unmistakably in the deed. It leaves the branch at the Pole bridge and runs along the road a few rods to the junction of the cross fence with the line fence; thence with the former to the horse lot, &c. And from the manner of expression used in the deed, and
218 the similarity of style and in *the mode of spelling a particular word, one might infer that it was written by the same person who wrote the two codicils purporting to have been written by the testator himself. But however this may be, he was doubtless familiar with the contents, and knowing the ground perfectly, he may have had some reason when he made the deed for deviating from the spring branch and adopting the fence as the division line instead. He is represented by all the witnesses who speak of his mental character and capacity, as being a man of vigorous intellect, and remarkable for caution in the transaction of business. It is difficult to suppose that such a man would in a few years have forgotten or become confused about a division line which he had carefully established between his own land and that of a neighbor; while upon the other hand, if he had changed his purpose of giving a large part of his home place to Mrs. Wootton as he certainly had in regard to his son Edmund Redd, it might have occurred to him that it would be proper (not knowing into whose hands the homestead might fall) to secure to Mrs. Wootton the strip between the spring branch and the fence as he seems to have thought it proper to secure to Edmund Redd the small piece of eighteen acres on the opposite side of the tract, north of the still-house branch. He may have thought (as many of the witnesses examined seem to think) that it would be important to Mrs. Wootton to have free access to the branch for water for her hands and stock, of which the supply would seem to have been otherwise scanty on that side of her land: and he knew that to run with the branch would straighten the line, save fencing and improve the form of both properties, while it would substitute a permanent natural boundary for one easily changed and in its nature perishable. That the will devises to Mrs. Wootton while the deed is to Wootton and wife, offers no
219 difficulty. Husband and *wife are treated as one both in common parlance and in law for most practical purposes, and from the character of the provisions of his will the testator appears not to have discriminated between them.

I think there is not much force in the argument that such terms as "all that part of my Marrowbone lands" could not have been intended to describe a small piece of land of nine acres. "All that part" is but a formal mode of legal expression, importing the entirety of the thing devised, whatever it may be, and not that it is either great or small. They were evidently used as words of form, copied from the will of 1836, which the testator had adopted as his guide as to the formal parts of the instrument, whilst the substantial parts were supplied by written memoranda or dictated orally by him at the time. Nor is there any thing in the local position of the devise to Mrs. Wootton, being the second clause of the will, to

raise a presumption that the testator intended to give her a large or substantial part of his lands, for we see that the bequest that precedes it, constituting the first clause of the will, is a nominal one of one dollar to his grand daughter Mrs. Preston.

Some stress has been placed on the fact that the wife of the testator and some of his children were buried on the home tract; and it is urged that it is not likely the testator would have directed that tract to be sold, and thus rendered it liable to pass into the hands of strangers. Upon subjects of this character men differ in their feelings and sentiments. In this country, where the character of our institutions combines with the spirit of the age to encourage the ready disposal of property of all kinds, which is accordingly constantly changing hands, this sentiment of attachment and veneration for a particular spot, where rest the remains of the deceased, is liable to be weakened and impaired. We have no clue to what
220 may have *been the particular sentiments of the testator on this point, though we see that he directs all his negroes to be sold, among whom, it is said, were old and valuable family servants. It may be that the value of the improvements on the home place was such as to render it difficult to divide it in a manner that he approved, and he may have thought that some member of his family would buy it in at the sale. At best, it is a mere circumstance, and one of little weight or significance.

But little light is thrown upon this subject by a comparison of the amounts that will have been received by the different children in the form of advancements, and of their respective shares under the will. In Choat v. Yeates, 1 Jac. & Walk. 104, Sir Thomas Plumer (master of the rolls) remarked, "It is always the safest mode of construction to adhere to the words of the instrument, without considering either circumstances arising aliunde or calculations that may be made as to the amount of the property and of the consequences flowing from any particular interpretation." This remark is cited with approbation by the vice chancellor in Parker v. Marchant, 1 Younge & Col. 290, 310. But from the best estimate which I have been enabled to make from the materials in the record, I think Mrs. Wootton will have received considerably more than either one of several of the children, and it may not be very remarkable that she may get less than some of the others. The evidence does not, I think, establish any thing like a marked partiality or favoritism on the part of the testator towards any of his children. There are some rather vague expressions of opinion by witnesses that Mrs. Wootton was a favorite, and some declarations proved of Edmund Redd to that effect. The reasons assigned for such opinion are not very satisfactory, and the general effect of the evidence is rather to prove that the
221 testator *cherished feelings of kindness and parental affection towards all of his children. And it would seem to be unexplained why the testator should have given to Mrs. Wootton the further sum of one thousand dollars by a codicil if he had in fact given to her the whole of the home place: whilst on the supposition that he had given her the nine acres only, a ready reason is suggested for his giving her that additional legacy.

The objection which has been urged to construing the devise to be of the nine acres, that the testator is thereby made to give to Mrs. Wootton a piece of land already belonging to her on the south side of the fence where the branch passes on that side near the spring, is I think sufficiently explained by the testimony. It is shown that the true original channel of the branch was upon the north side of the fence throughout, but that in consequence of a large deposit made on a lot of the testator on the branch, its course had been changed at that point and made to pass on the south side of the fence; and that if such deposit were removed, the branch would resume its original channel. And when the testator spoke of the branch, it may be presumed he referred to its proper original course and not to the new or artificial channel occasioned by the obstruction. There may be more difficulty in explaining why the testator should have called to run from the head of the branch "with the line heretofore deeded to John T. Wootton and the said Lucy D. Wootton to the Order line," when no part of the line mentioned in that deed as running to the "Order line," beyond the point of intersection with the line from the head of the spring, is any part of the boundary of the nine acres. But it will be remembered that the fence called for in the deed does not touch the spring, but passes it at a distance variously estimated at eight yards or from eight to twelve steps.
222 The proper call *therefore for the next course, after attaining the head of the spring, would not be run with a line so far distant from it, but to run to that line. Hence if we may suppose that from some confusion or misapprehension at the moment either on the part of the testator or of the scrivener, the word "with" was inserted instead of the word "to," which would seem to be the proper word indicated, the whole difficulty will be removed, and the call thus explained will be in effect to run from the head of the spring to the line in the deed to John T. Wootton and Lucy D. Wootton, which runs to the "Order line." So that this line would not be made, as it could not be (beyond the point of intersection) any part of the boundary of the nine acres, but would be simply referred to as that in which the terminus of the line running from the head of the spring was to be found. Or it may be that the testator having in mind the land which he had conveyed to Mr. and Mrs. Wootton and the line named in the deed which divided it from the land retained by him, and desiring to substitute the branch to its head as the division line in place of the fence, therefore

calls to begin at the Pole bridge (the apex of the figure embracing the nine acres and the point at which the line of the deed leaves the branch), and thence continues the line of division beginning at the mouth of the branch (on the creek) by running up to its source, and then finishes the entire division line by calling to run with the line of the deed to the "Order line." From its mouth to the Pole bridge, the branch was the division line according to the deed: by his will he continues the branch as the division line to its source, and then completes it by running from the spring with the old division line of the deed to the "Order line." Upon one or the other of these hypotheses, I think a probable solution of the difficulty may be accomplished: and it can occasion no surprise that a man

223 *who though of vigorous mind, was yet of but limited education and no doubt but little accustomed to systematize his thoughts or to reduce them to writing, should when he attempted to do so, be betrayed into inaccuracies and evince a want of order and method in the arrangement of his ideas and in the manner of giving expression to them. But if any solution of this difficulty were impracticable, I should think it less objectionable to disregard this doubtful call altogether than to reject all the particulars of description by boundaries in the devise, when from the particular form of expression adopted it is manifest that they either were or might have been intended to narrow the subject pointed at, and to restrict the gift to part instead of giving the whole.

I think therefore the piece of land between the fence and the branch is a subject which satisfies the description found in the devise when viewed in the light of the surrounding circumstances: that no evidence can therefore be received to prove the actual intention of the testator to give a greater or different subject, and that although possibly the testator may have intended to give more, yet the devisee can claim nothing but the subject so described.

But if it could be shown that this piece of land does not satisfy the description of the subject devised to Mrs. Wootton by the will, still I think the result to which we must be brought will be the same.

I have already endeavored to show that words of description in a devise can only be rejected where the subject is already sufficiently and clearly designated, and it is manifest they are merely words of description superadded where the subject is already perfectly described. If the words be restrictive, they never can be rejected; and it must be equally clear that they cannot be rejected if it be doubtful as they stand, whether they are descriptive

224 merely, or descriptive *and restrictive. For while there is such doubt, it never can be said that the subject is clearly and sufficiently described. Nor in such a case will the law intend error or falsehood. Doe v. Greathed, 8 East's R. 91, 104. Here then if the strip of nine acres does not satisfy the description given in the devise, it must be absolutely uncertain what it is they do describe, and whether the boundaries given were intended to be descriptive merely or restrictive also. The form of expression adopted, followed up by particulars of local description by boundaries, is such that it is at least doubtful whether the testator, by the terms "Marrowbone lands," referred to the lands on both sides of the creek, or on one side only. And if it be so, you cannot safely reject those particulars of description, and give effect to the previous clause, without regard to them. Before you can do so, you must first be satisfied that they were not intended to be restrictive. The testator then has given all that part of his Marrowbone lands whereon he then lived in the county of Henry, beginning at the Pole bridge, running up the branch to its head, and thence with the line named to the "Order line." What part of these lands is thus described? What fixes and determines its extent? We have here an irregular line between the Pole bridge and the "Order line," given as a base line upon which may be described an infinite series of diagrams, all varying in the quantity of land contained. And this uncertainty as to the extent of the subject devised must be equally fatal to the pretensions of the appellant. For a party claiming under a devise must show with certainty what subject was intended to be given. If the words of the will describe nothing, or if with the aid of the surrounding circumstances, they are insufficient to determine the testator's meaning, or to enable the judicial expositor to ascertain with legal certainty what is the exact subject devised, the testamentary

225 *disposition must be ineffectual and void for uncertainty. Wigram, Prop. 6, p. 83; Doe ex dem. Dell v. Pigott, 7 Taunt. R. 553; Richardson v. Watson, 4 Barn. & Adolp. 787; Mason v. Robinson, 2 Sim. & Stu. 295; Tolson v. Tolson, 10 Gill & John. 159.

If then the strip of nine acres satisfies the words of description in the devise, the Circuit court has not erred in decreeing it to the appellant. If, however, the devise is void for uncertainty, the appellant gets the nine acres under it: and of this the appellees do not complain, and the appellant cannot. In either view, therefore, I am of opinion to affirm the decree.

DANIEL and MONCURE, Js., concurred in the opinion of Lee, J.

ALLEN, P., and SAMUELS, J., dissented.

Decree affirmed.

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226 *Corbell's Ex'or v. Zeluff & als.

January Term, 1855, Richmond.

Executors and Administrators—Authority by Statute to Administrator to Sell Land—Case at Bar.*—An act of assembly empowers a County court to author-

*See monographic *note* on "Executors and Administrators."

ize G, administrator of Z, to sell and convey a tract of land belonging to the estate of Z, on such terms as the court may deem expedient; and to decree the mode in which he shall account for the proceeds of sale to those entitled thereto; having first required of the administrator a new bond with security conditioned to perform the decree of the court, and account for the proceeds of said sale to the parties entitled, according to the directions of the court. And should G refuse or neglect to give such bond for two months after the passage of the act, or should the court deem it proper to appoint some other person to carry the act into effect, it was authorized to do so. G gave the bond, but not within the two months: And then the court made a decree reciting that G had given the bond according to the act of assembly, authorizing G to sell the land on a credit specified, and to take from the purchaser three bonds with security, and a deed of trust on the land, the bonds to be payable to G, administrator, and to be returned to the County court, and to be subject to their order. G sold and conveyed the land, and took the bonds with security, and after they had become due, reported to the court that the purchaser had paid off one of the bonds, and a certain amount of another. The land was afterwards sold to pay the balance due, and did not bring enough to satisfy that balance, which was paid by the sureties of the purchaser. G and the purchaser became insolvent. HELD:

1. **Same—Same—Effect.**—That G in acting under this statute acted as administrator, and not merely as a commissioner of the court to sell land.
2. **Same—Same—Liability of Sureties of Administrator for Proceeds.**—That payments made *bona fide* by the purchaser to G were valid payments, for which his sureties in the bond executed under the statute, are liable to the parties entitled to the proceeds of the land.
3. **Judgments—Conclusiveness of.**—Upon a former appeal the Special court, with all the parties interested before it, having held that the bond was valid, though executed after two months, that judgment concludes the question, though the decree of the court below was reversed because the proceeding was by petition, and the cause was sent back to be regularly prepared and matured.

Peter Zeluff, a citizen of the state of New York, died some time previous to Sep-
227 tember 1837, leaving a *widow and three infant children. By his will he gave the principal part of his estate to his wife during widowhood; and if she should marry she was to have a child's part; remainder to his children. At his death he owned a small tract of land in the county of Nansemond in the state of Virginia: And Edwin Godwin qualified here as his administrator.

On the 9th of March 1838, the general assembly of Virginia passed an act, by which it was enacted, that the County court of Nansemond shall have power and authority to authorize Edwin Godwin, administrator of the estate of Peter Zeluff in the state of Virginia, to sell and convey the tract of land in the county of Nansemond, which belonged to the estate of Peter Zeluff at the time of his death, on such terms as the said court may deem expedient; and decree the mode in which he shall account for the bonds or other proceeds of said sale to those entitled thereto; having first required of the administrator a new bond with such security as the said court shall deem sufficient, conditioned to perform the decree of said court and account for the proceeds of said sale to the parties entitled thereto, according to the directions of the court. And should the said Godwin refuse or neglect to give such bond with such security, within two months after the passage of this act, or should the court deem it proper to appoint some other person than the said Edwin Godwin, the said court shall appoint some other fit person to carry the sale into effect, taking bond and security as aforesaid. And the proceeds of the sale were directed to pass as the land would have done.

The proceedings which were had under this act, and in this suit, are stated in the opinion of Judge Allen, and need not be repeated. The appeal was obtained by the executor of Samuel Corbell, one of the sureties of Godwin in his bond.

228 *C. Robinson, for the appellant.
Heath and Tazewell Taylor, for the appellees.

ALLEN, P. It was alleged in argument, though not assigned as one of the errors in the petition, that as the bond required from Edwin Godwin, administrator of Peter Zeluff deceased, in pursuance of the act of assembly passed the 9th of March 1838, entitled an act authorizing the sale of the lands of Peter Zeluff in the county of Nansemond, was not executed by him within two months after the passage of the act, the bond was taken without authority, and therefore void.

The act referred to, conferred on the County court jurisdiction to authorize the said administrator to sell and convey on such terms as the court might deem expedient, and to decree the mode in which he should account for the bonds or other proceeds of said sale to those entitled thereto, having first required of the said administrator a new bond, with such security as the court should deem sufficient, conditioned to perform the decree of the court, and account for the proceeds of said sale to the parties entitled thereto, according to the directions of the court. On the 14th of May 1838 the widow and children, devisees of Peter Zeluff, petitioned the County court to carry the act into effect by making the necessary order. The court, upon the presentation of the petition, entered a decree or order, which, after reciting that the administrator had given bond under and according to the act of assembly, authorized him, after advertising the land, to sell the same on a credit of six, twelve and eighteen months, (except for so much as would pay costs and charges of the sale and decree,) the whole carrying interest from the first day of January ensuing, taking from the purchaser three bonds with security and a deed of trust on the land to secure

the purchase money; the bonds to be payable to said E. Godwin, administrator,
229 and *to be returned to the said County court, and to be subject to their order: the decree further reciting, that the court would, at a future day, make a further order disposing of the fund to be raised by a sale of said land, and also make any other order in the premises which might seem proper.

On the 10th of April 1843 Edwin Godwin made a report, showing that the land was sold on the 9th of July 1838, to Elizabeth Godwin, who, with her securities, executed three bonds for one thousand dollars each, and paid the residue in cash: and he filed with his report two of the bonds; one subject to a credit of three hundred and fifty dollars, paid the 12th of December 1840, and to a further credit of fifty dollars, paid March 22d, 1841, endorsed by him as administrator; the balance of said amount the report states had been paid to the administrator. The bonds or single bills filed with the report, do not set forth the consideration for which they were given, and are payable to him as administrator. By the report Edwin Godwin charged three hundred and nineteen dollars and fifty-three cents for commission and expenses of sale. When this report was filed, it was ordered to lie for exceptions; and on the 12th of August 1844, the widow and children of P. Zeluff excepted to the report on account of the charge for commission and expenses, and because he did not bring the bonds into court.

On the 14th of July 1845, the cause coming on to be heard on the report, exceptions and papers, the County court was of opinion that the principles of the case should not be settled until all the parties interested were before the court; and therefore ordered that Elizabeth Godwin the purchaser, with her securities, and also the securities of Edwin Godwin in the administration bond, should be summoned to show cause why the exceptions should not be sustained,
230 and *to show cause if any they had against the said report and sale, and to abide such order as the court might pronounce in the case.

The summons being executed, the securities of Edwin Godwin filed answers, relying, amongst other things, on the ground that the two months prescribed in the act having expired, the authority of the court to appoint the said E. Godwin to sell the land had ceased and determined; and consequently the bond not having been executed in conformity with the statute, was merely null and void.

The cause being matured for hearing, the County court dismissed the petition: Whereby it was in effect decided, that the sale made by said Edwin Godwin was invalid; and the plaintiffs, if the decree had stood, would have been left to pursue their legal remedy to recover the land as devisees of Peter Zeluff. Upon appeal to the Circuit court this decree was reversed, and a decree pronounced declaring that Edwin Godwin was liable to account to the appellants for the whole amount paid to him by the purchaser of said land; and in the event of his estate being insufficient to pay, that the securities in the bond were liable; and that the purchaser was liable for the balance due on her bonds. For the payment of such balance of the purchase money, a decree was rendered directing a sale of the land, recited by the decree as having been conveyed by said Edwin Godwin to Elizabeth Godwin. The land was sold, and the proceeds not being sufficient to pay off the balance of the purchase money due from the purchaser on her bonds, a personal decree was rendered against her and her securities for such balance, after crediting the net proceeds of the sale of the land. And the decree against the estate of Edwin Godwin having proved unavailing, a decree was rendered against the securities in his bond for the amount received by him.

231 *From this decree the sureties of Edwin Godwin obtained an appeal to this court; and the Special court of appeals being of opinion that it was error in this proceeding in the state in which it stood in the Circuit court, to render a decree against the said securities of Edwin Godwin, or to determine whether those securities or the purchaser were primarily liable for the money improperly received by Edwin Godwin; and that it was also error in this proceeding to render a decree against the sureties of the purchaser for the balance due on her bonds for the purchase money; and that there was no error in the residue of the said decree, more especially as Elizabeth Godwin had not appealed therefrom; reversed so much of the decree of the Circuit court so declared to be erroneous, and affirmed the residue thereof; and remanded the cause with directions to allow the petitioners to file a bill bringing Elizabeth Godwin and her sureties, and the sureties of the said Edwin Godwin in said new bond, properly before the court, and in due form for litigating the several matters in respect to which the decree had been reversed.

When the cause went back, the petitioners filed a new bill, from which it appeared that the balance due on the bonds for the purchase money had been fully paid and satisfied; and the contest went on as to the amount received by the said Edwin Godwin.

The sureties in the new bond appeared and answered, referring to and relying on their former answer; and furthermore insisted, as they had done in the former answer, that the payment of the purchaser was made to Edwin Godwin without authority; that she thereby aided him in perpetrating a fraud, and that the payment so made in her own wrong, did not discharge the obligations given for the purchase money. The sureties of the purchaser and her administrator insist on the valid-
232 ity of the payment, and that *they had fully discharged themselves from the liability incurred by their obligation for the puchase money. No new fact was

brought into the case by this supplemental proceeding: and the court being of opinion that the sureties of Edwin Godwin were liable for the amount paid to him, and the decree against his estate proving unavailing, proceeded to render a dceree against the sureties for the balance unpaid; from which decree the representatives of one of said sureties has appealed.

Upon these proceedings it seems to me the authority of the County court to decree the sale of the land by Edwin Godwin has been adjudged, and in a proceeding to which, as to that question, all the sureties were parties.

As to which set of sureties were primarily liable, or whether any valid payment was made by the purchaser, or whether her payments were fraudulent in fact or not; these were questions which, in the opinion of the Special court of appeals, could not be decided in that proceeding as it then stood. The proceeding was upon the original petition to exercise the jurisdiction conferred by the act of the 9th of March 1838. Under that act the new bond had been taken from the administrator Edwin Godwin, and a decree rendered directing him to sell, and a sale and a report made; and all the parties, the sureties in the new bond executed by the administrator, and the purchaser and her sureties, were summoned to show cause against the said report and sale, and to abide such other orders as the court might pronounce in the cause. If the authority of the court to appoint the administrator had ceased, the judgment of the County court dismissing the petition should have been affirmed. The power of the court to render any decree in that ex parte proceeding to carry out the provisions of the act of March 9th, 1838, depended upon the
233 fact whether a valid *bond had been given by the administrator; the law having conferred the jurisdiction on the court to authorize the administrator to sell and convey upon the condition of having first required of him a new bond. The court required a bond, and thereupon ordered the sale. The jurisdiction to do so being conferred, the propriety of exercising it under the circumstances, was a question for its consideration when applied to by the petitioners to carry the act of assembly into effect. By accepting the bond, and thereupon authorizing the administrator to sell, the court affirmed that the bond, though not executed until after the expiration of two months, was a substantial compliance with the law, and invested the court with the power to authorize the administrator to sell. At a later period the County court changed its opinion, and dismissed the petition, thereby annulling all that had been done, and declining to carry the act of assembly into effect according to the prayer of the petition. The case itself was proper for the consideration of these questions. The regularity of the proceedings and the propriety of exercising jurisdiction under the facts before the court were questions arising in the case itself, and not upon any collateral enquiry: And a judgment would be conclusive, at least to that extent, upon all who were made or became parties to the case. The administrator, the securities in the new bond, the purchaser, and her securities, all had such an interest in these questions as to justify the order requiring them to be summoned to show cause against the report and sale. They were summoned and the sureties of the administrator raised the objection to the authority of the court to require the new bond: The Circuit court by its decree affirmed the validity of the bond and the sale; affirmed, moreover, that by the sale of the land and its conveyance by Edwin Godwin to the purchaser, the title had
234 passed to her; for it proceeds to *decree a sale of the land to discharge the balance of the purchase money. The land was sold under its order, and the sale confirmed; thus forever divesting the title of the petitioners, in this proceeding, to carry into effect the provisions of the act of March 9th, 1838: A conclusion which could only be justified upon the ground, that the authority conferred by that act had been properly exercised. The decree of the Circuit court to the extent that it operated upon the validity of the sale, the divesting of the title of P. Zeluff's devisees, and the transmission thereof to the purchasers under the different decrees in the case, was affirmed by the Special court of appeals, and at least concludes all those who were parties, upon those questions.

If the bond was valid and the sale regular, it becomes necessary to ascertain what was the authority vested in Edwin Godwin the administrator, by the decree entered on the ex parte application of the petitioners to carry the law into effect, and the liability imposed on him. Did he act as an ordinary commissioner appointed by a court in a chancery suit to perform some specific duty? Or did he act as an administrator having an authority derived from, and to be governed by, the law under which the proceeding was had? It seems to me the rights and duties of the administrator are to be deduced from the terms of the law under which the court was acting, rather than to be measured by those of a commissioner appointed by the court as its agent to carry into effect a decree rendered in the exercise of its ordinary jurisdiction. As administrator he had given bond to administer the personal assets of the deceased. That would not have covered the proceeds of this land, to be sold under the authority of this special act. The court is therefore, before authorizing a sale, to require a new bond of the administrator. Showing by
235 the expression new bond, *that the term "administrator" was not a mere description of the person, but that the authority was given to him in his official character. By the condition of the bond prescribed by the law, he was bound to perform the decree of the court, and account for the proceeds of said sale to the parties entitled thereto, according to the directions of the court.

It is clear from the condition prescribed,

that the law did not contemplate that he was to be a mere agent to sell or to perform some particular duty assigned to him as the agent of the court. It looked not only to his duty to sell, but his authority to collect, and his liability for the proceeds to the parties entitled thereto, according to the directions of the court. He was not to determine between the claims of the widow and devisee. The law provided that the proceeds should pass to the same persons and in the same proportions as the real estate would have passed, had the act never been enacted. Who were the persons entitled and in what proportions, the court was to determine with these parties before it. When the parties were thus ascertained and their proportions fixed, the condition of the bond bound the administrator to pay them. The law provided that the court should have power and authority to authorize the administrator to sell and convey the land. In the exercise of the ordinary jurisdiction of a court of equity, one commissioner may be appointed to sell, a second to convey, a third to collect. Here it is manifest the law looked to a sale, conveyance and collection by the administrator, under a special authority given to him in his character as such administrator. He was empowered by law to do what as administrator with the will annexed he could have done if the will had devised the land to be sold by the personal representative. He was to sell on such terms as the court might prescribe,
236 which had reference to the time and place of *sale, credit to be given, security to be required, &c.; but did not change or modify the liability incurred by the condition of the bond.

The decree conformed to the terms of the act. It authorized him to sell in a prescribed mode, taking from the purchaser three bonds with good security and a deed of trust on the land to secure the payment of the purchase money. The bonds to be payable to the said Edwin Godwin, administrator, &c., and to be returned to the court, and to be subject to their order; reciting also, that the court will proceed at a future day to make further orders disposing of the fund to be raised by a sale of said land.

The decree shows that the court contemplated that the administrator was to convey without further order. It required no report of sale, and did not contemplate any confirmation thereof in order to justify a deed. On the contrary, by requiring a deed of trust on the land to be given by the purchaser, it recognized the right of the administrator to convey as well as to sell, as a right conferred by the law upon giving the bond and being authorized to sell. By directing the bonds to be payable to said Edwin Godwin, administrator, the individual to receive was pointed out to the obligor. The purchaser became no party to any subsequent proceedings in the case. No confirmation of sale being necessary, the decree did not require it, and no such order was made. The decree of the Circuit court recites the fact that a conveyance was made, treats it as a regular transfer of the title, and in this respect has been affirmed.

As soon then as she gave her bonds for the purchase money and received her deed, the purchaser ceased to have any direct connection with the cause in court. She was not bound to enquire whether the bonds were returned to the court, or what disposition was made of them. That portion
237 of the decree directing them to *be returned could not affect the powers of the administrator as conferred by the act. Nor does it, as it seems to me, bear any such construction. The court, in the order, referred to the bonds as the proceeds of the sale, and as synonymous with the fund to be raised by the sale of the land; which fund the order recites the court would at a future day proceed to make a further order disposing of. This was the duty of the court under the act which declared that the proceeds should pass to the same persons and in the same proportions as the real estate would have passed if the act had not been enacted. With this distribution the purchaser had no concern. Having a deed and being authorized to pay to the obligee so as to relieve the land from the incumbrance and discharge her obligations, those entitled to the fund were protected by the condition of his bond to account for the proceeds of the sale. If the bonds had been returned, and upon ascertaining who were the persons entitled to the fund and in what proportions, the court, if such had been the most convenient course, might have directed the bonds to have been assigned by Edwin Godwin to the parties, and a payment to him after notice of such assignment would have been no discharge. Until that or some other measure was taken to prevent his receiving the proceeds, it was the right and duty of the purchaser to pay to the obligee, constituted by the law under which the proceeding was had, a trustee to sell, convey and receive, and to account for the proceeds to those who were entitled thereto. I think therefore the purchaser was justified in making payment to Edwin Godwin whilst he retained the bonds in his possession; and such payments, if made in good faith, operated as a discharge pro tanto of the purchase money. No attempt has been made to show that the purchaser was guilty of any fraud; that she knew that Edwin Godwin intended to misapply
238 the funds, or that *he had any such intention when he received them. It does not distinctly appear at what time the first bond was discharged. The credits on the second bond are after the bond fell due. The administrator reports that all but the two bonds returned by him in April 1843, had been paid to him; and in the absence of any allegation or proof to the contrary, the presumption would be that the payment of the first bond was not made until it became due. I think that looking to the authority of Edwin Godwin under this special act, the payment was valid; and therefore deem it unnecessary to express any opinion as to the effect of a payment

made under such circumstances to a commissioner appointed to sell by a chancery court in the exercise of its ordinary jurisdiction. I am for affirming the decree.

MONCURE and SAMUELS, Js., concurred in the opinion of Allen, J.

DANIEL and LEE, Js., dissented.

Decree affirmed.

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239 *Beane & Wife v. Yerby.

January Term, 1855, Richmond.

1. **Wills—Acknowledgment—Presence of Witnesses.***—C subscribes his name to his will in the presence of R, who wrote it, and requests R to witness it, who does so. H is then called into the room and requested by C to witness the instrument, and C acknowledges his signature to him, in the presence and hearing of R; and H subscribes his name as a witness in the presence of the testator and of R. HELD:

1. **Same—Same—Sufficiency of.**—The acknowledgment of his signature by C was a sufficient acknowledgment of the will.

2. **Same—Publication—Case at Bar.**—Though the testator spoke of the paper as an instrument, and did not speak of it as his will to H, yet knowing that it was his will and knowing its contents, it was a sufficient publication of it as his will.

3. **Same—Execution.**—The will was duly executed.

2. **Same—Publication—Statute.**—The act of 1849, Code, ch. 122, § 4, p. 516, does not change the former law, either as to what shall constitute an acknowledgment, or a publication of the will.†

This was an appeal from the judgment of the Circuit court of Richmond county, affirming the sentence of the County court admitting to probat the will of John Cundiff. The only question in the cause was as to the due execution of the will. The paper was propounded for probat by James T. Yerby, one of the nominated executors, and its probat was opposed by Addison Y. Beane and his wife.

John Cundiff was a bachelor; and requested Richard H. Lyell, a merchant doing business in partnership with his nephew Henry Lyell, at Farnham in the
240 *county of Richmond, to make some alterations in his will. Lyell undertook to do it; and a few days afterwards Cundiff came to the place, and in the counting room of Lyell's store, Lyell read to him the paper he had prepared, which Cundiff pronounced correct: At this time there was no other person present but Cundiff and Richard H. Lyell. After the will was read and approved, it was placed on a desk at which Cundiff was seated, and he then and there signed it, and at his request Richard H. Lyell signed it as a witness. This witness then, without leaving the room, called in Henry Lyell from the store room, who found Cundiff sitting at the desk with the will before him. Cundiff, without informing him that the paper was his will, requested him to witness the instrument; and he having first asked Cundiff if he acknowledged his signature to the paper, and having received an affirmative answer, signed it as a witness in the presence of the testator and of Richard H. Lyell; the latter of whom heard the acknowledgment of the signature by Cundiff, and was attending to and supervising the execution of the paper. Another witness, William L. Claybrook, was then called into the room from across the road; and he also attested the paper in the presence of the testator and Richard H. Lyell; though not of Henry Lyell.

Henry Lyell states, that though the testator did not tell him the paper was his will, he believed at the time it was, from what Richard H. Lyell had previously told him. And it appears that at the time he remarked jocularly to the testator, that he wished he had such an old uncle.

The time occupied in the reading of the paper and its execution by the testator and the witnesses, Richard H. Lyell states was between ten and fifteen minutes, during the whole of which time the paper was within the vision of himself and the testator, and the whole was one continued transaction.

241 *R. T. Daniel and Claybrook, for the appellants.

Patton, Gresham and Mayo, for the appellee.

MONCURE, J. This is an appeal from a sentence of the Circuit court of Richmond county, affirming a sentence of the County court of that county, admitting a paper writing to probat as the will of John Cundiff. The only objection made to the will is that it was not executed and attested in the manner prescribed by the Code, ch. 122, § 4, p. 516. This case is very much like that of Parramore v. Taylor, recently decided by this court; except that in this case no question is raised, and it appears none could have been raised, as to the perfect sanity of the testator, and his freedom from any undue influence at the time of the execution of his will. In other respects, the two cases are almost identical. After giving to the able arguments in this case (and that of Green & wife, &c. v. Crain, &c., which involved to some extent the same question, and came on for hearing immediately after this), all the consideration of which I am capable, I am confirmed in my conviction of the correctness of the views expressed in my opinion in Parramore v. Taylor. And regarding that case as a binding authority, I will notice only those particulars in which it was argued by the

*Wills—Acknowledgment—Presence of Witnesses.—See *foot-note* to Parramore v. Taylor, 11 Gratt. 220; also, *foot-note* to Sturdivant v. Birchett, 10 Gratt. 67.

†The act provides, that "unless" the will "be wholly written by the testator, the signature shall be made or the will acknowledged by him, in the presence of at least two competent witnesses present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

counsel of the appellant that this case is distinguishable from that.

The principle decided in that case is, that under our present law, a will acknowledged by the testator in the presence of two witnesses, present at the same time, who subscribe their names thereto in his presence, the whole being one continuous transaction, occurring at the same time, is well executed, though the witnesses do not subscribe their names in the presence of each other, and though one of them subscribe his in the order of time before the acknowledgment.

One feature of distinction between
242 the two cases, *according to the argument of the appellants' counsel, consists in this, that there was not in this case, as there was in that, any concert among the witnesses, any privity between the testator and them, any continuity of transaction, commenced, continued and ended, between the same parties, the testator and the witnesses. That in that case the two witnesses on whose attestation the will was sustained, were convened, for the purpose of being witnesses, before the execution of the will was commenced; while here the scrivener subscribed the will as a witness, and then the other two witnesses were successively called in, and subscribed it as such, not before having had any agency in the transaction, nor knowing that they were to be called in for that purpose. From my recollection of the facts in Parramore v. Taylor, there is no material difference in this respect between that case and this. If in that case either of the witnesses to the will or the codicil, except Corbin, had any previous knowledge that he would be called on to witness the transaction, the fact was certainly not relied on as one of the grounds of the opinion delivered, or judgment rendered therein. Nor do I conceive the fact to be of any importance whatever. It is very common and natural for a testator to sign his will in the presence of the scrivener, and after the latter has subscribed his name as a witness, to have other persons, who may be convenient, or be selected by him for the purpose, called in for the first time to witness it. It is not often material to him who are the witnesses, so that they be honest and correct men. But it is generally objectionable to him to have his will written or read in the presence of any person but himself and the scrivener, where one is employed; and therefore the business of writing and reading the will, and of its attestation by the scrivener, when one is employed, is generally completed before any other person is called in to witness it.
243 He does *not often convene the witnesses before hand, and keep them in attendance upon or about him during the whole transaction; especially when, as in this case, he executes his will at a place where he can obtain proper witnesses at any instant he may want them. Richard H. Lyell, the scrivener in this case, was relied on by the testator to have his will duly executed and attested. He was a most important agent in the whole transaction. In no part of it can it be said that he was a silent or unconcerned spectator. His office was not ended when he subscribed the will. He immediately, and without leaving the room, called in the other witnesses successively, and bore witness with them to the acknowledgment made to them respectively by the testator.

But the main feature of distinction contended for by the appellants' counsel between this case and that of Parramore v. Taylor, is, that there the testator acknowledged his will to the witnesses, all of whom knew, from what was said and done at the time, that it was his will. Whereas here, the testator acknowledged his signature merely, to two of the witnesses; and not only did not inform them that the paper was his will, but designedly concealed that fact from them. This difference between the two cases in point of fact, exists in regard to the will in that case; but not, according to my recollection, in regard to the codicil. I do not think, though the record in that case is not before me, that the second witness to the codicil was informed, or had any knowledge, of the name or nature of the instrument when he attested it. I would infer from the opinion delivered in that case that he had not; and at all events, that it was considered of no importance whether he had or not. Nor does it appear that there was any design on the part of the testator in this case to conceal from any of the witnesses to his will, the nature of the instrument. One of them, the
244 scrivener, *of course knew all about it, and he had informed another of the witnesses, his nephew and partner, that he had been requested to draw the will. It does not appear that any secrecy was enjoined upon him by the testator. Both of the other witnesses believed when they attested the instrument that it was a will; and one of them, it seems, indicated that belief, by a jocular remark made by him at the time. Whether however they were ingorant of the fact or not; or whether it was designedly concealed from them by the testator or not, is, as I shall presently endeavor to show, an immaterial circumstance.

The facts in regard to the attestation of the will by the second witness, Henry Lyell, as stated by himself, are, that he was called from the store room into the counting room by Richard H. Lyell to witness the will. When he went in, the testator was sitting at the desk, with the will, which he had signed, and R. H. Lyell had witnessed, lying on the desk before him or by him. The testator asked him "to witness that instrument of writing." Witness asked him if he acknowledged that to be his signature, meaning the signature to the paper referred to. The testator said, he did. Henry Lyell then subscribed the paper as a witness in the presence of the testator and of R. H. Lyell. The testator did not tell him it was his will, but he believed it was; and had reason so to believe, from what R. H. Lyell had told him. Certainly this would have been a good acknowledgment

of the will by the testator to Henry Lyell under the statute of 29 Ch. 2, and our corresponding statute which was in force before the Code took effect. The cases of White v. The British Museum, 19 Eng. C. L. R. 91, and Wright v. Wright, 20 Id. 197, are conclusive as to the former statute; and the case of Rosser v. Franklin, 6 Gratt. 1, as to the latter. The terms and evidence of the acknowledgment were much stronger
245 in this case than in *either of those.

In the two English cases none of the witnesses saw the testator's signature, and only one of them knew what the paper was. In the Virginia case, the will was signed by another for the testator, who made her mark, and the only surviving witness was a marksman. It was held not to be necessary that the testator should acknowledge to the witnesses the subscription of his name to be his signature; or even that the instrument is his will. It is enough that he should acknowledge, in their presence, that the act is his, with a knowledge of the contents of the instrument, and with the design that it should be a testamentary disposition of his property. Indeed, the counsel for the appellants admitted that the acknowledgment would have been sufficient in this case under the old law; but they argued that it is not under the new; which requires, as they contended, that the acknowledgment should convey and be intended by the testator to convey, to the minds of the witnesses, a knowledge of the fact that the paper acknowledged is his will; or, at all events, that the witnesses, at the time of their attestation, must have such knowledge; and the testator must be aware that they have. They contended that the report of the revisors, which conformed to the stat. of 1 Vict. ch. 26, § 9, in authorizing the testator's signature to be acknowledged, was amended in the legislature, by requiring the will instead of the signature to be acknowledged by him, for the very purpose of correcting the loose constructions which they supposed had been introduced by those cases and others. I do not think so, but quite the contrary. I think that amendment was made for the purpose of adhering to the old law, and the judicial construction it had received in that respect. The statute of Victoria in requiring the signature to be acknowledged instead of the will, effected, it seems, a material change of the 29 Ch. 2, as it had been ex-
246 pounded *by the courts. And in construing the former, the English ecclesiastical courts have held acknowledgments not to be good which would have been good under the latter. 7 Eng. Ecc. R. 129 and 340. I think our legislature designed to avoid the danger of such a consequence; and therefore, by the amendment adopted, employed terms broad enough to embrace every acknowledgment which would have been sufficient under the old law. There was nothing in that law which expressly authorized an acknowledgment of the will by the testator: It spoke of signing only. By judicial construction, an acknowledgment of the signature was held to be equivalent to making the signature in the presence of the witnesses: then an acknowledgment of the instrument as a will, was held to be so equivalent: and then an acknowledgment of the instrument with a knowledge of its contents and an intention on the part of the testator that it should operate as his will, was held to have the same effect, though the witnesses did not know that the instrument was a will. This construction was well settled; and the legislature seems to have designed to embody it in the new statute. In saying that the will may be acknowledged, they used terms which were well understood by the profession and the people, and must have intended them to be so understood. They could not have intended to embrace some forms of acknowledgment and exclude others. An acknowledgment of an instrument which is a will, and known and intended by the testator to operate as such, is an acknowledgment of the will, though not so called by the testator in making the acknowledgment, and though the witnesses be ignorant of the fact that it is a will. If the legislature had designed to make the change as contended for, they would have used plain language for that purpose, such as was used by the legislature of New York in making a similar change. Their
247 language *was that the testator, at the time of subscribing or acknowledging the will in the presence of the witnesses, shall declare the instrument to be his last will and testament. 2 Rev. Stat. 63, § 40. In construing this language, it has been held by the courts of that state, that there must be an actual publication of the instrument as a will, in the presence of the subscribing witnesses, in addition to the other formalities required by the statute. Brinkerhoof v. Remsen, 8 Paige's R. 488; S. C. 26 Wend. R. 325. The difference between the language of our statute and that of New York is very material; and yet it is contended that ours should be construed as that has been. I think that such a construction would extend the words "or the will acknowledged" greatly beyond their proper meaning, the meaning in which they are generally well understood, and would be inconsistent with the other terms and provisions of our statute. The legislature could not have designed, in such an obscure way, to make so radical a change of the law; and not only to make publication necessary as a statutory requisition to the validity of a will, but require it to be made in the presence of the subscribing witnesses.

It seems to be somewhat doubtful whether publication ever was necessary to the validity of a will. 1 Jarm. on Wills 71. If ever necessary, it might have been inferred from slight circumstances. 3 Lomax Dig. 42, § 24. The statute of 29 Ch. 2 did not require it; but on the contrary, seems to have dispensed with its necessity, if it previously existed; or at least substituted the requisitions thereby prescribed in place of

any other publication, in cases to which the statute was applicable. "All other requisitions (says Judge Lomax) would seem necessarily to be excluded, but those which are embraced in the statute; and publication, as a distinct act of the testator, is not one of those which are enumerated."
248 Id. 43. "Signing *and acknowledgment of a will before witnesses (says Judge Tucker) amount to what is called a publication of the will, although they are not informed that it is a will, and though the testator even calls it a deed." 1 Tuck. Com. pt. 2, 294. "The case of Trimmer v. Jackson (says Dr. Burn) was where the witnesses were deceived by the testator at the time of the execution, and were led to believe, from the words used by the testator at the execution of the instrument, that it was a deed and not a will. It was delivered as his act and deed; and the words sealed delivered were put above the place where the witnesses were to subscribe their names. And it was adjudged by the court, as it is said, for the inconveniences that might arise in families from having it known that a person had made his will, that this was a sufficient execution. 4 Burns' Eccl. Law, 8 Lond. ed. by Tyrwhitt, 130." This and other cases on the subject are reviewed in the able opinion of the chancellor in Brinkerhoof v. Remsen, 8 Paige's R. 488, from which I have taken the quotation above made from the work of Dr. Burn.

I have said that the construction contended for would be inconsistent with the other terms and provisions of the new law. It would not require publication where the will is wholly written by the testator; nor, though not wholly written by him, if the signature be made (instead of the will acknowledged) in the presence of the witnesses. Why is not publication as necessary in those cases, and especially the latter, as in a case in which the will is acknowledged? Can it be believed that the legislature intended to permit a testator who can and chooses to write his own will, or sign it in the presence of the witnesses, to conceal from them the fact that it is a will, and even to execute it in the form of a deed for that purpose; and yet to require a testator who cannot write, or who happens not to make his signature in the presence of
249 *the witnesses, to declare to them that the instrument is his will? Surely, if the legislature had intended to require publication at all, the requisition would have been uniform, and applied to all cases in which the reason for its application is the same. That is the case in the statute of New York, which requires publication as well where the signature is made, as where it is acknowledged in the presence of the witnesses. There the publication is a statutory ingredient in the execution of the will, entirely independent of the act of making or acknowledging the signature, and must coexist with that act, whether it be in one form or the other. Here the publication contended for would not be an independent, necessary ingredient in the execution of the will, but be a mere alternative, or substitute, for the act of making the signature in the presence of the witnesses. The most natural alternative for such an act would be the acknowledgment of the signature; and that is what the revisors proposed. But the legislature authorized the will to be acknowledged; and thus, I think, made any acknowledgment valid which would have been so, under the construction which had been put upon the old law. Therefore, the acknowledgment of the instrument, and a fortiori, of the signature, though the witnesses be not informed of the name or nature of the instrument, is sufficient; if the testator himself knows its contents, and intends that it shall be a testamentary disposition of his property. In this case, both the instrument and the signature were acknowledged by the testator; and that he knew its contents, and intended it to operate as a testamentary disposition of his property, is conclusively proved by the draftsman of the will and one of the subscribing witnesses thereto.

The construction contended for would, I think, greatly increase litigation, and produce much mischief without any corresponding good. The perplexing
250 *question in all cases of acknowledgment of a will would be, whether what was said or done by the testator amounted to an acknowledgment. Too much would depend upon the loose recollection of the witnesses; and the danger of their being tampered with, and of the will being thus defeated, would be greatly increased. The evils of increased litigation and confusion, arising from a change of the will law, are signally displayed in regard to a provision in the statute of Victoria, requiring the will to be signed "at the foot or end thereof by the testator." An immense number of cases have been before the English courts, involving the construction of these words. Our legislature wisely avoided the evil by adhering to the old law, and merely embodied in the new statute the judicial construction of that law, by requiring the will to be signed "in such manner as to make it manifest that the name is intended as a signature." There have been cases also before the English courts, involving the construction of the words of the statute of Victoria, requiring the signature to be acknowledged. Our legislature has, I think, in like manner avoided this evil by requiring the will to be acknowledged.

In conclusion, this is a case in which a man, having no family, wished to give his estate to some of his collateral kindred; and made his will for that purpose. He was of perfectly sound mind, and free from any undue influence at the time of its execution; and dictated and understood the contents of it. The scrivener and the witnesses were men of unimpeached integrity, having no interest of their own to subserve, and no motive, so far as the record shows, for favoring or disappointing any of the expectants upon the testator's bounty. He acknowledged his signature to the will in

the presence of at least two witnesses, present at the same time, who subscribed their names thereto in his presence. If this will be not valid, the law has, in
251 *this instance, signally failed in its intended effect, to secure a free and fair exercise of the testamentary right. But I am of opinion that it is valid, and I am therefore for affirming the sentence of the Circuit court.

ALLEN, P. I dissented from the majority of the court in the case of Parramore v. Taylor, and agreed with Judge Daniel in the opinion given by him in Sturdivant v. Birchett, 10 Gratt. 67. Upon the question decided in Parramore v. Taylor, I have seen no reason to change my opinion. But that case was fully argued and carefully considered. The decision was made by a majority of the whole court, and a motion for a rehearing was overruled. The same question has been again argued in this case, and with the same result. I must therefore consider it as settling the law on that question in future cases. Upon the other question presented in this case, whether an acknowledgment of the signature is a sufficient acknowledgment of the will under our statute, I concur in the opinion of the majority.

LEE and SAMUELS, Js., concurred in the opinion of Moncure, J.

DANIEL, J., dissented.

Judgment affirmed.

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252 *Green & als. v. Crain & als.

January Term, 1855, Richmond.

1. **Wills—Attestation—In Whose Presence.***—A paper prepared as the will of C, is read to him by the scrivener, and approved; and then the scrivener, at the request of C, subscribes C's name to the paper, and by like request he attests it; and no other witness attests it in the presence of this one. About three days after C acknowledges the paper as his will in the presence of H, who at his request, attests it in his presence. No other witness attests the paper on that day; but about four days after, H is again at the house of C with W, when C requests W to attest the paper, which W does in the presence of H and C, and C then acknowledges the paper as his will in the presence of H and W. HELD: The will is duly executed.

2. **Instructions—Assumption of Truth—Case at Bar.†**—In this case a motion to instruct the jury assumes all the facts stated by the subscribing witnesses as true, and asks the court to instruct the jury that the paper is not proved to be the will of C, according to the statute. The instruction does not ask the court to pass upon the truth of the facts, but upon the law as applicable to them; and therefore is not objectionable.

***Wills—Attestation—In Whose Presence.**—See *foot-note* to Parramore v. Taylor, 11 Gratt. 220.

†**Instructions—Assumption of Truth.**—See *foot-note* to Kincheloe v. Tracewells, 11 Gratt. 587.

This was a suit in equity in the Circuit court of Pittsylvania county, instituted by Laban Green and others, heirs and distributees of John T. Crain deceased, to set aside a paper which had been admitted to probat as the will of said Crain. The defendants were his devisees and the administrator with the will annexed. The court directed an issue devistavit vel non.

On the trial the contestants moved the court for an instruction to the jury, which was refused, and they excepted: and there was a verdict in favor of the will. The exception sets out the will, to which there were three subscribing witnesses, all of whom were examined on the trial. The first, Thomas W. Walton, proved that he wrote the said paper at the request of the testator, who approved it; and that
253 he signed the *testator's name at his request, and also at his request subscribed it as a witness in his presence; the testator then acknowledging it as his will. That this was done on the 5th of May 1852; and that no other witness attested the paper in the presence of this witness.

The second witness, John M. Hutchings, proved that about the 8th of May 1852, the testator acknowledged the paper to be his will in the presence of the witness, and requested him to subscribe his name as a witness, which was done in the presence of the testator. That no other witness attested the paper on that day; but that about four days after the witness had attested the paper, he was at the house of the testator in company with John D. Wright. That the testator, in the presence of the witness, requested Wright to subscribe his name to the paper as a witness, and that Wright did so subscribe his name in the presence of the witness and the testator: And that the testator did then, in the presence of both Wright and the witness, acknowledge the paper to be his will. The testimony of Wright as to what occurred when he attested the paper, was the same as that of the witness Hutchings. All the witnesses proved that the testator was of sound mind and disposing memory.

These being all the facts proved on the trial, the contestants by their counsel, moved the court to instruct the jury, that the said paper writing was not proved to be the last will and testament of John T. Crain according to the statute; because no two of the subscribing witnesses were present together with the testator when Walton subscribed his name as a witness; because no two of the subscribing witnesses were present together with the testator when Hutchings subscribed his name as a witness; because no two of the subscribing witnesses were present together with the testator when he directed and authorized Walton to sign his name to said will, the same being
254 *proved only by the said Walton, no other witness knowing any thing of such authority being given further than his subsequent acknowledgment as aforesaid of said will in the presence of said Hutchings and Wright; because no two of

the subscribing witnesses proved that either Walton or Hutchings subscribed their names in the testator's presence.

As before stated, the court refused to give the instruction, and the contestants excepted.

Upon the return of the verdict to the Chancery court, that court dismissed the bill: And thereupon the contestants applied to this court for an appeal, which was allowed.

Bouldin, for the appellants.
Robinson, for the appellees.

SAMUELS, J. In the argument here it was insisted that the motion to instruct the jury was properly overruled, for reasons apart from the proposition of law submitted for the judgment of the court; that the instruction, if given, would have been an invasion of the province belonging to the jury. If the record showed this to be true, then the motion was properly overruled, without regard to any other reason. This court, in Kincheloe v. Tracewells, 11 Gratt. 587, and in Harvey v. Epes, supra 153, decided that the courts might decide upon such motions by parties just as they were made, and were under no legal necessity of sifting or modifying such motions, so as to separate and withhold the erroneous portions from the jury. I am of opinion, however, there is no foundation for the objection. It appears that after all the evidence had been heard by the jury, the contestants submitted to the court the motion for an instruction to the jury. This motion did not ask of the court an expression of opinion in regard to facts
255 proved, or the weight of *evidence. The contestants admitting the absolute verity of every thing which the evidence tended to prove, yet insisted that the proof was insufficient to prove the will; that conceding all the witnesses had said to be true, yet as it was not proved that any two of the witnesses had subscribed the will in the presence of each other, the proof of execution was not sufficient in law. There was no proof tending to show such subscription by the witnesses (in fact it was disproved), and upon this absence of proof the contestants predicated their motion to instruct. It would have been idle to submit it to the jury in the usual form to pass on the sufficiency of evidence to prove a subscription by two witnesses in the presence of each other, when there was no proof whatever having a tendency to that end.

A court is not bound to decide questions of law, on a trial by jury, unless they be relevant to the case before it; such questions are relevant only when they arise upon the evidence. A bill of exceptions is intended for the sole purpose of putting upon the record the facts upon which a party rests his proposition of law, the proposition itself, and the decision of the court thereupon. It has been frequently decided by this court that the facts upon which a legal proposition is predicated must be shown by the record; if it were otherwise, cases might be decided upon abstract questions having no existence in such cases. A bill of exceptions to a ruling by the court in the progress of the trial is well taken, if it show that there was something in the evidence to serve as a basis for the proposition of law, the proposition itself, and the decision of the court. It is usual to state the tendency of the evidence, leaving its sufficiency to be passed on by the jury. If however the exceptor admits in advance the existence of every fact which the proof tends to show, and puts his admission
256 in the bill of exceptions which *he tenders, it is difficult to perceive why he may not do so. On facts thus stated the appellate court can determine whether the question of law did arise with as much certainty as if they had been stated in any other mode. In the case before us, it appears from the facts stated, that no two of the witnesses subscribed the will in the presence of each other. On this the contestants below, the appellants here, moved for an instruction to the jury to the effect that the will was not well executed. This instruction the court refused to give; and this decision is brought here for revision.

The facts in the record, so far as the witness Walton is concerned, are of no weight on the question whether the will was executed in the form prescribed by law: he was not in the presence of the testator at any time when any other witness was present. The case must therefore rest upon the facts with which the witnesses Hutchings and Wright are connected. The witness Hutchings, on or about the 8th day of May 1852, heard the testator acknowledge the will, and thereupon, in the presence of the testator, subscribed his name as a witness. The requisitions of the law up to this point had not been complied with. About four days afterwards, on or about the 12th of May 1852, the testator again acknowledged the will in the presence of the witnesses Hutchings and Wright, and Wright subscribed his name as a witness in the presence of the testator and of the witness Hutchings: the witness last named did not again subscribe the will. Thus the precise question passed on by the Circuit court was presented, and is, whether it was necessary that the subscription by each witness should be made in the presence of the other. The Circuit court held it was not necessary; and in this I think the court decided correctly. I am led to this conclusion as well by looking to the terms of the statute as to its obvious purpose and intention. It requires of the testator
257 *himself, that "the signature shall be made, or the will acknowledged by him, in the presence of at least two competent witnesses present at the same time." This requisition, construed as it should be, with reference to former laws of which our statute is a revision, means that the relation of "presence" shall exist between the testator and the witnesses, and does not require that the relation of "presence" should exist between the witnesses them-

selves. It is easy to conceive how witnesses might both be in the "presence" of the testator, and yet not in the presence of each other, if we give the word "presence" the meaning heretofore affixed to it by judicial decisions. Shires v. Glasscock, 2 Salk. R. 688; S. C. Carthew 81; Davy v. Smith, 3 Salk. R. 395; Casson v. Dade, 1 Bro. C. C. 99; Neil v. Neil, 1 Leigh 6.

The English courts, in passing on the statute 1 Victoria, ch. 26, § 9, from which our statute is taken, have decided that the witnesses must not only be in presence of the testator at the time he makes his signature or acknowledgment, but in the presence of each other. This is not the necessary meaning of the terms used; for as already said, the witnesses might both be in the presence of the testator, yet not in the presence of each other. To hold that the witnesses must not only be in the presence of the testator, but also in the presence of each other, will impose upon the courts of probat the double duty of deciding on these double relations; thus complicating the proofs, and thereby increasing the danger of defeating the testator's intention; and this because, as is said, it should be inferred that the witnesses must be in the presence of each other from the fact that they are required to be in the presence of the testator.

If we look to the obvious purposes of the statute, there is little room for doubt. The will must be in writing; the law makers
258 having deemed it unwise to *rely on parol testimony touching the disposition of property by will. After the will is written, it is required that the testator shall manifest his approval of its provisions by signing his name, or causing it to be done. The signature by the testator performs a double function; first to show his approbation of what is written, and next to identify the paper. The office of the witnesses is to identify the paper, to prove the signature or acknowledgment thereof when it shall thereafter be offered for probat. The law prescribes as the only mode of identification, that the witnesses subscribe their names in the presence of the testator, so that he may know the witnesses are subscribing the paper which he intends to be his will. All these purposes of the statute are secured by the construction of the Circuit court: It neither sacrifices the end to the means, nor the means to the end. That the testator in this case intended the paper propounded to be his will; that he acknowledged it as such in presence of Hutchings and Wright; that Hutchings in testator's presence subscribed the paper; that Wright in presence of Hutchings and of testator subscribed his name, are all facts beyond question: yet it is said that the will is defectively executed because Hutchings did not subscribe in presence of Wright as well as of testator. This, as I have already said, is not required by the letter of the statute. It is argued, however, that each witness should observe the act of subscription by the other as a security against fraud and forgery. Before yielding to this argument, it is well to consider whether the same security is not afforded by the construction put on the statute by the Circuit court. Under either construction, fraud or forgery could be made effective only by the perjury of two subscribing witnesses. They must prove, either truly or falsely, that testator put his signature to or acknowledged the paper as his will; if truly so proved, no in-
259 jury *is done to any one; if falsely proved, it can only be deplored as one of the many abuses which may be practiced in giving testimony. It will do no good to place the honest execution of wills under arbitrary and capricious restriction for the purpose of preventing the perpetration of fraud and forgery by means of perjury, seeing that fraud, forgery and perjury may attain their ends just as readily as if the restrictions had never been imposed. At last, it will be found that the only security against evil practices exists in the vigilance of the testator and the integrity of witnesses. If knaves shall combine to establish a spurious will, their work will be just as easy under one construction as under the other.

The general principles involved in this case were considered in the case of Parramore v. Taylor, 11 Gratt. 220; and Beane v. Yerby, supra 239, recently decided by this court; and it is unnecessary to go over the same ground. I therefore only refer to those decisions and the cases cited by Judge Moncure in Parramore v. Taylor, especially to Pollock v. Glassell, 2 Gratt. 439; Rosser v. Franklin, 6 Gratt. 1; Moore v. Moore's ex'or, 8 Gratt. 307; Sturdivant v. Burchett, 10 Gratt. 67; as giving the rule by which this case must be decided.

I am of opinion to affirm the decree.

MONCURE and LEE, Js., concurred in the opinion of Samuels, J.

ALLEN, P., and DANIEL, J., dissented.

Decree affirmed.

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260 *Custis v. Snead & als.

January Term, 1855, Richmond.

1. **Partition—Shares Assigned in Severalty—Departure from Rule—Record.***—Upon a bill for partition of land, as a general rule, the share of each parcener should be assigned to him in severalty. And if from the condition of the subject or the parties, it is proper to pursue a different course, the facts justifying a departure from the rule should, at least where infants are concerned, be disclosed by the report or otherwise appear, to enable the court to judge whether or not their interest will be injuriously affected.

2. **Same—Same—Same—Facts Justifying Must Appear to Court.**—Where the same parties are entitled to

*Partition—Shares Assigned in Severalty.—See *footnote* to Howery v. Helms, 20 Gratt. 1, where the cases are collected which cite the principal case. See also, Beckham v. Duncan, 1 Va. Dec. 679.

lands derived from the father and also to lands derived from the mother, and some or all of them are infants, if these lands are blended in the division, it must appear to the court that the interest of the parties in general will be promoted by this mode of partition, to enable the court to protect the rights of the infants.

3. **Same—Widow Must Be Party—Dower—Assignment.**—Where the widow of the person who died seized of the lands of which partition is sought, is alive, and entitled to dower, she should be a party to the suit, and her dower should be assigned to her, and partition made of the residue. And it is error to proceed in her absence, and make partition of the lands subject to her right of dower.

This was a bill filed in November 1842 in the County court of Accomack, by Lewis J. Snead and Thomas Custis, for partition of a tract of land descended to the children and heirs of Malinda Custis, of whom Thomas Custis was one, and had sold his share to Snead. It also prayed partition of a tract of land and slaves descended to the children and heirs of William Custis of Henry. William Custis was the husband of Malinda, and their children were the heirs of both. After their death one of these children died an infant, intestate and unmarried, and his interest in both estates descended to the other children; all of whom were infants when the bill was filed except Thomas Custis. The bill stated that
261 the second wife *of William Custis survived him, and was then married to James Stewart; but they were not made parties to the suit; and the prayer was for a partition of the two tracts of land and the slaves.

At the same term of the court a decree was made appointing commissioners to divide: First, the land descended from Malinda Custis, equally amongst the plaintiff Snead and the infant defendants: Second, the slaves equally amongst the plaintiff Thomas Custis and the defendants: Third, the land descended from William Custis of Henry, equally amongst Thomas Custis and the infant defendants. And they were directed to report their proceedings to the court.

In October 1843 the commissioners reported that they had divided the slaves according to the decree. That they had laid off and allotted to the plaintiff Snead one-fifth of the land descended from Malinda Custis: And that they had delayed to divide the land descended from William Custis, at the request of one of the parties, who desired to have a rehearing of the decree.

In October 1846, the plaintiffs filed an amended and supplemental bill, in which, after stating the previous proceedings, they say that Snead had purchased Thomas Custis' interest in the land descended from William Custis of Henry, and also the interest of the defendant Elizabeth Custis in the land descended from Malinda Custis. And they ask that both tracts of land may be divided, giving to Snead another fifth of the first named tract, as assignee of Elizabeth Custis, and one-fifth of the second tract as assignee of Thomas Custis; and that the other parties may each have his fifth allotted to him.

The cause came on again to be heard in October 1846, when the court confirmed the report of October 1843, and appointed the same commissioners, with directions to divide the land descended from Ma-
262 linda *Custis, except the fifth, which had been allotted to Snead, and also the land descended from William Custis of Henry, amongst the plaintiff Snead and the infant defendants.

In November 1846, the commissioners reported that they had assigned to Snead the whole undivided balance of the land descended from Malinda Custis, in full of his interest in both tracts; and that they had assigned to Elizabeth Custis and the three infant defendants the tract descended from William Custis of Henry, which they had divided equally among the four.

Benjamin F. Custis, one of the defendants, having attained the age of twenty-one years, he in October 1851 filed his affidavit in the cause, in which he expressed his belief that the division made by the commissioners was unequal in favor of Snead. And in December he excepted to the report of 1846, on the ground that they did not obey the directions of the decree of October 1846, but had assigned the whole of the land descended from Malinda Custis to the plaintiff Snead: And that this land was far more valuable than Snead's interest in the other tract.

The cause came on to be finally heard in December 1851, when the court overruled the exceptions, and confirmed the report: And thereupon Benjamin F. Custis applied to this court for an appeal, which was allowed.

R. T. Daniel, for the appellant.
Patton, for the appellee.

ALLEN, P., delivered the opinion of the court:

The court is of opinion, that as in a proceeding at law by writ of partition, it is the regular course to assign to each parcener his part in severalty; Litt. § 276, Coke 179 b; from analogy thereto, the same
263 *course should, as a general rule, be observed where the proceeding is by bill in chancery. That such partition of the whole subject is more likely to be equal and just than where a partial partition is made, as the commissioners will have an accurate view of the whole subject, and by dividing it into different parts, will be furnished with the means of making a fair comparison, and can correct inequalities. If from the condition of the subject or the parties, the interest of the parties in general would, in any case, be promoted by pursuing a different course, the facts justifying a departure from the rule should, at least where the rights of infants are involved, be disclosed by the report, or otherwise appear, to enable the court to judge whether their interest would be affected injuriousy or not.

The interlocutory decree of the 28th of November 1842 directed the commissioners, amongst other things, to divide equally amongst the plaintiff and the defendants who were infants, the tract of land of which Malinda Custis died seized. Instead of pursuing the directions of said decree, the commissioners, by their report filed the 30th October 1843, assigned to the appellee Lewis J. Snead one-fifth of said tract of land; leaving the residue thereof undivided.

The court is of opinion, that in this the commissioners violated their duty, and, in the absence of all evidence to justify it, it was error to confirm the report aforesaid in this respect.

The court is further of opinion, that the same objection exists to the report of the commissioners under the decree of the 26th October 1846. The said decree requiring a division of both the tract descended from Malinda Custis and the tract whereof William Custis of Henry died seized, separately amongst the parties according to their rights, the decree should have been followed and carried out according to its terms, unless the interest of all concerned required
264 a departure from *the terms thereof; and if so, the facts should have been reported or made to appear, to enable the court, having a regard to the interests of the infants, to judge whether such departure should have been permitted. That although under the 4th section of the act concerning partitions, 1 Rev. Code of 1819, p. 360, partition may be made of several parcels of land or other real estate to which the parties have title, though such title may be derived from different sources, by allotment of part in each parcel or of parts in one or more parcels, or of one or more individual parts, with or without the addition of a part or parts of other parcels, as shall be most for the interest of the parties in general; yet where the same parties are entitled to lands derived from the father and also to lands derived from the mother, and some or all are infants, as in the event of the infant dying under age, a different course of descent is prescribed, inconvenience might result from blending such lands in the partition; and it should at least appear in the words of the act, that the interest of the parties in general would be promoted, to enable the court to protect the rights of the infants. Nothing of that kind appearing either in the report of the commissioners or otherwise, the court is of opinion it was error to overrule the exception and confirm said report filed on the 30th November 1846.

The court is further of opinion, that as it is alleged in the original bill that said William Custis of Henry left a widow who at the time of filing said bill was the wife of James Stewart, and the bill prayed for a partition of the land of which said William died seized, subject to the widow's estate in dower, the widow and her husband should have been made parties; and her dower assigned; and partition should have been made of the residue. And it was error to have directed or confirmed a partition of said tract until such dower had been assigned; it not appearing, and there
265 being nothing *to justify the court in presuming, that such estate in dower had terminated. It is therefore ordered and adjudged, that so much of said decrees as is herein declared to be erroneous, be reversed, and the residue thereof be affirmed; and that the appellee L. J. Snead pay to the appellant his costs. And the cause is remanded, with instructions to require the appellees to make said widow and her husband parties, if such dower estate is still in existence; and for further proceedings, in order to a partition of said lands, in order to a final decree.

Decree reversed.

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266 *Delaney v. Goddin.

April Term, 1855, Richmond.

1. **Tax Sales—Report of Surveyor—Objections—Court Acts Ministerially.**—The County court in passing upon any question under the act, Code, ch. 37, § 15, is vested with no judicial power, but acts in a capacity purely ministerial: And in determining whether or not it will order the report of the surveyor therein required, to be recorded, is restricted to the consideration of objections to said report; and has no right to look beyond the return of the list of sales by the sheriff, required by § 11 of said chapter.*
2. **Same—Same—Duty of Court.**—In such case it is the duty of the court to see whether said report is in conformity with the provisions of said section, requiring it to specify the metes and bounds of the land sold, and the names of the owners of the adjoining tracts, and to give such other description of the land sold as will identify the same. And in order to discharge that duty, no enquiry into the regularity or validity of the previous proceedings is necessary or proper.
3. **Same—Same—Same.**—In such a case, upon a motion by the purchaser to order the report of the surveyor to be recorded, the County court, not acting judicially, has no authority to render a judgment overruling the motion with costs.
4. **Same—Same—Refusal of Court to Record—Mandamus.**†—If the County court renders such a judgment, upon appeal to the Circuit court, that court should simply reverse the judgment with costs; but should not proceed to order that the report of the surveyor should be recorded: The error of the County court in refusing to order the report to be recorded, can only be corrected by *mandamus*; and not by writ of error or *supersedeas*.

At the March term 1853 of the County court of Henrico, Isaac A. Goddin moved

*See the opinion of JUDGE DANIEL for the statute.

†**Tax Sales—Report of Surveyor—Duty of Court to Admit to Record—Mandamus.**—In addition to the cases cited in *foot-note* to Randolph Justices v. Stalnaker, 13 Gratt. 523, see, citing the principal case, Marcum v. Ballot Com'rs, 42 W. Va. 268, 26 S. E. Rep. 283; Board of Supervisors of Mason County v. Minturn, 4 W. Va. 303; McCullough v. Hunter, 90 Va. 701, 19 S. E. Rep. 776. See also, on mandamus, principal case cited in *foot-note* to Morris, *Ex parte*, 11 Gratt. 292.

the court to record the report of the surveyor of the county in relation to a lot of land sold by the sheriff for the nonpayment of the tax upon it. The lot was sold as the property of Matthew Delaney; and he appeared and opposed the motion. The court overruled the motion, and gave Delaney a judgment against Goddin for his costs.

And thereupon Goddin excepted.

267 *On the hearing of the motion Goddin showed by the list of delinquents on the land tax in the county of Henrico for the year 1847, that lot No. 8 in L. E. Harvie's plan, which was assessed with a tax of ten cents, was returned delinquent as owned by Matthew Delaney. And he presented a list of lands and lots returned as delinquent in the county of Henrico for the years from 1845 to 1849, inclusive, certified by the auditor of public accounts to the sheriff of said county in June 1850, in which was this lot of Delaney, as delinquent for the year 1847, for the tax of ten cents, with interest one cent. And he proved by the deputy sheriffs that this list had been received from the auditor; and that within twenty days thereafter, three copies thereof had been made; one of which had been set up at the court-house, and at two other of the most public places in the county, with a notice that the sale of the lands mentioned in the lists would take place on the first day of the next October court for said county. That the said sale was commenced on the day appointed, but that the court sitting only one day, and the sale not being completed, it was adjourned to the first day of the next County court; on which day it was completed. And that notice of such adjournment was posted, and proclamation thereof made, at the door of the court-house of said county on the said October court day. And the advertisement of the sale and of the adjournment were introduced in evidence, the first of which bore date the 25th of July 1850.

He also introduced a list of real estate within the county of Henrico, sold in the months of October and November, for the nonpayment of taxes thereon for the years from 1845 to 1849, inclusive, which list was verified by the oath of the sheriff of Henrico, and certified by the County court to the auditor of public accounts, in the man-

268 ner prescribed by law; which *list contained the said lot as owned by Delaney. And he also introduced the receipt of the sheriff, which was headed: Memorandum of real estate in the county of Henrico, sold this 7th day of October 1850 for nonpayment of taxes due thereon for the year 1847; and recited the name of the person charged with the tax; quantity of land; local description of land; amount of tax due; quantity of land charged; name of purchaser; and amount of purchase money: And at the foot a receipt for the purchase money, which was thirty-seven cents.

He then introduced the report of the surveyor, which was as follows:

Henrico County, to wit:

I certify that the above named lot No. 8, of L. E. Harvie's plan, lies in Henrico county, near the city of Richmond. Said lot is on the east side of Belvidere street, and is bounded on the north and south by property of Charles Dimmock, and east by the property of William Row. Given under my hand this 15th day of December 1852.

Joseph J. Pleasants,
Sur. Henrico County.

Delaney on his part, proved that in 1847 he lived in the city of Richmond, and owned a considerable amount of personal property; one witness said as much as two thousand dollars in value. And he proved that he paid to the sheriff of Henrico the tax on another lot in the county in the year 1847.

The County court having overruled his motion with costs, Goddin applied to the Circuit court of Henrico for a supersedeas to the judgment, which was awarded: And when the cause came on to be heard in that court, the judgment of the County court was reversed, with costs. And the court

269 proceeding to make such order *as the County court should have made, ordered that the said report be recorded; and for this purpose that the cause be sent back to the said County court. From this order Delaney applied to this court for a supersedeas, which was awarded.

The case was elaborately argued by Gilmer, G. N. Johnson and Patton, for the appellant; and by Howard, Randolph and Stanard, for the appellee.

The counsel for the appellant insisted that the act to be performed by the County court upon the motion to order the report of the surveyor to be recorded, was a judicial act; and that it was the duty of the court to look into all the previous proceedings to see whether they were regular; and if they were not, to refuse to order the report to be recorded. And they insisted that there were fatal irregularities in the previous proceedings.

The counsel for the appellee insisted that the act to be performed by the court, was a ministerial act; and that the enquiry was limited to the single question, whether the report of the surveyor conformed to the law. And they insisted further that there were no irregularities in the previous proceedings, which, if they could be looked to by the court, could justify a refusal to order the report to be recorded.

DANIEL, J. This case turns on the proper construction of the 15th section of the 37th chapter of the Code, prescribing the mode in which lands, returned delinquent for taxes, are sold therefor, or vested in the commonwealth. Preceding sections of the chapter having declared when, where and how land is to be sold for taxes, and provided for a payment of the purchase money and a receipt therefor, and for the return of a list of sales to the court of the county or corporation whose officer may have made the sales; and

270 *having also pointed out the time and

mode for the redemption of any land so sold, the 14th section provides that the purchaser of a part of any tract so sold and not redeemed within two years, shall have the quantity purchased surveyed and laid off, the survey to commence on either of the lines of the tract at the option of the purchaser, so as not to include the improvements on the same (if it can be avoided), and to be in one body, the length whereof shall not be more than double the breadth, when that is practicable. It further provides that a plat and certificate of the survey shall be returned to the court of the county; and if the court, upon examination thereof, find it to be correctly made in conformity with said fourteenth section, it shall order the same to be recorded.

And the fifteenth section provides that when an entire tract of land is so sold, and not redeemed within the two years, the purchaser shall have a report made by the surveyor of the county to the court thereof, specifying the metes and bounds of the land sold, and the names of the owners of the adjoining tracts; and giving such further description of the land sold as will identify the same: and the County court, unless it see some objection to such report, shall order the same to be recorded.

And the sixteenth section then provides that after the expiration of the two years, the purchaser of the land so sold and not redeemed shall obtain from the clerk or deputy clerk of the court of the county or corporation, whose officer may have sold such land, a deed conveying the same, in which shall be set forth all the circumstances appearing in the clerk's office in relation to the sale. Moreover if the sale be of part of a tract of land, the deed shall refer particularly to the plat and certificate of survey returned, according to the fourteenth section, and the order of the court thereupon; and if the sale be of an entire tract of
271 *land, it shall refer to the report made according to the fifteenth section, and the order thereupon. If the sale be of a town lot, or of an undivided interest in such lot, and a report be made by a surveyor describing the same, and such report be ordered by the court to be recorded, the deed shall refer to the said report. But when in the case of a sale of a town lot or of an undivided interest in such lot there is no such report, the clerk shall nevertheless execute a deed therefor to the purchaser, if he desire the same.

Can there be any reasonable doubt as to the nature and extent of the duty to be performed by the County court under the fourteenth section? After pointing out how the survey is to be made, and requiring a plat and certificate of it to be returned to the court, the section, in plain and unambiguous terms, limits the enquiry of the court to the question whether or no the survey is correctly made in conformity with said section. Does the plat and certificate show that the survey commences on one of the lines of the tract sold? Is it so made as not to include the improvements? Is it in one body? Is the length no more than double the breadth? If so, then the condition, the only condition on which the order for the record of the survey is in terms made to depend, is satisfied, and the duty of the court to make the order becomes absolute.

The duty of the court under the fifteenth section is, I think, equally simple and obvious. "Unless it see some objection to such report," it is to order it to be recorded. Does the report specify the metes and bounds of the land sold, and the names of the owners of the adjoining tracts, and give such further description of the land sold as will identify the same? If in any case arising under this section these questions are answered affirmatively, what possible objection can the court see to the re-
272 port? And how can it make *objection to the regularity of some previous proceeding the ground for refusing to record the report, without violating the express command requiring it to order the report to be recorded, unless it sees some objection; not some objection generally, but some objection to the report?

The meaning of the terms employed in the section seems to my mind too plain to admit of any doubt as to the answer to be given. And indeed we cannot convert the examination by the court of the survey under the 14th section, or of the order under the 15th, into an occasion for contesting and deciding upon the regularity and validity of the previous proceedings, without imputing to the legislature a gross partiality and injustice. For we have seen that by the provisions of the 16th section, when the sale is of part of a tract of land, the deed is to refer particularly to the plat and certificate of survey returned, and when the sale is of the entire tract, the deed is to refer to the report required by the 15th section. Whereas in the case of the sale of a town lot, the provision is, that if there be a report made by a surveyor describing it, and the report has been recorded, the deed is to refer to such report; but if there is no such report, the clerk shall nevertheless execute a deed for such lot to the purchaser, if he desire it. And thus as the purchaser may procure his deed, in the case of the sale of a town lot, without having had any survey or report made, the opportunity for showing defect in the previous proceedings, which under the construction contended for by the plaintiff in error is afforded in all cases to the owners of tracts and parts of tracts of land sold for taxes, is virtually denied to the owners of town lots so sold, by being made to depend on the mere option and course of the purchaser. Such a construction, therefore, is condemned as well by the results which flow from it as by the plain meaning of the language
273 *employed in the statute. And I feel no difficulty in coming to the conclusion that in cases like the one under consideration, the County court has no right to look beyond the return of the list of sales by the sheriff, and to examine into the regularity of the previous steps. No matter

what such steps may have been or how conducted, they can have no bearing on the simple duty it is called upon to discharge. That duty is in no wise judicial, but purely ministerial. Rex v. Justices of Derbyshire, 1 Wm. Black. 606; Dawson v. Thruston, 2 Hen. & Munf. 132; Manns v. Givens, 7 Leigh 689. And upon the authority of these cases, I think it also clear that the means of testing the correctness of the action of the County court in refusing to record the report, is not by writ of error or supersedeas, but by mandamus. So much of the judgment of the Circuit court, therefore, as passes on the refusal of the County court to order the report to be recorded, is erroneous. The Circuit court ought simply to have reversed the judgment of the County court dismissing the motion, and ordering the payment of costs, leaving the defendant in error free to renew his application to the County court to have the report recorded, or to take such other course as he may be advised to pursue in the premises.

ALLEN, P., dissented from so much of the opinion and judgment as held that in this case the action of the County court was to be treated as merely ministerial. The power was confided to a court of record, and the action of the court was judicial; the parties appeared and litigated the question; the court has affirmed its jurisdiction by pronouncing judgment which would conclude the parties until reversed; and therefore it was proper for the Circuit court to review and if erroneous to reverse it. He was further of opinion that the authority of the County court, although
274 *the court acted judicially, was limited to the enquiry whether the report of the surveyor conformed to the requisitions of the law; and that it was not competent for such court, upon this enquiry, to require proof of the regularity of the proceedings leading to or attending the sale. He was further of opinion that the survey did conform to the requisitions of the law, and was therefore for affirming the judgment of the Circuit court reversing the judgment of the County court, and proceeding to enter the judgment it did.

LEE and SAMUELS, Js., concurred in the opinion of Daniel, J.

MONCURE, J., concurred with Allen, J.

The order was as follows:

The court is of the opinion that the County court, in passing upon any question arising under the 15th section of the 37th chapter of the Code of 1849, prescribing the mode in which lands returned delinquent for taxes are sold therefor or vested in the commonwealth, sits simply as a court of registry; and in determining whether or no it will order the report of the surveyor, therein required to be recorded, is restricted to the consideration of objections to said report, and has no right to look beyond the return of the list of sales by the sheriff required by the eleventh section of said chapter, into the previous proceedings provided for in said chapter. That the said court, in discharging its duty under the said 15th section, is vested with no judicial powers, but acts in a capacity purely ministerial; that it is its duty to see whether or no said report is in conformity with the provisions of said section, requiring the report to specify the metes and bounds of the land sold, and the names of the owners of the adjoining tracts; and to give such
275 *other description of the land sold as will identify the same; and that in order to discharge this duty, no enquiry into the regularity or validity of the previous proceedings is necessary or proper. And if it sees that there is no objection to said report on the score of its failing to make the specifications or to give the description just mentioned, it becomes the imperative duty of said court to order said report to be recorded.

The court is, therefore, also further of opinion, that the County court had no authority to render the judgment of the 14th of March 1853, dismissing the motion of the defendant in error, and ordering him to pay costs to the plaintiff in error.

And the court is also further of opinion, that whether or no there was such objection to the report of the survey in the proceedings mentioned, as justified the County court in refusing to order the same to be recorded, is a question which it was not competent for the superior court to take cognizance of by means of writ of error or supersedeas; and that the propriety of the action of the County court in refusing to order said report to be recorded, can be tested in the superior court by mandamus only.

And the court is therefore also further of opinion that the Circuit court erred in undertaking to decide on the refusal of the County court to order said report to be recorded, and in rendering a judgment ordering the same to be recorded: And that instead of rendering its said judgment of the 20th July 1854, the Circuit court ought simply to have rendered a judgment reversing, with costs to defendant in error, the judgment of the County court dismissing his motion, and ordering him to pay costs.

It is therefore considered, that so much of the said judgment of the Circuit court as reverses the said judgment of the County court, with costs to the defendant in error, be affirmed; and that so much thereof
276 *as orders the report aforesaid to be recorded, be reversed and annulled. And that the said plaintiff in error recover against the said defendant in error his costs by him expended in the prosecution of his writ of supersedeas aforesaid here. And the said defendant in error is at liberty to renew his application before the County court, or to take such other legal course as he may be advised to pursue in the premises. All which is to be certified, &c.

277 *Taliaferro & als. v. Pryor.*

April Term, 1855, Richmond.

1. **Ejectment—Evidence—Admissibility.**—In ejectment, it being proved that an ancestor of the plaintiff lived upon the land, evidence that he was generally considered the owner, or that the witness so considered him, is incompetent and inadmissible.

2. **Records—Conclusiveness of—Collateral Attack.**†—The clerk's office of a County court, with all the records therein, having been consumed by fire, a paper purporting to be an official copy of a will of record in that office, and to be certified by a former clerk of the court, is admitted to record under the act of February 19, 1840, Sess. Acts, ch. 55, p. 47. The act of the clerk admitting the paper to record is conclusive upon the question whether the paper is what it purports to be; and evidence to prove that the copy was not certified by the clerk whose name is affixed to the certificate, but by another person, who was not authorized to make the certificate, is inadmissible in a collateral action.‡

This was an action of ejectment in the Circuit court of Gloucester county, brought by Skaife W. Pryor against Philip Taliaferro, and upon his death, revived against his heirs. The plaintiff claimed as only child and heir of John C. Pryor, who was the son of Christopher Pryor. The land which was the subject of the action is a tract of three hundred acres, called "The Ware-house." On the trial the plaintiff introduced a witness, James Jones, who stated on his direct examination, that he was well acquainted with the land; and also that he was well acquainted with Christopher Pryor as early as the year 1792 or 1793. That Christopher Pryor resided on the said place called "The Ware-house," from the time the witness first became acquainted with him until his death in 1803; but that he did not know whether or not he was the owner of
278 *said land. That after Christopher Pryor's death his widow continued to reside on the land as long as she lived. That after her death one Captain Harwood and Willis Perrin resided on the land; but that the witness did not know whether or not they owned it. The witness was then asked by the plaintiff's counsel, whether the said Christopher Pryor, at the time of residing on said land, was generally reputed to be the owner of the land? To this question the defendants objected; but the court allowed it to be put; and the witness answered, that he did not know whether the said Christopher Pryor was generally reputed to be the owner of said land, but that the witness considered him to be so. Thereupon the defendants objected to the said answer going in evidence to the jury; but the court overruled the objection: And the defendants excepted as well to the opinion of the court authorizing the question to be put, as to that admitting the answer as evidence.

The plaintiff then introduced another witness, William G. Wiatt, who stated that he knew the land, and Christopher Pryor. That from his first acquaintance with Pryor, which was three or four years before his death, he lived on the land, and that he died in 1803 on the land. The plaintiff then asked the witness the same question he had put to the witness Jones; which was objected to by the defendants, but allowed by the court. Whereupon the witness answered, that he did not know whether Christopher Pryor was the owner or not of said land; but that the witness so regarded him, and believed he was generally considered to be the owner of said land. To this answer the defendants also objected; but the court overruled the objection: And the defendants again excepted.

The plaintiff further proved that the clerk's office of Gloucester County court, together with all the records thereof, was destroyed by fire in the year 1820.
279 And *he further proved that John C. Pryor was the son of Christopher Pryor, and that the plaintiff was the only son of John C. Pryor, who died about four years previous to the trial of the cause. He then offered in evidence a paper purporting to be an official copy of the will of Christopher Pryor. This paper had annexed to it a certificate of its admission to probat in the County court of Gloucester on the 4th of April 1803, to which is signed the name of "Thomas Nelson, C. C.;" and the paper and certificate are subscribed, "A copy—Teste, Thomas Nelson, C. C." To this paper the following certificate was annexed:

"This copy of the last will and testament of Christopher Pryor deceased, duly authenticated and attested by Thomas Nelson, a former clerk of this court, was, on the 14th day of April 1846, produced to the clerk of the County court of Gloucester; and it appearing that the record thereof has been destroyed by fire in the clerk's the same is admitted to record, upon the application of Christopher Pryor, guardian of Skaife W. Pryor. Teste, John R. Cary, C. C."

The paper offered was an official copy of the will and the certificates thereon, certified by Cary, as clerk of the court. The reading of this paper in evidence was objected to by the defendants; and in support of their objection, they proposed to prove by Cary the clerk, that the paper was admitted to record in his office on the 14th of April 1846, without any other evidence of the genuineness of said copy, and of the due attestation thereof, and of Thomas Nelson's being the clerk of the County court of Gloucester, than was furnished by said copy itself on its face; and that he had no personal knowledge

*For monographic note on Acknowledgments, see end of case.

†**Records—Conclusiveness of.**—Upon the question of the conclusiveness of the records of a court, see the principal case cited and approved in Grove v. Zumbro, 14 Gratt. 515, and *note*; Vaughn v. Com., 17 Gratt. 390, and *note*; Quinn v. Com., 20 Gratt. 144; Herring v. Lee, 22 W. Va. 672; State v. Vest, 21 W. Va. 800; Burley v. Weller, 14 W. Va. 272; Nat. Bank of Fredericksburg v. Conway, 17 Fed. Cas. 1204. See also, *foot-note* to Johnston v. Slater, 11 Gratt. 321. For monographic *note* on "Acknowledgments," see end of case.

‡See the statute quoted in the opinion of MONCURE, J.

of any of the facts himself. And they further proposed to prove that neither the copy of the will, nor the certificate of the probat, nor the attestation thereof, nor the sig-
280 nature of Thomas *Nelson, C. C., subscribed to said certificate, was in the handwriting of said Thomas Nelson; but that the whole will, certificate, attestation and name were in the handwriting of one George W. Camp, who was a copyist at one time in the office of the clerk of Gloucester County court; and never either the clerk or deputy clerk of said County court. But the court excluded the evidence offered by the defendants, and overruled their motion to exclude the paper, and admitted the same as evidence: And the defendants again excepted.

After the foregoing proceedings had occurred, and all the evidence had been introduced, the court, upon the motion of the plaintiff, instructed the jury, that the said copy of the copy of Christopher Pryor's will, read in evidence to the jury by the plaintiff as aforesaid, should be regarded and received by them as evidence of the will of said Pryor, and as evidence of the contents of said Christopher Pryor's will; and to be regarded by them in the same manner that they would regard the original will as evidence if that were introduced instead of a copy. To the giving of this instruction the defendants again excepted. There was another exception, which it is unnecessary to state.

There was a verdict and judgment for the plaintiff; and the defendants applied to this court for a supersedeas, which was awarded.

Griswold, for the appellants, insisted:

1st. That the evidence of the witnesses Jones and Wiatt, as to the reputation of Christopher Pryor's ownership of land, was illegal. That the general rule was against the admission of evidence of reputation; and that this case did not come within any of the exceptions to that rule. And he referred to 1 Starkie on Evi. 32, 33; Doe v. Thomas, 14 East's R. 323; and Morewood v. Wood,
281 in a note to that case, 327; Outram *v. Morewood, 5 T. R. 121; Mima Queen v. Hepburn, 7 Cranch's R. 290; Ellicott v. Pearl, 10 Peters' R. 412, 434–35; Gregory v. Baugh, 4 Rand. 611; Masters v. Varner, 5 Gratt. 168.

2d. That the admission of the copy of the will to record by the clerk was not conclusive of the question whether it was a duly certified copy of the will. That it had been frequently held by this court that the copy of a paper improperly recorded, was not evidenced. Turner v. Stip, 1 Wash. 319; Currie v. Donald, 2 Wash. 58; Maxwell v. Light, 1 Call 117; Givens v. Manns, 6 Munf. 191; Peterman v. Laws, 6 Leigh 523; Pollard's heirs v. Lively, 2 Gratt. 216. That until the act of 1840, Sess. Acts, 1839–40, ch. 55, § 2, p. 47, there was no provision by which a paper which had been destroyed could be rescued and recorded; and that this act provides that the original paper or a duly attested copy may be recorded. That the clerk was not a judge to decide whether the paper was duly attested; a fact which in many cases he could not know. But his business was to record the paper, leaving the question whether it was a paper which the law authorized to be recorded, open as in the cases above cited, to be determined when it should arise between parties interested to enquire into it.

R. T. Daniel, for the appellee, said:

That as to the first question made by the appellants' counsel, it did not arise, as the witnesses stated that they knew nothing on the subject to which the enquiry related: And therefore the asking the question could not have injured the appellants. And he referred to Preston v. Harvey 2 Hen. & Munf. 55; Faulcon v. Harris, Id. 550. But that the question had regard to the possession, which was a matter complicated of law and fact, and it was a mere mode of sifting the character of the possession. He re-
282 ferred *to Judge Baldwin's opinion in Taylor v. Burnsides, 1 Gratt. 165, 190; and Overton v. Davisson, Id. 211; Clapp v. Bromaghan, 9 Cow. R. 530; Jackson v. Joy, 9 John. R. 102.

On the second point, he insisted that the act of the clerk in admitting the copy of the will to record was conclusive in this collateral action. That the clerk was authorized to perform a probat act: That it was a part of his duty to ascertain whether the paper offered to him was a duly attested copy of a lost original paper; and having done so, his act cannot be questioned elsewhere. Harkins v. Forsyth, 11 Leigh 294; Carper v. McDowell, 5 Gratt. 212.

MONCURE, J. The questions presented by the first and second bills of exception in this case, are as to the admissibility of general reputation, and of the individual opinions of witnesses, to prove the title of Christopher Pryor, under whom the defendant in error claims the land in controversy.

It is a general rule that hearsay evidence is inadmissible. It is also a general rule that the opinions of witnesses are not admissible evidence. There are certain well defined exceptions to each of these general rules; but it is needless to state them. They may be seen by reference to 1 Stark. Evi. p. 30–35, and 153, 4; and 1 Greenl. Evi. § 440. It is sufficient to say that this case falls under the general rules aforesaid, and not under any of the exceptions to them. Therefore, the Circuit court erred in overruling the objections of the plaintiffs in error to the questions and answers mentioned in the first and second bills of exception. See Doe v. Thomas, 14 East's R. 323; Mima Queen v. Hepburn, 7 Cranch's R. 290; Ellicott v. Pearl, 10 Peters' R. 412.

The questions presented by the third bill of exceptions are, as to the admissi-
283 bility of the paper purporting *to be an official copy of the will of Christopher Pryor; and of the testimony offered by the plaintiffs in error in resistance of the reading of the said paper in evidence to the jury.

The clerk's office of Gloucester County court, with all the records thereof, was destroyed by fire in 1820. The paper in ques-

tion is an official copy of a paper which was recorded in that county on the 14th of April 1846, in pursuance of the second section of the act passed February 19, 1840, entitled "an act concerning the preservation of records;" which declares, "that if the deed book containing the record of any conveyance, will, testament or other writing, or papers which may lawfully be recorded in any court of this commonwealth, or containing the record of any suit, judgment, decree or order of any court, be stolen, destroyed or mutilated, it shall be lawful for the clerk of such court, upon the production to him of the original writing so recorded, or a copy thereof duly attested, or a copy of any such record, judgment, decree or order duly attested, to record the same again upon the application of any person who may require it to be done, and to charge to such person the same fee as may have been chargeable for recording the same in the first instance. Every such record shall state whether it was made from the original writing or a copy thereof, and also the form of its authentication or attestation; and thereupon the conveyance, will, judgment, decree, order or other writing so recorded, shall be held and taken to be duly recorded, and the record thereof, or a copy of the same, shall in like manner have the same effect as the original record thereof in the book stolen, destroyed or mutilated, or a copy thereof would have been entitled to."

The paper in question appears on its face to be in strict conformity with the statute in all respects; and there can be no doubt but that it is admissible evidence.

284 *The only question is, whether the evidence offered to show that the paper admitted to record as aforesaid, was not in fact duly attested, is admissible evidence. I am of opinion that it is not.

The object of the statute is to reinstate, as far as possible, a destroyed record; to provide something which shall be equivalent to that which is destroyed. Where the record of a deed or will has been destroyed, and the original, or a copy of the deed or will duly attested, is in existence, there is no difficulty in attaining this object: and the legislature has therefore provided that the clerk of the court whose record is destroyed, shall record the deed or will again, upon the production to him of such original or copy; and that thereupon the deed or will shall be held and taken to be duly recorded, and the record thereof, or a copy of the same, shall in like manner have the same effect as the original record thereof, or a copy of it would have been entitled to. The paper so produced to the clerk for record must appear on its face to be duly attested; and to show whether it is or not, the statute cautiously provides, that "every such record shall state whether it was made from the original writing, or a copy thereof, and also the form of its authentication or attestation."

If the paper does not appear on its face to be duly attested, the clerk has no power to admit it to record, and his act in so doing is void. But if it does appear on its face to be duly attested, the statute confers on him the power to admit it to record, and charges him with the duty of deciding whether or not the attestation be genuine. This duty, it is true, is quasi judicial in its nature; but it is not unlike many other duties with which he is chargeable; and the legislature reasonably supposed that he would know whether his own attestation, or that of one of his predecessors in office, was genuine; and that, being

285 a sworn public officer, *bound by bond with surety for the faithful discharge of the duties of his office, he might safely be intrusted with the performance of this duty. He can easily ascertain, and it is his duty to ascertain, if he does not already know, whether the person whose name is signed to the certificate of probat was clerk of the court at the date of the certificate, and whether the signature was made by such clerk, or by his authority; and the law gives him credit for a proper discharge of this duty. His decision in favor of the genuineness of the attestation is final and conclusive; at least in any collateral proceeding in which the record or a copy of it may be given in evidence. This, I think, is the necessary construction of the statute, and results from the nature of the act which it authorizes the clerk to perform. Evils and inconveniences may sometimes, perhaps, result from it; but not so great as would result from a different construction. The object of the record is to give notice to the world, and to afford permanent evidence for the benefit of all persons concerned. If, though regular and legal on its face, it could at any distance of time and in any collateral proceeding be impeached by evidence aliunde, it would be of little or no value, but would occasion surprise, and be a fruitful source of injury. In a proper case for relief it may be obtained by a suit in equity, or perhaps by an action on the official bond of the clerk. Horsley v. Garth, 2 Gratt. 471, was considered a proper case for equitable relief.

Under the law which existed on the subject when the statute of 1840 was passed (1 Rev. Code 1819, p. 516), the clerk could not record a paper of which the original record was destroyed, without a previous order of the court of which he was clerk. Upon the court devolved the judicial duty, if it may be so called, of deciding upon the genuineness of the attestation; and upon the clerk the

286 merely ministerial duty of *spreading the paper again upon the record book, if so ordered by the court. There could be no doubt, I presume, of the finality and conclusiveness of an order of probat under that law, in the absence of any appearance of irregularity on the face of the proceedings. The statute of 1840 substitutes the clerk to the place of the court; and devolves on him the judicial as well as the ministerial duty. The legislature could not have intended that a probat under that statute should have less force and effect than under the pre-existing law.

The construction I have put upon the statute is not only in accordance with its literal terms and obvious intention, but also, I think, with the well settled principles of the law of evidence, as laid down by the elementary

writers. In the case of The King v. Hopper, 3 Price's R. 495, it was unanimously decided by the Court of exchequer, that the enrollment of a deed of bargain and sale by a clerk under the statute of enrollments, 27 Hen. 8, is itself a record, against the verity of which there can be no averment. Indeed the difficulty, if any, in that case seemed to be whether the date was a part of the enrollment; the statute not expressly requiring that it should have a date. The court decided that it was.

But without looking elsewhere for authority on this subject, the cases of Harkins v. Forsyth, 11 Leigh 294, and Carper v. McDowell, 5 Gratt. 212, seem to be conclusive of the question.

In Harkins v. Forsyth it was held that the certificate of justices, pursuant to the directions of the statute, of the privy examination of a feme coyert, is conclusive in a collateral proceeding, and evidence to prove that the deed was not fully explained to her, is inadmissible. The observations of Tucker, P., in that case (in which the other judges concurred) are very applicable to this.

In Carper v. McDowell, the only
287 opinion delivered *was that of Judge Baldwin, in which it does not expressly appear that the other judges concurred. It is only stated that they concurred in the decree; and it cannot therefore be known on what particular grounds they respectively based their judgment. Judge Baldwin placed his upon the ground that the certificate of a clerk of the acknowledgment of a deed in his office by the parties thereto, is conclusive, and cannot be impeached by extrinsic evidence, in a collateral proceeding, that the deed was in fact acknowledged out of the office. He was of opinion that the registration of a deed under our law is the exercise of a probat jurisdiction. "It follows (he says) from the nature and purposes of such a jurisdiction, that though its proceedings are often and most generally ex parte, yet that when perfected they are evidence for and against the whole world; that they cannot be impeached by extrinsic evidence in collateral controversies concerning the rights to property; and that as a general rule they cannot be so impeached even directly in a suit instituted for the very purpose. If this were otherwise, the obvious result would be to defeat, in a great measure, the objects of the probat jurisdiction, and to introduce much uncertainty and confusion into the administration of justice."—"It is immaterial whether the probat jurisdiction be vested in a court or in a commissioner, in a judicial or a ministerial officer, in a tribunal established or an officer appointed for the sole purpose of its exercise, or in tribunals or officers established or appointed for other purposes."—"The registration itself, when completed, and appearing upon its face to have been had conformably to law, is the final act of an exclusive jurisdiction, designed to establish amongst all persons, and in all time, the very matter which extrinsic evidence would draw into question."—"The degree of credit due to this record evidence does not depend
288 upon the question, whether *this or that part of it, or the whole of it taken together, is to be considered as a judicial or as a ministerial act; but upon the consideration that it is an institute of the law, for purposes of a general, public and permanent interest, which cannot be otherwise accomplished."

These observations of the learned judge are as applicable to this case as to that in which they were made; and if they are sound, as I think they are, they put an end to the question I am now considering.

The counsel for the plaintiffs in error argued that the two cases last referred to, only decided that the certificates of the justices and clerk were conclusive of the facts certified; so that it could not be denied, in the former case, that the wife had been privily examined by the justices, nor in the latter that the deed had been acknowledged in the clerk's office: whereas, in this case, there is no question as to the truth of the fact certified by the clerk in his certificate of the admission of the paper to record as a copy of the will of Christopher Pryor. I think the evidence offered and excluded plainly tended to contradict the certificate; and so was inadmissible, on the principle of the two cases referred to. The certificate is that the copy of the last will and testament of Christopher Pryor to which it is annexed, was duly authenticated and attested by Thomas Nelson, a former clerk of the court. The evidence offered and excluded tended to show that the said copy was not duly authenticated and attested by Thomas Nelson, a former clerk of the court. Here is an express denial of an important fact certified by the clerk who admitted the copy to record. His certificate is at least as conclusive of that fact as the certificate of the justices and clerk were conclusive of the facts of privy examination and acknowledgment in the two cases referred to. It can surely make no difference that the facts certified in those cases depended on the personal knowledge of the justices and clerk;
289 and *the fact certified in this case was a conclusion of the judgment of the clerk from the evidence produced before him. This would be to place the certificate of a fact known to be false, on higher ground than the certificate of a fact believed to be true; to make a ministerial act conclusive, and a judicial one not so.

The same counsel further argued that, according to several cases decided by this court, which he cited, a paper acquires no validity from recordation unless it be properly recorded; and that the evidence offered and excluded tended to show that the paper in this case was not properly recorded. The answer to this argument has, in effect, been already given. It is that the certificate of probat, which is conclusive in a collateral proceeding such as this is, shows that the paper was properly recorded.

I think there is nothing in the foregoing opinion inconsistent with the case of Johnston & wife v. Slater, 11 Gratt. 321. It was there decided that a husband is not a compe-

tent witness, within the meaning of the registry acts, to prove the execution of a deed to his wife; and that evidence of the fact of his being her husband, is admissible, in a collateral proceeding, to avoid the registration. Nothing was said in the opinion, nor I believe in the argument in that case, about the effect of the registration as a probat proceeding. It was contended in the argument that the object of registration is to give notice; and that that object is equally well attained, whether the witnesses be competent or incompetent. This view was sustained by two cases cited from the North Carolina Reports, viz: Jones' lessee v. Ruffin, 3 Dev. R. 404; McKinnon v. McLean, 2 Dev. & Bat. 79, Law Reports. But this court was of opinion that as, under our law and the decisions upon it, the record of a deed duly recorded, or an official copy thereof, is primary evidence, not only of the registration but of the deed
290 itself, in any *controversy; the witnesses by whom the deed is proved for record must be competent, on the same principle on which a witness by whom a deed is proved on the trial of a cause must be competeut. It was considered that the deed in that case was not duly recorded; that it was in fact proved by but two witnesses instead of three, as the law then required; the husband of the grantee being in effect no witness. If the certificate of probat had shown that the deed was proved by only two witnesses, it would not have been legally recorded. Maxwell v. Light, 1 Call 117. So, if it had shown that the third witness was the husband of the grantee, and therefore incompetent. It did show that a person who in fact was the husband of the grantee was one of the three witnesses who proved the deed. And evidence aliunde of that fact was not inconsistent with the certificate, and was therefore admissible. The evidence showed that the deed was not legally recorded; that the case was, as it were, coram non judice. In this case the evidence offered and excluded was in conflict with the certificate of probat upon a fact which was within the cognizance of the clerk, and as to which his certificate is conclusive.

I am of opinion that the Circuit court did not err in giving the instruction mentioned in the fourth bill of exceptions. This follows as a necessary consequence from what I have already said.

It is unnecessary to express any opinion upon the question presented by the fifth and last bill of exceptions, as it is not likely to arise in any future trial of the case.

I think the judgment should be reversed, with costs to the plaintiffs in error, the verdict set aside, and the case remanded for a new trial to be had therein.

SAMUELS, J., concurred in the opinion of Moncure, J.

291 *LEE, J., was disposed to affirm the judgment throughout; but yielded to the views of the other judges, and concurred in the opinion of Moncure, J.

ALLEN, P., and DANIEL, J., dissented from the opinion of Moncure, J., to the extent to which it goes as to the conclusiveness of the certificate of the clerk.

Judgment reversed.

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I. DEFINITION.

Acknowledgment is the act of one who has executed a deed, in going before some competent officer or court and declaring it to be his act or deed. Bouv. Law Dict. 88.

II. OBJECT AND NECESSITY.

A. IN GENERAL.

Object.—The object of having a deed acknowledged is twofold in its character. The first is in order to entitle it to be recorded so as to give notice of its contents; the second is to enable it to be admitted in evidence without any further proof of its execution. 1 Am. & Eng. Enc. Law (2d Ed.) 484.

To Bond of Commissioner of Sale—Not Necessary.—The failure of the clerk to require an acknowledgment to the bond of a special commissioner of sale, which he has a right to do for his own protection, in no manner affects the validity of the bond. It is not necessary to the validity of such bond that it should be either acknowledged or proven before the clerk. Lyttle v. Cozad, 21 W. Va. 183.

Power of Attorney within Statute.—A power of attorney for the conveyance of lands, falls within both the letter and spirit of the act regulating conveyances, 1 Rev. Code, ch. 99, § 7, p. 363, authorizing deeds to be acknowledged before any two justices of the peace for any county or corporation within the United States, and the certificate of the justices

is sufficient for the admission of the power of attorney to record with the conveyance, although it does not certify the instrument to any court or clerk's office, for the purpose of being recorded. Shanks v. Lancaster, 5 Gratt. 110, 50 Am. Dec. 108.

Powers of Attorney of Married Women Not Embraced in Statute.—The act which confers upon justices of the peace the power to take, upon privy examination, and certify the acknowledgment by a married woman to a deed executed by her and her husband, embraces only deeds of conveyance and not powers of attorney. Shanks v. Lancaster, 5 Gratt. 110, 50 Am. Dec. 108.

Between the Parties—Acknowledgment Unnecessary.—The purpose of registration is to protect against the rights of creditors and subsequent purchasers for valuable consideration without notice, and when there are no such claims, but all rights of parties interested are protected by the deed itself, which is properly executed, it is immaterial whether it is properly acknowledged and recorded. Scruggs v. Burruss, 25 W. Va. 670; Turner v. Stip, 1 Wash. 319; Raines v. Walker, 77 Va. 92.

A person who signs, seals, and delivers an instrument as his deed, will never be heard to question its validity, upon the ground that it was not acknowledged by him, nor proved at the time of the delivery. It is the sealing and delivery that gives efficacy to the deed; not the proof of its execution. Board of Supervisors v. Dunn, 27 Gratt. 608.

Same—Not Necessary to Deed of Partition.—A brother and sister owned a tract of land jointly. In a deed of partition made between the brother and his wife, and the sister and her husband, there was no acknowledgment annexed. Possession in severalty by the parties, and those claiming under them had followed ever since. The partition was valid and binding on the parties, without any privy examination of the wives. Bryan v. Stump, 8 Gratt. 241.

Same—Improper Recordation Has No Effect.—The failure to properly record an acknowledgment by clerk does not affect the validity of a deed, but it is still good as between the parties, and can be admitted to record on the old acknowledgment. Thomas v. Stuart, 91 Va. 694, 22 S. E. Rep. 511.

Marriage Settlement Recorded with No Examination of Wife Good against Creditors of Husband before Marriage.—A deed of marriage settlement conveying the property of the intended wife to a trustee, to permit the husband and wife during their joint lives to take and enjoy all of the profits and interest, which was executed *before*, and recorded *after* the marriage, but within the time required by law, is conclusive against the creditors of the husband for debts contracted by him before the marriage. And this, although such deed was recorded upon the acknowledgment of the parties, without any privy examination of the wife. Scott v. Gibbon, 5 Munf. 86.

B. FOR RECORDATION.

Necessity of Acknowledgment before Recordation.—The exercise of the probate jurisdiction in regard to deeds consists of two parts, one of which is the official taking of the proof or acknowledgment; and the other is its recordation. These two parts when duly performed by the proper authorities constitute a complete act of registration. Both must be performed, and the fact that both may be performed by the same officer, will not authorize him to dispense with the first. Where a deed has been admitted to record or copied in the deed book, before it has been proven or acknowledged in the manner prescribed by law, it is not "duly admitted to record," and is not notice to creditors and subsequent purchasers for valuable consideration without notice. Cox v. Wayt, 26 W. Va. 807; Carper v. McDowell, 5 Gratt. 233. See also, Davis v. Beazley, 75 Va. 491, and Moore v. Auditor, 3 H. & M. 232.

Proper Endorsement.—The following endorsement on a deed was held sufficient for it to be properly admitted to record: "Recorder's Office, Martinsburg, West Virginia, Feb. 17th, 1869. This deed of bargain and sale from Enoch G. Hedges was acknowledged in the recorder's office by the party grantor, and admitted to record. Teste, S. Garrard, R. B. Co. per J. R. Hite, Dept. R. B. Co." Robinson v. Pitzer, 3 W. Va. 335.

C. FOR ADMISSION IN EVIDENCE.

Deed Properly Acknowledged Admissible in Evidence.—A deed which has been authenticated for record in the manner prescribed by law, is admissible as evidence without further proof of its execution, though it has not been duly recorded. Hassler v. King, 9 Gratt. 115.

Improper to Admit unless Acknowledged.—It is improper to admit a deed in evidence, which has not been proved and there is no sufficient proof of possession in conformity therewith. Shanks v. Lancaster, 5 Gratt. 110.

A deed which has been admitted to record, although unacknowledged as required by law, cannot be read in evidence, but as between the parties it is valid and binding. Raines v. Walker, 77 Va. 92; Turner v. Stip, 1 Wash. 319.

No Proof of Execution or Handwriting Required of Recorded Deed.—No proof of the execution of, nor of the handwriting of the grantor in a recorded deed is required, before it can be admitted in evidence. Robinson v. Pitzer, 3 W. Va. 335.

III. NATURE OF THE ACT—JUDICIAL.

Act of Taking Acknowledgment Is Judicial.—The act of an officer in taking an acknowledgment of a deed is judicial in its character, and cannot be impeached collaterally. He determines whether the person whose name is signed to the deed is the actual grantor, and also whether he truly acknowledges the same as his act and deed; and after these points have been determined and certified by him, in conformity with law, and the deed has been duly recorded, the proceeding has all the force and conclusiveness of a judgment of a court of record. The mischievous consequences of a different doctrine can hardly be overstated, inasmuch as it would render titles to real estate utterly insecure, and liable at any moment, and at any distance of time afterwards, to be questioned and overthrown by parol evidence in a collateral proceeding. Murrell v. Diggs, 84 Va. 904, 6 S. E. Rep. 461.

Husband and wife, signed, sealed and delivered a deed of mortgage, and the justices of the peace certified in statutory form that the wife had personally appeared before them, had been examined privily and apart from her husband, and after having the deed fully explained to her, acknowledged the same to be her act and deed, and that she had willingly signed, sealed and delivered the same and wished not to retract it. It was contended in a suit afterwards brought to foreclose the mortgage that the deed was void as to the wife, because of failure to give such an explanation as the statute requires, and the depositions of justices were taken to prove this fact. *Held*, that taking the acknowledgment was a judicial act, and effectually passed all the wife's title and interest, as the facts of privy

examination, acknowledgment, and declaration of the wife were certified by the justices pursuant to statutory directions. Harkins v. Forsyth, 11 Leigh 294; Davis v. Beazley, 75 Va. 491.

An acknowledgment of a deed by a grantor before the trustee is invalid, and recordation upon such acknowledgment gives no notice because the act of an officer in taking an acknowledgment is judicial in its character, and cannot be performed by one who is interested in it, since no man can be a judge in his own cause. Bowden v. Parrish, 86 Va. 67, 9 S. E. Rep. 616; Davis v. Beazley, 75 Va. 491.

Same—Conclusive in Absence of Fraud or Duress.—The certificate of a justice or attorney of the privy examination, acknowledgment, and declaration as to the execution of a deed of a married woman is in its nature a judicial act, and in the absence of fraud or duress, it is conclusive of the facts therein certified. Pickens v. Knisely, 29 W. Va. 1, 11 S. E. Rep. 932.

Same—Officer Not Liable in Damages without Malice.—The official act of taking and certifying the acknowledgment and privy examination of a married woman to a deed, whether done by a court, justice or notary, is in its nature a judicial act; and the officer is not liable in damages for such act, however imperfectly he may perform it; unless he acted from malicious, impure or corrupt motives. Henderson v. Smith, 26 W. Va. 829.

Same—Distinction between Acknowledgment of Married Woman and of a Man.—A deed of trust by a man and wife to trustees was acknowledged before one of the trustees as a notary public, and was admitted to record; such deed will be regarded as to the married woman an absolute nullity, and as to her husband an unrecorded deed, because of the judicial nature of the act. Tavenner v. Barrett, 21 W. Va. 656.

Admission to Record Is a Ministerial Act.—The admission of a deed to record is a ministerial act, and being intended to serve as notice, does not give it any additional validity. When a deed is presented for record it ought to be admitted to avail *quantum valere potest.* Dawson v. Thruston, 2 H. & M. 132.

IV. WHO MAY TAKE.

A. IN GENERAL.

Officer Cannot Take His Own Acknowledgment.—The clerk of the county court cannot take his own acknowledgment of a deed executed by him, so as to render it valid as against a subsequent purchaser for value from him, as a deed admitted to record. Davis v. Beazley, 75 Va. 491.

Acknowledgment by Commissioner in Chancery.—A certificate of acknowledgment was as follows: "State of Virginia, City of Buena Vista, to wit: I, T. F. Amole, a commissioner in chancery for the city aforesaid, in the state of Virginia, do certify that G. W. Leckie and E. M. Leckie, whose names are signed to the writing hereto annexed, bearing date on the 30th day of August, 1897, have acknowledged the same before me in my city aforesaid. * * * Given under my hand this 30th day of August, 1897. T. F. Amole, Com'r in Chy." The city of Buena Vista had no circuit court at that time. The certificate was sufficient. A commissioner in chancery whose territorial jurisdiction was limited to that city, was plainly a commissioner in chancery for that city, and the certificate could only mean that T. F. Amole was a "commissioner in chancery for the corporation court of the city of Buena Vista." Hurst v. Leckie, 97 Va. 550, 34 S. E. Rep. 464.

Acknowledgments before Deputy Clerk.—An acknowledgment by a deputy clerk taken prior to the Act of Feb. 10, 1890, of a deed to be recorded in the office of his principal, was valid. Under the Code of 1873, ch. 159, § 8, "the clerk of any county, corporation or circuit court, may, with the consent of the court, or of the judge in vacation appoint a deputy, who, during the continuance in office of said principal, may discharge any of the duties of said clerk unless otherwise provided by law." The clerk is authorized to take acknowledgments of deeds, and it is nowhere provided that his deputy shall not perform that duty. Gate City v. Richmond, 97 Va. 337, 33 S. E. Rep. 615.

Aldermen of Richmond Cannot Take Acknowedgments.—The Act of 1785 requires that the privy examination of a *feme covert* shall be executed before two justices of the peace of the county in which she lives. The charter of the city of Richmond (1782) gives to its mayor, recorder and aldermen the powers of justices of the peace. *Held*, that they have no authority to take the privy examination and acknowledgment of a married woman. Currie v. Page, 2 Leigh 617.

Trustee and Officer Taking Acknowledgment Presumed Different Persons.—When the trustee in a deed is described as "L. Triplett, Jr.," and the acknowledgment is taken before "L. Triplett, N. P.," although the certificate begins, "I, L. Triplett, Jr., a Notary Public," the presumption, in the absence of proof to the contrary, is that they are different persons. It will not be assumed that the officer has been guilty of improper conduct in the discharge of a duty incident to his office. Corey v. Moore, 86 Va. 721, 11 S. E. Rep. 114. See Bell v. Wood, 94 Va. 677, 27 S. E. Rep. 504.

Clerk May Take Anywhere in His County.—Chap. 73, § 2, of the Code of W. Va. provides as follows: "The clerk of the county court of any county in which any deed, contract, power of attorney or other writing is to be, or may be recorded, shall admit the same to record in his office, as to any person whose name is signed thereto, when it shall have been acknowledged by him, or proved by two witnesses as to him, before such clerk of the county court." The recording statutes are remedial, and should be construed to advance rather than retard the remedy on narrow and technical grounds; hence the fact that the clerk took an acknowledgment out of his office, but in his county will not invalidate it. Janesville Hay Tool Co. v. Boyd, 35 W. Va. 240, 13 S. E. Rep. 381.

B. BENEFICIARY MAY NOT TAKE.

Beneficiary as Officer — Invalid. — Beneficiary as officer cannot take the grantor's acknowledgment to a deed, and a deed so acknowledged and admitted to record cannot effect a notice under the registry laws. Corey v. Moore, 86 Va. 721, 11 S. E. Rep. 114; Iron Belt B. & L. Ass'n v. Groves, 4 Va. Law Reg. 380.

Acknowledgment before Stockholder or Officer of Corporation.—By Acts 1893-94, p. 580, it is provided that no acknowledgment heretofore or hereafter taken to a deed or writing, made by a company for the benefit of a company, shall be invalidated because the officer taking such acknowledgment at that time was a stockholder or officer in the company executing such writing, or in the company for whose benefit it was executed, provided he was not otherwise interested in the property conveyed. This act does not affect the validity of vested rights

or judgments, and so far as such liens may be affected, to such extent the act is unconstitutional and void. Merchants' Bank v. Ballou, 98 Va. 112, 32 S. E. Rep. 481.

Corporator of Eleemosynary Corporation, Who Is Beneficiary in Deed Can Take Acknowledgment, Although Recipient of Small Salary.—Pecuniary interest is a ground of disqualification in a judge. But when an acknowledgment is taken before a commissioner in chancery, who is one of the corporators of the Gloucester Charity School, the beneficiary in the deed, and who also receives a small compensation for attendance upon meetings of the board, and for his services as secretary of the board, this does not constitute such an interest as will disqualify him from certifying such an acknowledgment. It was not a business corporation, was not organized to make money, has no stock and declares no dividends. A corporator of an eleemosynary corporation has no disqualifying interest which will prevent his performing judicial functions. Nicholson v. Gloucester Charity School, 93 Va. 101, 24 S. E. Rep. 899.

Clerk as Grantee or Beneficiary.—The duties of the clerk to take and certify acknowledgments of deeds and to admit them to record, involve inquiry and determination, and partake of a judicial character. Hence a grantee in, or beneficiary under, a deed is not allowed as an officer to take the acknowledgment with a view to registration, and his certificate of such acknowledgment is invalid as authority for admission of such deed to record. Davis v. Beazley, 75 Va. 491.

C. TRUSTEE MAY NOT TAKE.

Trustee as Officer—Invalid.—Where the grantor acknowledges the deed before the trustee as officer, it constitutes an invalid acknowledgment, and recordation upon such acknowledgment does not give constructive notice. Bowden v. Parrish, 86 Va. 67, 9 S. E. Rep. 616; Clinch River Veneer Co. v. Kurth, 90 Va. 737, 19 S. E. Rep. 878; Barton v. Brent, 87 Va. 385, 13 S. E. Rep. 29; Iron Belt B. & L. Ass'n v. Groves, 4 Va. Law Reg. 380; Nicholson v. Gloucester Charity School, 93 Va. 101, 24 S. E. Rep. 899; Davis v. Beazley, 75 Va. 495; Raines v. Walker, 77 Va. 92; Corey v. Moore, 86 Va. 721, 11 S. E. Rep. 114; Tavenner v. Barrett, 21 W. Va. 656.

Recordation on Improper Acknowledgment Is No Notice Although Officer Did Not Know He Was Trustee and Repudiated the Trust as Soon as He Did.—Where the officer taking the acknowledgment is the trustee in the deed, although he did not know it at the time, and refuses to accept the trust as soon as he does become aware of it, it makes no difference. Recordation upon this acknowledgment gives no notice of the deed. Iron Belt B. & L. Ass'n v. Groves, 96 Va. 138, 31 S. E. Rep. 23.

D. IN OTHER STATES.

Acknowledgment in Another State Must Be before Two Justices.—The provision of the Act of 1792, ch. 90, § 5, was repealed by the Act of 1819, ch. 99, §§ 5 and 7, so that *now* a deed of lands in Virginia made by a party residing in another state, cannot be recorded here, upon acknowledgment thereof by the party before a *court* of such state where he resides, but only on such acknowledgment before *two justices of the peace* of such state. Lockridge v. Carlisle, 2 Leigh 186.

Before Aldermen.—In May 1837, a deed was acknowledged before two aldermen of New York City, and on such acknowledgment was admitted to record in Virginia. The registry law then provided that "any deed may be admitted to record, upon the certificate under seal of any two justices of the peace for any county or corporation within the United States," etc. The presumption is warranted that they are justices of the peace, when they undertake to act as such under authority of the statute, in the absence of proof to the contrary. The deed was properly admitted to record. Welles v. Cole, 6 Gratt. 645.

Before Mayor.—A deed executed in 1799, which shows upon its face that the parties to it resided out of the state of Virginia, was properly acknowledged before the mayor of the city in another state, and the certificate of the mayor describing himself as such, and purporting to be under the seal of the city, was a sufficient authentication of the deed to authorize its admission to record. Cales v. Miller, 8 Gratt. 6.

Before Notary of Texas.—An acknowledgment of a deed or power of attorney before a notary public of Texas was held to be an insufficient acknowledgment for the admission of such writing to record in Virginia. Randolph v. Adams, 2 W. Va. 519.

Before Magistrates.—Since the Act of 1814 the certificates of magistrates of other states has been sufficient evidence of the execution of a deed by a *feme covert*. Sexton v. Pickering, 3 Rand. 468.

Under Official Seal Presumed Valid.—The certificate of the official of another state, being made in his official capacity and under his official seal, will be presumed to be made in the usual manner. Hassler v. King, 9 Gratt. 115; Cales v. Miller, 8 Gratt. 6.

Commissioners Presumed to Have Authority.—The Acts of 1748, required that the commission to take the privy examination of a married woman, should be addressed to persons being justices of the peace. It is necessary that the commissioners taking such acknowledgment should in reality be justices, but the presumption will be that they are justices until the contrary appears. Harvey v. Borden, 2 Wash. 156.

Deed Improperly Authenticated for Record in West Virginia.—A deed, having a certificate of acknowledgment of the grantor, from the mayor of the town of Staunton, state of Virginia, in October, 1863, and also a certificate from the clerk of the circuit court of the city of Richmond, that said deed was admitted to record therein; and also a certificate from the clerk of the county court of Augusta county, Virginia, that the said deed, with the foregoing certificates annexed, was admitted to record in that office, is not properly authenticated for record in West Virginia, and is not competent evidence, as a recorded deed. Fleming v. Ervin, 6 W. Va. 215.

V. WHO MAY MAKE.

A. IN GENERAL.

Must Be Acknowledged by Parties.—Where a deed is acknowledged by parties, who are not named therein as grantors, it is no deed as to them. Only parties to a deed may bind themselves by acknowledging it. Adams v. Medsker, 25 W. Va. 127; Laughlin v. Fream, 14 W. Va. 322.

Acknowledgment by Deaf Mute.—The deed of a deaf and dumb person was acknowledged and admitted to record. It appeared that he could make himself understood and did understand others by signs, and did understand the acknowledgment, which was explained to him. In the absence of proof of fraud this is a good acknowledgment and the deed was sustained. Morrison v. Morrison, 27 Gratt. 190.

Acknowledgment of Corporate Deed.—A certificate

of acknowledgment of a deed conveying real estate by a corporation, which fails to show that the officer executing it was sworn, and deposed to the facts contained in the certificate, as required by § 5, ch. 73, Code of W. Va., is fatally defective and does not entitle such deed to be recorded. Abney v. Ohio, etc., Co., 45 W. Va. 446, 32 S. E. Rep. 256.

A deed bearing date 1891 was signed by a corporation by its president, with the corporate seal attached. The notarial certificate states that "T. L. R., president, whose name is signed to the writing hereto annexed, bearing date on the 2d day of December, 1891," acknowledged the same before him in his county. This identifies the subscriber, specifies the writing subscribed, states the capacity in which he executed it, and certifies his acknowledgment thereof; this contains all that is necessary and is not defective. Banner v. Rosser, 96 Va. 238, 31 S. E. Rep. 67. For form of acknowledgment by corporations in Virginia, see Va. Acts 1895-96, p. 542. In West Virginia, see ch. 73, § 5, Code 1899.

Nonresidents—Temporarily Residing in Virginia.—Temporary residence is held to be sufficient to authorize the acknowledgment of a deed by a nonresident of Virginia, under the Act of 1792, ch. 90, § 5. Cales v. Miller, 8 Gratt. 6.

B. MARRIED WOMEN.

1. IN GENERAL.

Applies Only to Deeds to Third Persons.—The acknowledgment of a married woman, as prescribed by statute, by which her interest in real estate may be divested, applies only to conveyances executed by husband and wife to third persons, and not to deeds executed by the wife to the husband, or for his benefit. The fact that there was a privy examination to a deed of separation between husband and wife in which she conveys property for his benefit, does not render the deed valid. Switzer v. Switzer, 26 Gratt. 574.

Husband and Wife Must Acknowledge Same Deed.—The wife cannot acknowledge a deed which has not been signed by her husband. It must be one deed, which must have been signed by the husband previous to her acknowledgment, and it cannot be signed in duplicate. Cecil v. Clark, 44 W. Va. 659, 30 S. E. Rep. 216.

Acknowledgment under Force from Husband.—A privy examination is intended to secure freedom of mind to the wife, hence where she acknowledges a deed under the force and menace of her husband, the legal title does not pass. Countz v. Geiger, 1 Call 190.

Necessary to Relinquishment of Dower.—The wife's dower right can only be relinquished in a conveyance, which she signs and acknowledges according to the statutory provisions. McMullen v. Eagan, 21 W. Va. 233; Jarrell v. French, 43 W. Va. 456, 27 S. E. Rep. 263.

Absence of Statutory Acknowledgment Renders Deed Void.—A deed from husband and wife without privy examination and relinquishment, is utterly void as to her, and furnishes no consideration to support a subsequent conveyance. Harvey v. Pecks, 1 Munf. 518.

A deed or executory contract of a married woman having no separate estate unless acknowledged and recorded as required by statute, after a privy examination, is absolutely void as to her. Gillespie v. Bailey, 12 W. Va. 70; Radford v. Carwile, 13 W. Va. 572; Central Land Co. v. Laidley, 32 W. Va. 134, 9 S. E. Rep. 61.

2. OBJECT AND EFFECT.

Object of Privy Examination.—The object of the statute, which provides for the privy examination of the wife, is to furnish a substitute for the common-law proceeding by fine, and to throw a certain safeguard around the wife by which the influence and control of her husband over her, is substantially provided against. It also secures an indefeasible title and an unquestionable transfer of all right, title and interest of every nature, which at the date of the deed she may have in any real estate conveyed therein, as effectually as if she were at the time an unmarried woman. First Nat. Bank of Harrisonburg v. Paul, 75 Va. 594; Rollins v. Menager, 22 W. Va. 461; Harkins v. Forsyth, 11 Leigh 306.

Defective Acknowledgment—Renders Deed Void.—A married woman conveyed land by deed in 1875, which deed was defective in its acknowledgment. The whole transaction was null and void and the purchaser cannot compel specific performance, nor can he obtain from the heirs of the married woman, who had recovered the land because the deed was void, the purchase money which he had paid to the married woman. Wynn v. Louthan, 86 Va. 946, 11 S. E. Rep. 878.

Same—Does Not Affect Husband.—A defective acknowledgment by the wife to a deed made by both husband and wife conveying the wife's land, in which the husband has a life estate by the curtesy, will not affect the husband's interest conveyed, and the grantee will take the life interest, and those claiming through the wife will have no right of re-entry, until after the husband's death. Arnold v. Bunnell, 42 W. Va. 473, 26 S. E. Rep. 359.

If the husband and wife convey land in which the husband has a freehold estate for their joint lives, which deed is void as to the wife because of lack of proper certificate of her examination and acknowledgment, and they put the grantee in possession, he is entitled to hold such possession until the death of the husband, and the wife's heirs have no right of entry until that time. Central Land Co. v. Laidley, 32 W. Va. 134, 9 S. E. Rep. 61.

Same—By Infant Married Women.—The statute providing for the execution of a deed by a married woman expressly says that by executing with the legal formalities, she shall pass all her right, title, and interest, "as if she had been an unmarried woman," removing but one of her disabilities, coverture. The deed of an unmarried infant is not binding on her, neither is that of a married infant, even if the statute be strictly followed. Thomas v. Gammel, 6 Leigh 9.

Specific Performance Maintained.—It is incontrovertible, that a married woman is bound by her covenants in a fine and recovery, and an action of covenant may be maintained against her for specific performance on her covenant of further assurance. A conveyance by husband and wife, provided she be privily examined, shall be as good and effectual in law, as if made by a fine and common recovery, and she passes all her interest of any kind except an estate tail, under the land law of 1748. Nelson v. Harwood, 3 Call 394.

3. PRIVY EXAMINATION.

Statute Must Be Strictly Observed.—A married woman has no power to convey real estate except in strict pursuance of the powers conferred by law in regard to the conveyance of real estate by a *feme covert*. Thus, where a married woman signed, but did not acknowledge the deed, the grantee acquired

no equitable title against her. Hawley v. Twyman, 29 Gratt. 728.

Examination Must Precede Acknowledgment.—Where the statute requires that the wife's acknowlment should be made after she was removed from her husband's presence, and the acknowledgment was in fact made prior to the examination, it was held insufficient, although every requisite of the statute was then complied with. Hockman v. McClanahan, 87 Va. 33, 12 S. E. Rep. 230; Laidley v. Knight, 23 W. Va. 735.

For a construction of §§ 4 and 6, ch. 73, of the W. Va. Code, holding that the privy examination of the wife must precede the acknowledgment, and the certificate must show a substantial compliance with the statute, see McMullen v. Eagan, 21 W. Va. 233.

4. UNDER RECENT STATUTES.

No Privy Examination Is Necessary in Virginia or West Virginia.—When husband and wife convey real estate, the wife may acknowledge the same either together with, or separate from her husband, and in the same manner that he does, privy examination being dispensed with. Writings of married women are now admitted to record upon the same acknowledgment as if unmarried. See ch. 111 of the Va. Code of 1887, and ch. 73 of the W. Va. Code of 1899.

VI. THE CERTIFICATE.

A. IN GENERAL.

Should Leave Nothing to Be Inferred.—The certificate of acknowledgment of a married woman, as required by § 4, ch. 73, Code of W. Va., must be a positive statement of the acknowledgment, and nothing must be left to be inferred. Hanley v. National Loan & Investment Co., 44 W. Va. 450, 29 S. E. Rep. 1002.

Officer's Certificate Sufficient to Show Authority in Absence of Express Requirement.—Under the Act of 1792, as amended by the Act of 1794, it was provided that when the grantor does not reside in Virginia, the execution of the deed shall be by the proof of three witnesses, "before any court of law, certified by such court in the manner such acts are usually authenticated for record in Virginia." In a case where a deed was admitted to record in Virginia, which had been duly proven in a court in Massachusetts by three witnesses, it was held a proper recordation although the certificate of the clerk was not under the seal of the court. Because in the absence of any express requirement that the official character of the officer should be certified, his certificate that he is such officer should be deemed sufficient, without any proof or verification *aliunde* of his official character. Smith v. Chapman, 10 Gratt. 445.

Certificate of Justices with No Seals Attached.—Where the certificate of privy examination of a *feme covert*, made under the Act of 1792, purports in the body of the certificate to be under the seals of the justices, but has no seals affixed to their names, this is sufficient to cast a cloud upon the title, and a sale of the land should not be made,—the husband being dead, and the interest of the feme having been the fee, and her title not being barred by lapse of time,—until the cloud is removed, though neither the feme during her life nor her heirs since have set up any claim to the land. Bryan v. Stump, 8 Gratt. 241.

Deed with Defective Certificate—Good as Contract.—The Act of April 4th, 1877, providing a separate estate for women, says, "and any such married woman shall have power to contract in relation thereto, or for the disposal thereof, and may sue and be sued as if she was a *feme sole*, provided that her husband shall join in any contract in reference to her real and personal property." In 1880 a husband and wife executed a deed conveying her separate estate in land, and the certificate of acknowledgment was defective as to her; but under the above statute it was held to constitute a contract of which specific performance was enforceable in equity. Va. Coal & Iron Co. v. Roberson, 88 Va. 116, 13 S. E. Rep. 350. See also, Clinch River Veneer Co. v. Kurth, 90 Va. 737, 19 S. E. Rep. 878.

Several Papers Connected May Be Acknowledged as One.—Where there is a contract of one date, and an addendum, which refers to the original contract, of another date, and the paper thus completed was acknowledged and admitted to record, in a certificate of a notary that "E. M. G. & E. G., whose names are signed to the foregoing writing, have this day acknowledged the same before me, in my county aforesaid," this is sufficient to show the acknowledgment of the whole paper, and the certificate of the clerk of the county court of the proper county to said paper that the foregoing writing bearing the date of the original contract, with certificate of acknowledgment attached, was duly admitted to record in his office, is sufficient evidence of the recordation of the whole paper. Fouse v. Gilfillan, 45 W. Va. 213, 32 S. E. Rep. 178.

B. PRESUMPTION OF REGULARITY.

Certificate Presumed Correct.—When the certificate of acknowledgment shows that the writing was properly acknowledged before a competent officer or court, and states all the essential requisites of the acknowledgment, in the absence of evidence to the contrary, it will be presumed to be correct, and is sufficient proof of a valid recordation. Hassler v. King, 9 Gratt. 115; Peyton v. Carr, 85 Va. 456, 7 S. E. Rep. 848; Wise v. Postlewait, 3 W. Va. 452; Bensimer v. Fell, 35 W. Va. 15, 12 S. E. Rep. 1078.

C. WHAT IT SHOULD CERTIFY.

Substantial Compliance with Statute Necessary.—While it is well settled by our decisions that a literal compliance with the statute is not necessary, and that when there has been a substantial compliance therewith it is sufficient (Langhorne v. Hobson, 4 Leigh 225; Tod v. Baylor, 4 Leigh 498; Siter v. McClanachan, 2 Gratt. 280; Dennis v. Tarpenny, 20 Barb. 371; Dundas v. Hitchcock, 12 How. 256; Deery v. Gray, 5 Wall. 795, and Hockman v. McClanahan, 87 Va. 33, 12 S. E. Rep. 230), yet the result of the authorities is, as was said in the last-named case, that, while a substantial compliance with the statute will suffice, it must be a substantial compliance with every requisite of the statute. None of these requirements can be dispensed with, and a compliance with some of them will not be held to contain the substance of them all. Virginia Coal & Iron Co. v. Roberson, 88 Va. 118, 13 S. E. Rep. 350; Hurst v. Leckie, 97 Va. 550, 34 S. E. Rep. 464.

Certificate Must Contain All Requisites—Privy Examination.—It is absolutely necessary to observe each of the statutory requisites for the privy examination of the wife before a married woman can pass title to her real estate, and if the certificate fails to show that they have been done, it matters not that they have in fact been done, the deed will be nevertheless void as to her. Laidley v. Knight, 23 W. Va. 735.

Certificate Must Show That Privy Examination Precedes Acknowledgment.—The certificate of acknowledgment must show that the married woman acknowledged the deed, *while* she was being examined privily and apart from her husband, and *after* the same had been fully explained to her, otherwise it will not operate to pass her title to her lands, although it shows all other requirements have been fully complied with. Laidley v. Knight, 23 W. Va. 735; McMullen v. Eagan, 21 W. Va. 233; Watson v. Michael, 21 W. Va. 568.

Married Women.—The certificate of acknowledgment of a married woman must contain substantially all of the requisites of the statute, and any material omission will invalidate the effect of her acknowledgment. Va. Coal & Iron Co. v. Roberson, 88 Va. 116, 13 S. E. Rep. 350; Watson v. Michael, 21 W. Va. 568; Tavenner v. Barrett, 21 W. Va. 656; Hairston v. Doe, 12 Leigh 458; Bolling v. Teel, 76 Va. 487; Bartlett v. Fleming, 3 W. Va. 163; Laughlin v. Fream, 14 W. Va. 322; Laidley v. Knight, 23 W. Va. 735; Pickens v. Knisely, 29 W. Va. 1, 11 S. E. Rep. 932; Blair v. Sayre, 29 W. Va. 604, 2 S. E. Rep. 97; Laidley v. Central Land Co., 30 W. Va. 505, 4 S. E. Rep. 705; Hockman v. McClanahan, 87 Va. 33, 12 S. E. Rep. 230; Jones v. Porters, Jefferson 62; Langhorne v. Hobson, 4 Leigh 224; Tod v. Baylor, 4 Leigh 498; Siter v. McClanachan, 2 Gratt. 280; Welles v. Cole, 6 Gratt. 645; First Nat. Bank of Harrisonburg v. Paul, 75 Va. 594; Clinch River Veneer Co. v. Kurth, 90 Va. 737, 19 S. E. Rep. 878; Wise v. Postlewait, 3 W. Va. 452; McMullen v. Eagan, 21 W. Va. 233.

D. ERRORS AND OMISSIONS.

Omission of Grantor's Name Immaterial.—When the certificate of acknowledgment on a deed states that it was "signed, sealed and acknowledged," but omits to state that it was done by the grantors by name, this is a substantial compliance with the Act of December 13th, 1792, which required deeds to be acknowledged by the parties who sealed and delivered them, or to be proved by three witnesses, etc., before the general court, etc. Wise v. Postlewait, 3 W. Va. 452.

Variance in Dates Not Fatal.—The fact that the date of the deed which is recorded is 13th of March, 1836, and the certificate of acknowledgment describes the same as dated on the 30th of March, 1836, does not invalidate the recordation, if the identity of the deed with that described in the certificate of the justices, sufficiently appears from other parts of said certificate, and the annexation thereof to said deed. Horsley v. Garth, 2 Gratt. 471.

Any Omission of Statutory Requirements Fatal.—The certificate of acknowledgment to a *feme covert's* deed, must set forth what the statute requires that the wife, being examined privily and apart from her husband, acknowledged the deed to be her act, and if it does not it is insufficient and the deed is inoperative to pass her interest in the land in the deed. Hockman v. McClanahan, 87 Va. 33, 12 S. E. Rep. 230; Va. Coal & Iron Co. v. Roberson, 88 Va. 116, 13 S. E. Rep. 350; Wise v. Postlewait, 3 W. Va. 452; Healy v. Rowan, 5 Gratt. 414; Clinch River Veneer Co. v. Kurth, 90 Va. 737, 19 S. E. Rep. 878.

A certificate of the justices of the execution of a deed by a married woman, which omits to state that she had the deed fully explained to her, she willingly executed the same and wished not to retract her execution of such deed, is radically defective and inoperative as to her. Bartlett v. Fleming, 3 W. Va. 163; Hairston v. Randolphs, 12 Leigh 445; Countz v. Geiger, 1 Call 190; Harvey v. Pecks, 1 Munf. 518; Leftwich v. Neal, 7 W. Va. 569; Henderson v. Smith, 26 W. Va. 829; Tavenner v. Barrett, 21 W. Va. 656; Grove v. Zumbro, 14 Gratt. 501; Linn v. Patton, 10 W. Va. 187; Watson v. Michael, 21 W. Va. 572; Laidley v. Land Co., 30 W. Va. 514, 4 S. E. Rep. 709; Arnold v. Bunnell, 42 W. Va. 484, 26 S. E. Rep. 363; Blair v. Sayre, 29 W. Va. 604, 2 S. E. Rep. 97.

E. EQUIVALENT EXPRESSIONS.

Equivalent Words Sufficient.—Literal compliance with the statute is not necessary, it is only requisite that equivalent words or expressions be used, as where it was certified that the deed was "signed, sealed and delivered in the presence of the court," this is equivalent to an acknowledgment and is a substantial compliance with the West Virginia Act of 1792. Wise v. Postlewait, 3 W. Va. 452; Pickens v. Knisely, 29 W. Va. 1, 11 S. E. Rep. 932.

The word "signed" is equivalent to "executed," and the substitution of the former for the latter will not render the certificate void. Bensimer v. Fell, 35 W. Va. 15, 12 S. E. Rep. 1078.

Sufficient Identification in Certificate.—It is a sufficient identification of a deed for the certificate of acknowledgment or recordation to refer to it as "the foregoing writing," without giving the date of the deed. Fouse v. Gilfillan, 45 W. Va. 213, 32 S. E. Rep. 178.

F. EXPRESSIONS NOT EQUIVALENT.

Words Not Equivalent.—The use of the words "and the deed being read to her" in the certificate of acknowledgment, for the words "being fully explained to her" is not such a substantial compliance with the statute as will prevent the acknowledgment from being fatally defective. Watson v. Michael, 21 W. Va. 568.

The declaration "that she did execute the deed willingly" cannot be held an equivalent to an acknowledgment, which is composed of (1) privy examination, (2) explanation, and *then* (3) acknowledgment of it as her act, (4) declaration of having willingly executed it, and (5) that she does not wish to retract it. Hockman v. McClanahan, 87 Va. 33, 12 S. E. Rep. 230.

The certificate of acknowledgment of a married woman contains the words, "she acknowledged that she had willingly executed the same, and does not wish to retract it." These are not equivalent to the statutory requisite that, "she *acknowledged* the same to be her act, and *declared* that she had willingly executed the same, and does not wish to retract it." Blair v. Sayre, 29 W. Va. 604, 2 S. E. Rep. 97.

The following words in a certificate of privy examination of a married woman, "being examined by me privily and apart from her husband, and having the deed aforesaid fully explained to her, she acknowledged that she had willingly signed, sealed and delivered the same, and wished not to retract it," were held not to be equivalent to the statutory requirement, that "she *acknowledged* the same to be her act, and *declared* that she had willingly executed the same, and does not wish to retract it." Laidley v. Central Land Co., 30 W. Va. 505, 4 S. E. Rep. 705.

G. CERTIFICATE AS EVIDENCE.

Conclusive of Contents in Absence of Fraud.—In the absence of fraud the notarial certificate or justice's certificate is conclusive of all the facts stated in the acknowledgment and required by the statute. Burson v. Andes, 83 Va. 445, 8 S. E. Rep. 249; Harkins v. Forsyth, 11 Leigh 306; Carper v. McDowell, 5 Gratt. 212; Ocheltree v. McClung, 7 W. Va. 232; Rollins v.

Menager, 22 W. Va. 461; Pickens v. Knisely, 29 W. Va. 1, 11 S. E. Rep. 932; Taliaferro v. Pryor, 12 Gratt. 277.

Of Residence of Grantor.—When a deed is acknowledged before the mayor of a city in another state, in the proper form, the certificate of acknowledgment is sufficient evidence that the grantor, for the time being at least, resided in said city, although the deed on its face described him as a citizen of another state. Cales v. Miller, 8 Gratt. 6.

Prima Facie Evidence of Authority, etc.—The officer taking the acknowledgment must show his official character, and when the certificate described him as such, and purporting to be under the official seal of the city, this will be *prima facie* evidence of his character and authority, and is a sufficient authentication to authorize admission to record. Cales v. Miller, 8 Gratt. 6.

Not Conclusive of Execution—Intention of Grantor.—A deed was acknowledged before justices by the grantor, who retained possession of it. *Held*, that their certificate was not conclusive evidence of the complete and perfect execution of the deed, but that this depended upon the grantor's intention at the time, which may be ascertained by evidence of his previously declared purpose, although nothing was said at the time of the acknowledgment to indicate his intention. Hutchison v. Rust, 2 Gratt. 394.

Evidence of Fraud Must Be Clear and Convincing.—And in order to impeach the certificate and avoid the deed on the ground of fraud, the evidence of fraud must be clear, convincing and satisfactory. Rollins v. Menager, 22 W. Va. 461; Pickens v. Knisely, 29 W. Va. 1, 11 S. E. Rep. 932.

VII. TIME OF RECORDATION AFTER ACKNOWLEDGMENT.

Within Twenty Days to Relate Back to Date of Acknowledgment.—A deed is void as to creditors "until and except from the time it is duly admitted to record." And in order for deeds to be valid from and relate back to the date of acknowledgment, they must be recorded within 20 days from date of their acknowledgment. See sec. 2467 of Code of 1887; Slater v. Moore, 86 Va. 26, 9 S. E. Rep. 419.

Recordation in Four Months from Reacknowledgment Good from That Date.—A deed which has been reacknowledged within eight months from its date, and recorded within four months from the date of reacknowledgment, is good from the latter date, notwithstanding the fact that there are more than eight months between the time the deed was first executed, and the day of recordation. Eppes v. Randolph, 2 Call 125.

Acknowledgment after Lapse of Statutory Period Is Equivalent to Re-execution.—A deed dated in April 1804, and the execution thereof attested by witnesses, is not recorded within eight months from its date; but, in April 1805, the grantor acknowledges the deed in open court, and upon such acknowledgment it is ordered to be recorded. *Held*, upon the construction of the statute of conveyances of 1792, 1 Old Rev. Code, ch. 90, §§ 1, 4, such acknowledgment of the deed in court is to be taken as a re-delivery and re-execution of the deed, so as to make it a deed as of the date of such acknowledgment, and so the deed is well recorded within eight months from the time of the execution, and is valid as against the grantor's creditors. Roanes v. Archer, 4 Leigh 550.

VIII. CURING DEFECTIVE ACKNOWLEDGMENT.

By Re-execution.—The defects in an acknowledgment may be cured by a reacknowledgment, because this is equivalent to a re-execution of the same deed or to the execution of a new one in proper manner. McMullen v. Eagan, 21 W. Va. 233; Roanes v. Archer, 4 Leigh 550.

Not Cured by Rewriting It after Recordation.—A defect in the certificate of acknowledgment cannot be cured by the officer's rewriting it and signing it as of the time of the first acknowledgment, after the deed has been recorded. The officer has no power to correct his first certificate, though it was not written in such a way as showed the real facts. McMullen v. Eagan, 21 W. Va. 233.

Omission of State in Certificate Cured by Reference to the Deed.—In a deed conveying land in the state of West Virginia, it is recited that the grantors are "of the county of Fayette in the state of Pennsylvania." The certificate of acknowledgment shows the county, but fails to show the state, being headed simply, "Fayette county, ss." But this is accompanied by a certificate of the court of common pleas of Fayette county, state of Pennsylvania, that the two justices were at the time of acknowledgment of Fayette county, state of Pennsylvania. The deed was properly admitted to record, as it is sufficiently shown that the Fayette county named is in the state of Pennsylvania. Adams v. Medsker, 25 W. Va. 127.

When the certificate of acknowledgment of the justices to a power of attorney omits to state that the county named in the certificate was in the state of Virginia, and also that it was acknowledged in said county, if it sufficiently appears from the power of attorney, the certificate of acknowledgment and the order of recordation that the said county was in the said state, and the acknowledgment was taken in said county, it is properly admitted to record. Oney v. Clendenin, 28 W. Va. 34.

Parol Evidence Not Admissible to Cure Defects.—When the law constitutes a written instrument as the authentic and sole medium of proving a fact, as where the certificate is the complete evidence of the acknowledgment, oral testimony will not be admitted to prove or disprove it. Such certificate is the evidence of the acknowledgment. Harkins v. Forsyth, 11 Leigh 306; First Nat. Bank of Harrisonburg v. Paul, 75 Va. 594; Hurst v. Leckie, 97 Va. 550, 34 S. E. Rep. 464; Leftwich v. Neal, 7 W. Va. 569.

Upon authority and principle parol testimony cannot be admitted to cure defects in acknowledgments. If it should be, then a married woman's acknowledgment before witnesses, *in pais*, would be as good as one before the proper authority, and thus the guarded provisions of our statutes might be substituted by a new branch of equity jurisdiction. Leftwich v. Neal, 7 W. Va. 569; Jones v. Porters, Jefferson 62; First Nat. Bank of Harrisonburg v. Paul, 75 Va. 594; Hockman v. McClanahan, 87 Va. 33, 12 S. E. Rep. 230.

The certificate must set forth the declaration and acknowledgment of the married woman as prescribed by statute; it must be on or annexed to the deed; and it must be admitted to record along with the deed; no amendment will be allowed, and parol testimony will not be allowed to support a palpably defective certificate. First Nat. Bank of Harrisonburg v. Paul, 75 Va. 594.

Officer Cannot Contradict His Own Certificate.—The officer who takes an acknowledgment will not be allowed to testify that there was fraud and coercion on the part of the husband towards the wife, and thus falsify his own certificate. Hockman v. McClanahan, 87 Va. 33, 12 S. E. Rep. 230; Harkins v. Forsyth, 11 Leigh 294; Rollins v. Menager, 22 W. Va.

461; Pickens v. Knisely, 29 W. Va. 1, 11 S. E. Rep. 932; Hairston v. Randolphs, 12 Leigh 445, and First Nat. Bank of Harrisonburg v. Paul, 75 Va. 601.

Certificate of Acknowledgment Not Contradicted by Parol Evidence.—When the privy examination, acknowledgment and declaration of a married woman shall have been taken in the manner prescribed by sec. 4, of ch. 73 of the Code and recorded or certified, the *feme covert* will not be permitted by parol evidence to contradict the facts set out in the certificate of her privy examination, acknowledgment and declaration so as to avoid the effect of the deed of trust, unless she first establish by parol evidence satisfactorily, that with the concurrence of those claiming under the deed of trust the married woman has been defrauded or imposed upon by the pretended privy examination, acknowledgment and declaration. Rollins v. Menager, 22 W. Va. 461.

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292 ***Sights v. Yarnalls.**

April Term, 1855, Richmond.

1. **Licenses—Ordinaries—Right—When Perfected—Case at Bar.**—By an ordinance of the city of Wheeling, a license to keep a house of entertainment is to expire and be of no further effect on the 1st day of May next succeeding the date thereof. The council having in April granted such a license for the succeeding year, such grant did not vest in the party to whom it was granted, any absolute or vested right to such license; but the right did not become perfect until the actual emanation of the license, or until the 1st day of May following.
2. **Same—Rescission of Order Granting—Case at Bar.**—By the same ordinance the council has authority at any time to annul a license actually issued under its order. *A fortiori* it may rescind an order granting a license before the 1st of May, which has not issued.
3. **Same—Same—Mandamus.***—A party to whom such license was granted in April cannot properly apply for a *mandamus* to compel the proper officer to issue it, before the 1st of May; and therefore the pendency of such a *mandamus* cannot affect the right of the council to rescind the order granting the license, before that time.
4. **Same—Payment of Tax Condition Precedent to Emanation.**—The council being authorized by the charter of the city to assess a tax on licenses to keep ordinaries, in addition to the state tax, it was competent for the council to make the payment of the tax a condition precedent to the emanation of the license.
5. **Same—Same—Case at Bar.**—The council having by an ordinance assessed a tax on a license to keep an ordinary, and having granted a license "under existing rates of taxation," such grant must be taken to refer to not only the state tax, but the tax imposed by the council; and to require the payment of the latter as the condition of the right to call for the license.
6. **Same—Same—Tax Illegal—Effect.**—In such case, though the tax was unequal, oppressive and illegal, yet as its payment was a condition precedent to the emanation of the license, without the performance of the condition nothing passed under the grant: And the condition cannot be separated from the grant and disregarded, so as to render the grant absolute and unconditional: The whole must be taken together, and accepted or rejected.
7. **Same—Same—Same—Mandamus.***—By the charter of the city the council has power to refuse a license to keep an ordinary; and if the tax laid is
293 unjust, excessive and *illegal, it is in effect the exercise of this power, and for all legal purposes should be so regarded. And the exercise of this power cannot be controlled by the Circuit court by *mandamus* or otherwise: But the charter authorizing a party to whom a license is refused, to apply to the County court of Ohio for it, his only remedy is to apply to that court.
8. **Same—Same—Right to License without Paying Tax.**—The order granting the license having been made in April, if the tax then imposed was illegal, or if no tax had been assessed upon it at the time, it was competent for the council, at any time before the 1st of May, to modify its grant by requiring the payment of a legal tax in lieu of that which was illegal, or to supply the omission to lay a tax upon ordinaries: And without the payment of this tax at least, the party to whom the license had been granted, had no right to demand it.
9. **Same—Mandamus Nisi—Return of Officer.***—Upon a *mandamus nisi* sued out by the party to whom the license was granted by the council, against the officer whose duty it is to issue the license, he may in his return set up the ordinance passed since the order granting the license, imposing a tax upon it.
10. **Same—Same—Issued without Previous Rule.*†**—In a case of this kind a *mandamus nisi* may be issued in the first instance, without a previous rule upon the party to appear and show cause against it.

On the 19th of April 1854, Z. S. & J. J. Yarnall presented a petition to the judge of the Circuit court of Ohio county for a mandamus to George W. Sights, clerk of the city of Wheeling, to compel him to issue to them a license to keep an ordinary at the "Sprigg house" in said city. A mandamus nisi was issued, returnable to the first of May following; at which time Sights made his return, setting out the various statutes of the state and ordinances of the city bearing upon the question; and the action of the city council in relation to the license to the petitioners to keep the said ordinary. The case, as it appears from the petition and the return to the mandamus, is as follows:

The act to incorporate the city of Wheeling, passed the 11th of March 1836, vests in the council the usual powers to make ordinances for the regulation of their proceedings, and for the transaction of their business, and also for the appointment of such officers as they may deem necessary for the execution of the powers
294 *vested in the city or council. And by another act passed March 4th, 1854, it was enacted that the council "shall have exclusive authority within said city to grant or refuse license to the keepers of ordinaries, inns and taverns, houses of public or private entertainment, boarding-houses, public eating-houses, coffee-houses,

*On the subject of mandamus, see cases cited in *foot-note* to Morris, *Ex parte*, 11 Gratt. 292.

†**Mandamus.**—See principal case cited in Fisher v. Mayor of Charleston, 17 W. Va. 631, 638; Fisher v. City of Charleston, 17 W. Va. 610.

places at which spirituous liquors shall be sold, and places of public amusement."

"They shall further have authority to regulate the manner in which such houses or places shall be kept and to levy and collect taxes thereon, in addition to any tax which is or shall be payable on the same to the state. But if the council shall upon application refuse to grant any such license to keep an ordinary, a license to keep the same may be obtained from the County court of Ohio county, upon application thereto, as in other cases of ordinaries in said county." It is the last clause of the act which was added in March 1854.

By an ordinance of the council passed May 2d, 1840, it is ordained, "If the council shall order license to be granted upon any application, the applicant shall pay to the treasurer of the city the tax, if any, imposed on such license by the ordinances of the city, and to the officers authorized by law to receive the same, the tax, if any, due thereon to the state; and shall take proper receipts therefor, and shall deliver the same to the clerk of the city. And further, if bond be necessary, shall deliver to the clerk the proper bond executed by himself and the security or securities named in his application or required by the council, and shall pay to the clerk the proper fee, whereupon the clerk shall issue license according to the order of council."

By another section of this ordinance it is required that before any license to keep an ordinary shall be issued by the clerk of the city, the applicant shall enter into a bond of a prescribed form, with the security
295 *named in his application or prescribed by the council. And by another section of said ordinance, all licenses for ordinaries and houses of private entertainment shall expire and be of no effect on the first Monday of May next succeeding the date thereof; but it shall be lawful for the council, at any time, to annul any license so issued, and shall return a ratable proportion of the tax.

By an ordinance passed on the 14th of March 1854, supplementary to one passed on the 14th of February preceding, assessing taxes for the city of Wheeling for the year 1854, it was ordained:

1st. That there shall be paid to the treasurer of the city, on every license to keep an ordinary within said city, the following tax, viz:

For a license for an ordinary to be kept at the house called the "Sprigg house," the tax shall be four thousand five hundred dollars per annum.

For a license for an ordinary to be kept at the house called the "McClure house," the tax shall be three thousand dollars per annum.

For a license for an ordinary to be kept at any other house within said city, the tax shall be two thousand dollars per annum. There were other provisions which need not be stated.

The council having been advised that there was doubt whether the foregoing ordinance of the 14th of March was constitutional and valid, on the 28th of April passed an ordinance to amend it. By this ordinance a tax according to the rental was laid upon ordinaries: and for the highest class it was provided, that if the annual rental value exceeded one thousand dollars, there should be a tax of three hundred and eighty dollars on the first one thousand dollars, and twenty-five per cent. on the excess; provided the tax on every such license should not exceed one thousand and five dollars.

296 *On the 11th of April 1854, Z. S. & J. J. Yarnall applied in writing to the council for a license to keep an ordinary for one year from the first Monday of the next May at the place in the city of Wheeling called the "Sprigg house:" And they named their securities in their petition. And on the same day the council made an order granting them the license as asked for, under existing rates of taxation: And it was certified that the petitioners were persons of good moral character, and not addicted to drunkenness or gaming.

By one of the ordinances of the city it was provided that the journal of the proceedings of the council shall be read and approved by the council, shall be signed by the presiding officer and countersigned by the clerk, and shall then only have their proper force and effect. And the proceedings of the meeting at which the license was granted to the Yarnalls was not so approved and signed until the 24th of April; at which time it was among other things ordered, that the order made at the last meeting of the council granting license to Z. S. & J. J. Yarnall for an ordinary to be kept at the "Sprigg house," be and the same is repealed. Previous to this meeting of the council the Yarnalls had applied to the judge for the mandamus, and a mandamus nisi had been directed.

It appears that the petitioners had previously kept an ordinary at the "Sprigg house;" that they had executed the bond required by the ordinance in the prescribed form, with the securities mentioned in their petition; that they had paid the tax due to the state, and delivered both the receipt and the bond to the clerk of the city. It also appears that previous to the ordinance of March 14th, 1854, the tax upon ordinaries was ratable according to the rental, and that the highest tax upon any ordinary had been two hundred and fifty-eight dollars; that on the "Sprigg house" for the year 1853 was about one hundred and sev-
297 enty *dollars, when as the petitioners insisted the rental value of the house was as great as it was in 1854. They insisted that the ordinance of March 14th, 1854, was unconstitutional and void, and that there was no tax assessed by the council on ordinaries.

Sights, the clerk of the city, objected to the issue of a mandamus, on the grounds:

1st. That the grant of the license having been made expressly subject to the payment of the tax assessed by the ordinance of

March 14th, 1854, the petitioners were only entitled to the license upon the terms upon which it was given. And if the condition was invalid, the grant itself was also invalid.

2d. That the order granting the license was of no effect until the proceedings were approved and signed. And at the meeting at which that was done, the order was rescinded.

3d. That the license asked for was for the year commencing the first Monday in May 1854, and could not be issued before that time. There were other objections taken, which need not be stated.

Upon the hearing a peremptory mandamus was directed to issue to Sights, the clerk of the city of Wheeling, commanding him as such clerk forthwith to make, issue and deliver to Z. S. & J. J. Yarnall a license to keep an ordinary at the place called the "Sprigg house," for the license year extending from the first Monday in May 1854 to the first Monday in May 1855. From this order Sights applied to this court for a supersedeas, which was allowed.

Fry, for the appellant.
Russell, for the appellees.

LEE, J., delivered the opinion of the court:

The court is of opinion, that as by the ordinances of the city of Wheeling,
298 the annual license granted by *the council for ordinaries and houses of entertainment was to expire and be of no further effect on the first Monday of May succeeding the date thereof, it was manifestly contemplated and intended that such license should issue and bear date on or after the first day of May in any year, and not before: and that the act of the council in entertaining the application of the defendants in error and passing the order of the 11th of April 1854, for granting them a license for an ordinary under the existing rates of taxation, must be regarded as voluntary and for convenience only, and not compulsory or binding beyond recall upon the said council; and that the said order did not confer upon the defendants in error any perfect, absolute or vested right to such license, but a right which was incomplete and inchoate only; and which would not become perfect and consummate until the actual emanation of the license, or until the time at which it might lawfully be issued and take effect, to wit, the 1st day of May 1854.

And the court is further of opinion, that as by the same section of said ordinance, power was expressly reserved to the council at any time to annul a license which had actually issued under its order, a fortiori it would possess the power to rescind an order for granting such license made prior to the 1st of May in any year, at any time before the actual emanation of the license, or before the 1st day of May next after the date of such order.

The court is therefore of opinion, that it was competent for the council prior to the 1st of May 1854 to repeal and rescind its order of the 11th of April 1854 granting a license for the year following to the defendants in error: that its right so to repeal and rescind the same was to be taken and considered as an incident to and constituting a part of said grant, and that its order to that effect, passed on the 24th of April 1854, was a valid and effectual
299 repeal of the said order of the *11th of April 1854, and put an end to all right on the part of the defendants in error thereafter to demand that the said license should be issued to them.

And the court is further of opinion, that the right of the council to rescind the order of the 11th of April 1854 granting the license, was not affected or impaired by the pendency of the application to the judge of the Circuit court of Ohio county for a mandamus to compel the issuing of the license; because the right to the same under the order of the council of the 11th of April 1854 being imperfect and inchoate only, the application for the mandamus could not regularly be entertained until the time at which the license might be issued and take effect, and could not therefore, until such time, have the effect to destroy or abridge the control which the council would otherwise have over the subject, or the right to modify, amend or rescind the order as to it might seem just and proper.

And the court is further of opinion, that the council being authorized by the charter of the city of Wheeling to impose a tax upon ordinaries, &c., in addition to any state tax that might be levied upon the same, was fully authorized to make the payment of such tax a condition precedent to the right to demand the emanation of the license: and that by the ordinance of the 2d of May 1840 the said council have required that payment of the tax imposed by them should be made before the applicant would be entitled to demand that the license should be issued.

And the court is further of opinion, that the council having by its ordinance of the 14th of March 1854 levied the sum of four thousand five hundred dollars as the tax to be paid for a license for an ordinary to be kept at the house of the defendants in error, and having by its order of the 11th of April 1854 granted such license to the defendants "under existing rates of taxation," such grant must be taken to have reference
300 *not only to the state tax imposed by law upon licenses to ordinaries, but also to such tax so levied by the council as aforesaid; and to have required payment of the latter also as the condition of the right to call for the emanation of the license.

And the court is further of opinion, that whether the tax imposed by the supplementary ordinance of the 14th of March 1854 was just, fair and reasonable, or was unequal, excessive and illegal, is a question not material to be determined in this cause; because whether the one or the other, payment of the same was required to be made by way of condition precedent to the ema-

nation of the license; and without the performance of such condition, nothing passed under the grant of the said license; nor could such condition be separated from the grant and disregarded, so as to render the grant absolute and unconditional: but the whole must be taken together and must be accepted or rejected in whole as it stands.

And the court is further of opinion, that if the said tax so levied by the said ordinance of the 14th of March 1854, was unjust, excessive and illegal, the grant of the license, on payment of such unjust, excessive and illegal tax, was in effect the exercise of the power reserved to the council by the thirty-fifth section of the charter of the 11th March 1836, to refuse the license, and for all legal purposes should be so regarded and treated; but that the exercise of the discretion conferred by said section in refusing to grant the license could not be the subject of review in the Circuit court upon mandamus or otherwise; and that to obtain such license the remedy remaining to the applicants was that given by the act of March the 4th, 1854, by a resort to the County court of Ohio county, as prescribed by said act.

And the court is further of opinion, that as the council had at least until the
301 1st of May 1854, full *control over the order of the 11th of April 1854, and the right wholly to revoke and rescind the same, so if the tax imposed by the ordinance of the 14th of March 1854 were unjust, excessive and illegal, or if in point of fact no tax had been imposed on ordinaries by any ordinance of the said council, it was competent to the council to modify its grant of the 11th of April 1854, at any time before the period above indicated, by requiring payment of a valid and legal tax upon the same in lieu of that imposed by the act of the 14th of March 1854, or to supply the omission to lay a tax upon ordinaries; and that consequently the ordinance of the 28th of April 1854 amending the previous ordinances assessing taxes for the city of Wheeling, and imposing taxes on ordinaries, was valid and operative upon all licenses to be issued on or after the 1st day of May, and applied equally to that which had been granted to the defendants by the order made before its enactment; and that without payment of the tax imposed by this ordinance at least, the said defendants, if otherwise entitled, could not demand that the license should be issued and delivered to them.

And the court is further of opinion, that the said ordinance of the 28th of April 1854 and the ground of defense which it suggests is sufficiently presented by the return made by the plaintiff in error upon the writ of mandamus nisi, and that the same properly might and should have been looked to and considered by the Circuit court in passing upon the question of a peremptory mandamus.

And the court is further of opinion, that from the materials afforded by the record in this case, it cannot undertake to say that the tax imposed by the said ordinance of the 28th of April 1854 was unjust, unequal and exorbitant, nor that the exercise of the discretion vested in the said council as to the amount of the tax to be levied on ordinaries, was undue, improper or oppressive.

302 *And the court is further of opinion, that there was no irregularity in awarding the mandamus nisi in the first instance without any previous rule upon the party to appear and show cause against the same.

Wherefore, and without deciding any other question raised in the cause than those upon which the opinion of the court is above declared, the court is of opinion, that the return made upon the said writ of mandamus nisi is sufficient; that the judgment of the said Circuit court is erroneous, and should be reversed, with costs to the plaintiff in error; that the motion for the peremptory mandamus should be overruled, and the mandamus nisi discharged; and that the plaintiff in error should recover his costs in the Circuit court expended.

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303 *Booker v. Young & als.

April Term, 1855, Richmond.

Absent ALLEN, P.

1. **Banking Corporation—Election of President—Vote of Directors—Majority—What Constitutes.***—A majority of the directors of a bank constitute a board to do business; and if in the election of a president a majority vote, the person receiving a majority of the votes cast is duly elected.

2. **Same—Same—Validity—Rival Corporation—Mandamus—Case at Bar.**†—A board of directors of a bank consists of seven: and they are all present. Upon a vote for president but five vote, three of whom vote for Y, and two for B, who had been president the year previous. Under the belief that it required a majority of the whole number to elect, they postpone the election; and B continues to act as president. At a subsequent meeting they proceed again to the election, when Y receives the three votes he had received at the former meeting, and votes for himself; making a majority of the whole number; B receives the two votes he had received before, and he votes for S. Whereupon Y is declared to be duly elected; and he proceeds to act as president. Upon an application by B for a *mandamus* to restore him to the office: HELD: by two of the judges, that Y was duly elected on the first day; and whether or not he accepted the office, B had no right to it after that time. One judge held that Y not then having insisted on it, it was no election; but that he might vote for himself, and therefore he was duly elected on the last day. And another judge held, that the votes

*See monographic *note* on "Banks and Banking" appended to Bank v. Marshall, 25 Gratt. 378.

†**Mandamus.**—In addition to the cases upon mandamus cited to Morris, *Ex parte*, 11 Gratt. 292, see the principal case cited in Cross v. W. Va., etc., Ry. Co., 35 W. Va. 182, 12 S. E. Rep. 1074; also, in dissenting opinion of BRANNON, J., in State v. McAllister, 38 W. Va. 516, 18 S. E. Rep. 782.

of both Y and B were to be treated as nullities, under the act, Code, ch. 56, § 16; and therefore that Y received a majority of the legal votes cast on the last day, and was duly elected.*

304 *In March 1854, Samuel D. Booker applied to the judge of the Circuit court of Mecklenburg for a mandamus to compel the directors of the branch of the Exchange Bank at Clarkesville to admit him to the office of president of said branch bank. The facts are as follows:

The annual meeting of the stockholders of the Exchange Bank is held in Norfolk on the first Monday in May of each year. At this time four directors for each branch are elected by the stockholders, and three are appointed by the executive. For the year ending the first Monday in May 1853, Samuel D. Booker was the duly elected president of the branch bank at Clarkesville; and by the charter the officers are to hold over until their successors are appointed.

On the 18th of May 1853, the new board of directors for the branch bank at Clarkesville held their first meeting. Of these, the first on the list of those elected by the stockholders, was John W. Young: Booker was appointed by the executive. At this meeting the whole number being present, they proceeded to the election of a president, when upon the first vote Young received three votes, Booker received two, and Scott received one. Another vote was then taken, when but five votes were cast; Young receiving three, and Booker receiving two. Further attempt to elect a president was then postponed, and they proceeded regularly to business; Booker acting as president.

On the 25th of May, there was another attempt to elect a president. Three votes were taken, in all of which Young received three votes, Booker received two, and Scott one: And the subject was again postponed to the next regular meeting. On the 22d of June, it was again resolved to proceed to the election of a president; when Young received four votes; having voted for himself, as he said, under instructions from the stockholders; Booker received two votes, and Scott received one. And there-

305 upon Young was *declared to be duly elected president, and proceeded to act as such. Up to this period Booker had so acted.

The court below refused to issue a peremptory mandamus; and thereupon Booker applied to this court for a supersedeas, which was allowed.

The Attorney General and Macfarland, for the appellant.

Bouldin, for the appellee.

SAMUELS, J. I am of opinion, that the statute, Code, ch. 58, § 4, construed according to the statute, Code, ch. 16, § 17, rule third, gave authority to a majority of the seven directors to form a board for the election of a president.

I am further of opinion, that if a majority be present and qualified to vote and do vote, the election may be made by a majority of the votes given, although they be not a majority of the whole board; and this although others of the directors be present, but do not vote.

I am further of opinion, that inasmuch as on the 18th of May 1853, John W. Young received the votes of three directors, and Samuel D. Booker the votes of two directors, there having been but five votes given, John W. Young might then have been duly declared to be elected president, if nothing more appeared in the record. Yet as it is shown that he did not then accept the office, or enter upon its duties, but left Booker to discharge those duties, and that the election was adjourned to another day, it should be held that no election was made on that day.

I am further of opinion, that the board of directors have authority to decide when they will go into an election, or having commenced it, to decide whether they will proceed with it, or to adjourn it to another day.

306 *I am further of opinion, that the statute, Code, ch. 57, § 16, withholding the right of voting in case of personal interest, applies to the election of president. The obvious purpose of the statute was to prevent directors, mere trustees, from voting in such cases, lest their individual, personal interests might be promoted at the expense of the cestuis que trust, the stockholders. This construction is in strict conformity with the general principles of law governing the relations of principal and agent, and cestui que trust and trustee.

Thus I am further of opinion, that in the election of June 22d, 1853, the vote of John W. Young to put himself in office, and the vote of Samuel D. Booker the then incumbent, in effect to keep himself in office, were both given without warrant of law, and should not be counted; thus leaving but five votes, of which Young received three and Booker two, and that thus Young at that time was duly elected president.

I am of opinion to affirm the judgment.

DANIEL, J. The proceeding by way of mandamus seems to me to be a fair, convenient and ready mode of litigating and deciding upon questions such as those presented by the record of this case. The propriety of resorting to it in cases of the like kind is, I think, fully sanctioned in Smith v. Dyer, 1 Call 562, and in Dew v.

*The act, Code, ch. 58, § 4, provides, that the directors, as soon as may be after every annual election of directors, shall elect a president, who shall act until his successor is appointed.

By the act, Code, ch. 16, § 17, rule third, words purporting to give authority to three or more public officers or other persons, shall be construed as giving authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority.

The act, Code, ch. 57, § 16, provides, that no member of the board of a chartered company shall vote on a question in which he is interested otherwise than as a stockholder.

The Judges of the Sweet Springs, 3 Hen. & Munf. 1. I am not aware that the authority of these precedents has been questioned in any subsequent decision of this court; and they furnish, in my opinion, a satisfactory answer to the objections made here to the remedy selected by the petitioner.

It becomes necessary therefore for us to consider the case on its merits. In doing so, the first question which we have to decide (and indeed the only one which needs be considered if answered in the negative) is, has Booker any right to the office?

When the new board of directors
307 assembled on the *18th of May 1853, Booker held the office of president by virtue of a previous appointment; and by the provisions of the 4th section of ch. 48 of the Code, he had a right to enjoin the office until his successor was appointed.

If such successor has been appointed, Booker's right to hold office any longer is determined, and he has no claim to be restored, even though it should be made to appear that Young has now no valid title to the office.

It is stated in the return, that on the 18th of May 1853 three votes were taken, all of the directors being present. On the first, six votes were cast, Booker receiving two, Young three, and Scott one. On the second and third votes, only five directors voted, and on each occasion Young received three and Booker two votes, Young and Booker each failing to vote.

Was not Young duly elected on the second casting of votes? In Wilcock on Corporations, § 546, it is said that after an election has been properly proposed, whoever has a majority of those who vote, the assembly being sufficient, is elected, although a majority of the entire assembly altogether abstain from voting, because their presence suffices to constitute the elective body, and if they neglect to vote, it is their own fault, and shall not invalidate the act of the others, but be construed an assent to the determination of the majority of those who do vote; and such an election is valid, although the majority of those whose presence is necessary protest against any election at that time, or even the election of the individual who has the majority of votes: the only manner in which they can effectually prevent his election is by voting for some other qualified person. This section is adopted in Angell & Ames on Corporations, and forms the 126th section of the treatise. See also Oldknow v. Wainwright, 1 Wm. Black. R. 229; S. C. 2 Burr. R. 1017.

308 *It is nowhere alleged or suggested that the assembly of the 18th May was not held regularly, or that the election was not "properly proposed." The whole body of electors was present; and Young received a majority of those who chose to vote. Was he not, on the force of the authorities just cited, then elected? And if so, was not Booker's successor then appointed?

No further act is required to be done in order to complete the title to the office; nor indeed does the law prescribe any admission or form of induction into office to be observed in order to perfect the right to its possession.

The third section of the 48th chapter of the Code provides that no director of a bank or branch shall act as such without first taking the oath therein prescribed. But no additional oath is required of the president, as such.

When it was ascertained, therefore, that Young had received a majority of the votes cast, the right to the office was ipso facto conferred upon him; and consequently Booker's right to it was determined and gone. The fact that the assembly, after the vote was announced, proceeded to order an adjournment over of the election, as if no election had been made, could not have the effect of restoring Booker's right to the office. Nor is this proposition at all affected by the consideration that Young acquiesced in the adjournment, or by the further consideration that Booker still continued to act as president, without any challenge of, or protest against, his right to do so. This course was no doubt pursued by all the parties under a belief that no valid election had taken place; but all the facts on which the rights of the parties depended were fully known. There is no suggestion that the assembly did not go into the election with the intention to be governed by its legal result; and if that result was to transfer the right to the office from Booker to
309 *Young, no subsequent action of the assembly could annul or destroy it. Young, it is true, had a right to accept or reject the office. Whether the adjournment over of the election with his assent, and the subsequent holding of the office by Booker, might not be construed into an implied refusal by Young to claim or accept the office by virtue of the proceedings of the 18th May, is, however, a question, the answer to which cannot affect Booker. The relinquishment of the office, however formal, by Young, could not invalidate the election; and of course could not reinvest Booker.

The casting of the votes, as soon as completed and announced, became an irrevocable act. The choice was then made and declared; and the appointment conferred by the appointing power, whose function pro hac vice was thereupon discharged and ended. There was nothing inchoate or incomplete in the transaction.

Young's title to the office, and right to enter upon it, was perfect, and of course Booker's right to hold over no longer had any existence. His old title was determined, and the resolution or order of the board adjourning over the election could not, by implication, confer on him a new title to the office. And any election thereafter held to elect a president would, in legal contemplation and intendment, be, not an election to appoint a successor to Booker, but an election to fill the vacancy occasioned by Young's resignation, or refusal to accept. Marbury v. Madison, Ch. Jus. Marshall's

Opinion, 1 Cranch's R. 137; Bank of Va. v. Robinson, 5 Gratt. 174.

The objection to this view, founded on the third rule prescribed for the construction of statutes, in the 17th section of ch. 16, tit. 8 of the Code, is, I think, untenable. That rule declares that words purporting to give authority to three or more public officers or other persons, shall be construed as giving such authority to a majority of such officers or other persons,
310 *unless it shall be otherwise expressly declared in the law giving the authority. It is argued that this rule applies here; and that, under it, Young could not rightfully have claimed to be elected by the proceedings of the 18th of May 1853, as he did not, on any one casting of the votes, receive a majority of the votes of the whole body of directors. This is to give to the rule an application and effect which a fair construction of its language does not in my opinion justify. No attempt was made, by any number of the directors less than a majority of the whole, to make an election.

Conceding, for the sake of the argument, that as Young and Booker declined to vote, they should not be counted as part of the assembly, still the two directors who voted for Booker were as much engaged in the exercise of the authority given to the directors as the three who voted for Young. And Young's election, in this state of things, would be the result not merely of the action of the three directors who voted for him, but of the action of the five, in holding the assembly, going into the election, casting, counting, announcing and recording the vote. In all these things the five directors equally participated, and in this aspect of the case the election was made, the authority conferred on the body of the directors was exercised by five, and not by three directors.

But in fact Booker and Young were present, and, by force of the authority which I have cited, must be regarded as assenting to the determination of the majority of those who voted: And thus, though we should yield to the construction of the rule contended for by the counsel of Booker, and hold that in order to make a valid election four directors must unite in the specific purpose of electing a particular nominee, the requirements of the rule would be virtually and substantially fulfilled, and
311 Young would be regarded *as the choice of five. And if it be said that in this view of the case Young would be assenting to his own election, it would still be unnecessary to go into the consideration of his right to vote for himself, inasmuch as, after discarding his assent, there would be still four, a majority of the seven directors, assenting to his election.

From the best consideration I have been able to give to the subject, it seems to me that Young was duly elected on the second casting of votes on the 18th of May; and that Booker's right to hold over was thereby determined. Booker's right to the office being thus negatived, it becomes unnecessary to look into the present state of Young's title. Without considering, therefore, whether or not Young has lost or abandoned his title to the office as founded on the election of the 18th of May, and if so, whether or not he was afterwards legally elected on the 22d of June 1853, I am for affirming the judgment, on the ground that Booker, at the date of the institution of this proceeding, had no right or title to the office.

LEE, J., concurred in the opinion of Daniel, J.

MONCURE, J., concurred in the results; but did not concur entirely with Daniel or Samuels, Js. He thought that the first election not having been insisted on, was no election. But he thought that Young might vote for himself, and that therefore the second election was valid.

Judgment affirmed.

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312 *Southall's Adm'r v. The Exchange Bank of Va.

April Term, 1855, Richmond.

(Absent ALLEN, P.)

1. **Action of Debt—Common Order Irregularly Confirmed—Effect.***—In an action of debt, the common order is confirmed at rules irregularly, the defendant having pleaded to a part of the plaintiff's demand. This irregularity cannot afterwards be corrected at rules.

2. **Pleading and Practice—Irregularity at Rule—Correction at Next Term.**—An irregularity committed at rules may be corrected at the next term of the court; and the plaintiff may be allowed to withdraw a defective replication, and reply; and if the plea filed at rules does not go to the plaintiff's whole demand, he may sign judgment for so much as is not covered by the plea.†

3. **Same—Same—Right to Continuance—Case at Bar.‡**—In such a case the defendant is entitled to a continuance of the cause as of right, if he demands it. But if instead of asking for a continuance, he asks that the cause may be sent back to rules, and excepts because his motion is overruled, the appellate court cannot reverse the judgment because the court required him to proceed to trial.

This was an action of debt in the Circuit court of York county, by the Exchange Bank of Virginia against George W. Southall's administrator, upon a negotiable note for the sum of eight thousand eight hundred and sixty dollars, made by one Richard

*See monographic *note* on "Debt, The Action of," appended to Davis v. Mead, 13 Gratt. 118.

†Code, ch. 171, § 51, p. 653. "The court shall have control over all proceedings in the office during the preceding vacation. It may reinstate any cause discontinued during such vacation, set aside any of the said proceedings or correct any mistake therein, and make such order concerning the same as may be just."

‡**Continuances.**—See monographic *note* on "Continuances" appended to Harman v. Howe, 27 Gratt. 676.

Coke, junior, and endorsed by Southall; and discounted by the Exchange Bank.

At the August rules 1852, the declaration was filed, and a common order taken.

At the September rules, the defendant in the action appeared and filed a plea of
313 payment of eight thousand *eight hundred dollars, parcel of the debt in the declaration mentioned, and gave a rule for replication: and at the same rules the plaintiff filed a replication to the plea; and an issue was made up upon it by the clerk.

At the ensuing term, the defendant moved the court to correct the error alleged to have been committed by the clerk in failing to enter a discontinuance of the cause, upon the plaintiff's filing a general replication to the plea of the defendant: And thereupon, on the motion of the plaintiff, he had leave to withdraw his replication; and the cause was sent to rules for further proceedings. This was upon the 29th of September 1852.

At the October rules 1852, the record states that on the motion of the plaintiff, the common order entered against the defendant at the August rules was confirmed.

At the November and December rules 1852, and at the January and February rules 1853, the entry was that the cause was continued for replication, on motion of the plaintiff.

At the March rules 1853, the plaintiff filed a general replication to the plea; and took a confirmation of the common order for the part of the debt in the declaration mentioned not answered by the plea.

At the following term, the defendant moved the court to send the cause back to rules, because the clerk had improperly entered a confirmation of the common order at the October rules; and because he had improperly received a replication to the plea at the March rules, and given judgment for that part of the debt not controverted by the plea. But the court being of opinion that the errors at rules might be corrected by the court, refused to remand the cause to rules, set aside the orders entered at the October and March rules, and gave the plaintiff leave to file his
314 *replication at that time. The replication was then filed, and an issue made up thereon: and at the same time judgment was granted the plaintiff for that part of the debt not answered by the plea.

The court was also of opinion, that the case should be then tried unless the defendant showed he would be prejudiced thereby; which not being shown, the defendant pleaded nil debet, on which issue was joined: And a jury having been impaneled, a verdict was found, and final judgment rendered for four thousand one hundred and ninety-eight dollars and seventy-one cents, with interest and costs.

To the opinion of the court refusing to send the cause back to rules, and giving leave to the plaintiff to reply to the plea in court, the defendant excepted. And he subsequently presented a petition to this court for a supersedeas to the judgment, which was allowed.

Crump, for the appellant.
Morson, for the appellee.

LEE, J. It is not alleged by the plaintiff in error that the judgment rendered in this case is for any other or greater sum than is justly due from the estate of his intestate to the defendant in error. The complaint is that irregularities have been committed in the proceedings which have resulted in the judgment; and for those irregularities it is said the judgment should be reversed.

According to the rule of pleading, if a plea profess to answer only part of the declaration, and is in truth but an answer to part, the plaintiff is entitled to "sign" judgment for the part not answered by the plea, and to demur or reply as to the part that is answered. If however he demur or reply to the plea without signing judgment for the part not answered, the whole action is discontinued. 1 Chit. Pl. 453;
315 Steph. Pl. 232; 1 *Saund. 28, n 3.

So that when the plea was filed at the September rules 1852, the plaintiff in the action should have caused the common order to be confirmed as to so much of the debt as the plea did not and did not profess to answer. The failure so to do, and filing a general replication, occasioned the technical discontinuance of the action. And so at October rules after the cause had been remanded to rules at the previous term, the plaintiff, instead of confirming the common order generally, should have confirmed it as to the part not answered by the plea, and then filed his replication. Nor after such a general confirmation of the office judgment, could the irregularity be cured by the subsequent proceedings at the rules. The clerk I apprehend could not correct the error which had been committed at the October rules, by making the proper entry at the March rules following. By the general confirmation of the common order at the October rules, the proceedings at rules were closed; and the defendant could not be held to attend longer at the rules in the expectation that at a subsequent rule day the plaintiff would correct the error in his proceedings, and put him to a further pleading.

But though it was not competent for the clerk to correct the proceedings at rules, yet under the fifty-first section of chapter 172 of the Code, p. 653, the court, it is clear, had full authority so to do. By that section, control is expressly given to the court over all proceedings in the office during the previous vacation; and it may reinstate any cause discontinued during such vacation, set aside any of the proceedings, correct any mistake therein, and make such order concerning the same as may be just. There can be no doubt then that the court might properly, as it did, set aside all the proceedings at rules after the cause had been remanded at the previous term, and permit the plaintiff to do then, in court,
316 what he could and should have *done,

at the rules, to wit, file his replication and take judgment for the part not answered by the plea. No injustice could be done by this to the defendant, as it only placed the cause exactly where it would have been but for the irregularities which had occurred at the rules. The whole matter then resolves itself into the question whether the case should have been tried at the same term. And here I do not hesitate to say that if the defendant had claimed a continuance of the cause as a matter of right and without showing any cause, he would have been clearly entitled to it. The plaintiff having only at that term placed himself rectus in curia, could not insist upon a trial at the same term. He was bound to submit to a continuance of the cause if the defendant had claimed it. But it does not appear that the defendant asked for a continuance, nor did he take any exception to the opinion of the court that the case might be tried at the same term. His motion was to send the cause back to rules, and his exception was to the refusal of the court to grant this motion, and to its giving the plaintiff leave to reply to the plea. If he had claimed a continuance of the cause and the court had refused it, and he had tendered a bill of exceptions, the plaintiff might have yielded the point; and if otherwise, and the exception had been taken, I think it would have been error for which the judgment should have been reversed. But I do not think the court erred either in permitting the plaintiff to reply in court to the plea, and take judgment for the part unanswered by it, or in refusing to send the cause back to rules.

I am of opinion therefore to affirm the judgment.

The other judges concurred in the opinion of Lee, J.

Judgment affirmed.

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317 *Winston v. Starke & als.

April Term, 1855, Richmond.

(Absent ALLEN, P.)

Fraudulent Conveyances—Suit to Set Aside—Case at Bar.*—In a suit between S, trustee in a deed for the wife of the grantor, and B, a creditor of the grantor, the deed is held to be fraudulent to the amount of one thousand four hundred and eighty-three dollars; much more than sufficient to pay B's debt. W, another judgment creditor of the grantor, files a bill, in which he states his debt and the decree in the former suit; and asks that S may be decreed to pay plaintiff's debt out of the balance remaining in his hands for which the deed was declared fraudulent: And he files a copy of the record in the first case. S answers, denying that the deed was fraudulent, and objecting to the record of the former suit as evidence. HELD:

*See monographic *note* on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348.

1. **Same—Bill Charging Fraud—Answer—Case at Bar.**—If the bill is to be considered as charging fraud in the deed, the answer puts that fact in issue; and the plaintiff not having been a party or privy in the first suit, the record is not competent evidence.
2. **Same—Case at Bar.**—The bill does not charge fraud in the deed, but relies upon the first suit as a proceeding of which plaintiff is entitled to the benefit. The case does not come within the principles upon which proceedings *in rem* are held to bind all the world.
3. **Evidence—Duty to Court to Advise as to Sufficiency of.**—It is not the duty of the court to advise a party as to the sufficiency of his evidence; as to that he must judge for himself, before going to a hearing of his cause.
4. **Evidence—Admissibility—Right to Decision by Court.**—If a party has doubt about the admissibility of his proof when objected to, he may bring the question before the court, and have it decided before going to a hearing.

This was a suit in equity in the Circuit court of Hanover county, instituted by Philip B. Winston against Joseph Starke and others. The case is stated by Judge Samuels in his opinion. The Circuit court dismissed the bill: And Winston thereupon applied to this court for an appeal, which was allowed.

318 *Lyons, for the appellant.

Griswold and Claiborne, for the appellees.

SAMUELS, J. The bill in this case in substance alleges, that complainant has obtained a judgment for debt, interest and costs, and issued a writ of fieri facias thereon against William L. White. That about the time of or shortly after the rendition of complainant's judgment, White took the benefit of the insolvent laws at the suit of other creditors. That before White's insolvency, he had made a conveyance to Joseph Starke, as trustee for the benefit of White's wife and children. That this conveyance was afterwards assailed in the Circuit court of Hanover, as fraudulent and void, and that it was so adjudged to be by the decree of that court to the amount of one thousand four hundred and eighty-three dollars and ninety-six cents. That by a subsequent decree, Starke the trustee was directed to pay Ira L. Bowles, the creditor who had so assailed the deed, the sum of seven hundred and nineteen dollars, and interest, parcel of the sum of one thousand four hundred and eighty-three dollars and ninety-six cents, leaving the residue thereof liable for White's debts, of which that due complainant had priority; the residue, however, being more than enough to pay complainant's debt. The bill refers to the papers and proceedings in the case of Bowles v. Starke (meaning Starke v. Bowles), as evidence.

Complainant also filed with his bill abstracts from the record in the case of Starke v. Bowles, also copies of the deed of trust from White to Starke, as trustee, and of White's insolvent papers.

Starke filed an answer to Winston's bill. He denies that the deed of trust was tainted with fraud; and he also objects to the proceedings had in the case of Starke v. Bowles, as evidence for any purpose in this suit.

319 *If the bill in this case could be regarded as tendering an issue on the fact of fraud, the answer makes that issue by denying the fraud; and this would impose on the complainant the necessity of proving his bill.

The only proof offered by complainant on this issue is the record in the case of Starke v. Bowles, to which complainant was no party, nor is he in privity with any party thereto. This record and the abstracts therefrom were objected to as inadmissible; and on well settled principles the objection was well taken. It was wholly irrelevant to the issue of fraud (if made up between these parties) that in another case, at a different time, between different parties, and upon other evidence, the same or a like issue had been decided. The fact that such decision had been made is immaterial, and could not be proved. With much less appearance of reason can it be said that the record might be used as evidence not only of its own existence, but also to prove the facts upon which the decision therein was rendered. In any case in which a record is relied on as evidence, it must conclude both parties to the case, or neither. It is perfectly clear that Winston was not bound by the decree in Starke v. Bowles; he was no party to it; had no opportunity to offer evidence, to be heard at the trial, or to appeal if aggrieved by the decision; he was not bound by the decision that White's deed to Starke was void to the amount of one thousand four hundred and eighty-three dollars and ninety-six cents, and good for all beyond that sum. If he had the evidence, he might have assailed the deed as wholly fraudulent, and therefore void. Winston not being concluded, Starke stands in the same condition.

I have considered the case up to this point as if the parties were at issue upon the question of fraud in the deed; the pleadings, however, present no such issue.

320 *The bill does not allege as a fact that fraud existed, but merely that another party, in a different suit, had successfully impeached the deed for fraud. The theory of complainant's case is, that as Bowles established his charge of fraud against the deed, his success enures to the benefit of complainant, a creditor by judgment and fieri facias. That the suit between Starke and Bowles was a proceeding in rem, and that all the world is bound by the result in that case. No authority is cited to sustain this position; nor can any be found affording it the slightest support. The case presented merely the comparative merits of the lien held by Starke and that held by Bowles; the court held that Bowles' lien to the full amount of his debt took precedence of Starke's lien; thus the only question in the cause was decided. It is true the Circuit court did decree that Starke's lien was invalid as against Bowles to an amount exceeding Bowles' debt; the difference between Bowles' debt and the amount declared to be fraudulent was not expressly disposed of, but left in the hands of Starke, whereby in effect it was decided that Starke had the better right to it.

This case falls clearly without the principles upon which proceedings in rem are held to bind all the world. See 1 Stark. Evi. p. 228, § 77; p. 99, § 73.

It was insisted by the appellant's counsel in the argument here, that if the evidence offered by complainant were inadmissible, still the court should not have dismissed the bill, but should have given him leave to offer additional proof. In reply it may be said that the Circuit court was under no legal obligation to offer advice in regard to the sufficiency of the proof; that is a subject upon which parties must decide for themselves before going to a hearing. If a party be in doubt about the admissibility of his proof, when objected to, he may bring the subject to the notice of the court before going to hearing; if, however,

321 this *course be not pursued, the court cannot know whether or not the party has any other proof to offer. In this case the evidence was sufficient to prove that Bowles had successfully impeached the deed to Starke; and upon this fact, in connection with his own lien by judgment and execution, complainant sought to recover without any other allegation or proof of fraud. On these facts, although fully appearing, the court rightly dismissed the bill. The defect was in the case itself, not in the proof by which it was established.

I am of opinion to affirm the decree.

DANIEL and LEE, Js., concurred in the opinion of Samuels, J.

MONCURE, J., was for affirming the decree; but thought it should be without prejudice to the right of the appellant to file a bill to set aside the deed for fraud.

Decree affirmed.

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322 *Burwell v. Hobson.

April Term, 1855, Richmond.

(Absent ALLEN, P.)

Injunctions—Riparian Owners—Case at Bar.*—H owning lands on both sides of a creek which frequently overflowed its banks, built a dike along the south side of it, to protect his low grounds on that side of the creek; and this caused the creek to overflow the land on the north side still more. At his death his lands were divided by commissioners, who allotted to one of his children the land on the south side of the creek, and to another, W, the land on the north side: And in their report they made no allusion to the dike. The son receiving the land on the south side of the creek, afterwards sold it to B; and then W owning the

*See monographic *note* on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518.

land on the north side, commenced to build a dike on that side, to protect his lands, which would have the effect to destroy the dike built by H, and overflow the low grounds on the south side. B then filed a bill to enjoin the building of the dike on the north side. HELD:

1. **Riparian Owners—Case at Bar.**†—B is entitled to have his dike as it was when H died, and to have his lands protected thereby; and W has no right to build a dike on his side of the creek, which would destroy the dike of B, and overflow his low grounds.

2. **Equity Practice—Riparian Owners—Case at Bar.**—Equity will interfere to prevent the building of the dike; and will compel W to abate so much of his dike already built as would injure the dike and low grounds of B.

This was a bill in the Circuit court of Powhatan county by Blair Burwell to enjoin Willis W. Hobson from building a dike upon his land along the margin of Deep creek, in that county. The pleadings and proofs make the case as follows:

Joseph Hobson, under whom both parties claim, owned a large tract of land in the county of Powhatan, lying on both sides of Deep Creek. Some years before his death he cleared up the low grounds on the south side of the creek, and to protect them from the floods of the creek, he built a dike along the south bank of the creek, about
323 four feet high, and extending *down the creek about four hundred yards, to a natural elevation in the ground. This dike was kept up from that time until this suit was brought, though there were some breaks in it, at this latter period, which had not been repaired. The low grounds on the north side of the creek were rather higher than on the south side; and though a part of them was cleared, that part lying farthest up the creek remained in woods. There was no dike on that side of the creek.

Joseph Hobson died before the year 1833; and in that year his estate was divided among his children, by commissioners appointed by the County court of Powhatan. In this division the commissioners allotted to Joseph V. Hobson a tract of one hundred and twenty acres, bounded on the north by Deep creek, and embracing the low grounds protected by the dike aforesaid. And they allotted to Willis W. Hobson a tract of one hundred and eighty acres, bounded on the south by Deep creek, and separated by that creek from the land allotted to Joseph V. Hobson.

In November 1834 Joseph V. Hobson sold and conveyed the land allotted to him, to his brother Thomas L. Hobson; and in December 1838, Thomas L. sold and conveyed to Blair Burwell. Burwell owned a tract of land lying on both sides of the creek just above these lands.

In 1851 Willis W. Hobson commenced to build a dike on his side of the creek, extending it at one point to within six feet of the bank. This dike was about six feet high; and the evidence was very clear that its effect would be to throw the water in times of freshets in the creek (and they were frequent), upon the low grounds of Burwell which had been protected by the dike built by Joseph Hobson, unless that dike was raised and strengthened, which could not be done but at great expense. It was equally clear that without his dike, Hobson's low grounds were overflowed
324 when *there were freshets in the creek, and that if he was permitted to complete his dike they would be protected.

Upon the application of Burwell, Hobson was enjoined from proceeding to build his dike: and when the cause came on to be heard, the court being of opinion that both parties had equal right to have their lands secured against the freshets of the creek, appointed commissioners who were directed to report a plan by which this object might be attained. These commissioners reported that the object could be effected by building a dike upon either side of the creek at a proper distance from it, and by keeping the bed of the stream clear of sand and other deposit to the depth of three feet below the surface of the flat lands adjoining, and by the removal of all obstructions to the passage of the water for the whole distance between the creek and the proposed dike. And they fixed the height of the dike above the flat land at six feet; and that it should be forty feet from the centre of the channel of the creek to the foot of the slope of the dike next the creek. This report was excepted to by the plaintiff.

†**Riparian Owners—Easements—Dominant and Servient Lands.**—In Linkenhoker v. Graybill, 80 Va. 839, it is said: "Easements follow the land into the hands of an assignee, and 'the division of the dominant estate does not destroy the easement; and the owner or assignee of *any portion* of that estate may claim the right so far as it is applicable to his part, provided the right can be enjoyed as to the separate parcels, without any additional charge upon the servient tenement.' Hills v. Miller, 3 Paige (Ch. N. Y.) 254; 24 Amer. Decis. 218. 'Where land is granted with a right of way, that right is appurtenant *to every part* of the land thereafter granted.' Watson v. Bioren, 1 Sergeant & Rawle (Pa.) 227; 7 Amer. Decis. 617. 'Where a judgment creditor levied on a part of the debtor's lands, leaving the latter no passage from the remaining portion to the highway, the debtor has, necessarily, a right of way over the land levied upon.' Pernam v. Wead, 2 Mass. 203; 3 Amer. Decis. 43; Taylor v. Townsend, 8 Mass. 411; 5 Amer. Decis. 108. 'Grant of continuous and apparent easements is implied *on severance of heritage*, where, though having no legal existence as easements, they have in fact been used by the owner during the unity of heritage, or when they are necessary to the full enjoyment of the several portions of the heritage.' Elliott v. Rhett, 5 Richardson (S. Car.) 405; 57 Amer. Decis. 750; *note* to Elliott v. Rhett, 57 Amer. Decis. 767, citing *Burwell v. Hobson, 12 Gratt. 322*, and others." See, in accord, Masonic Temple Ass'n v. Banks, 94 Va. 697, 27 S. E. Rep. 490; Sanderlin v. Baxter, 76 Va. 305; Switzer v. McCulloch, 76 Va. 788; Cairo, V. & C. Ry. Co. v. Brevoort, 62 Fed. Rep. 134, all citing the principal case. See principal case cited in *foot-note* to Amick v. Tharp, 13 Gratt. 564; also, extended *note* to principal case in 65 Am. Dec. 247.

When the cause came on to be finally heard, the court overruled the plaintiff's exception to the report, and decreed that the plaintiff and defendant should each within six months from the date of the decree, remove so much of their respective dikes or embankments located on their lands respectively, as approached within forty feet of the centre of the natural channel of Deep creek; and all other obstructions to the natural flow of the water of said creek, built or constructed by them or those under whom they claim, within the said space of forty feet from the centre of said creek. And they each were authorized to erect on their own lands dikes or embankments to the height of six feet above the ordinary level of the adjoining flat land on their respective sides of said
325 *creek, provided the same did not approach nearer than forty feet of the centre of the channel of said creek; and to remove the obstructions to the flow of the water on their respective sides between the said embankments and the creek. And Hobson was enjoined from proceeding to erect the dike he had commenced in any manner inconsistent with the decree. From this decree Burwell applied to this court for an appeal, which was allowed.

Burwell, Rhodes and Macfarland, for the appellant.

Patton, for the appellee.

MONCURE, J. The maxim sic utere tuo ut alienum non lædas emphatically applies to the case of a riparian proprietor, and is the true legal as well as moral measure of his rights. He has no right to divert the stream, or any part of it, from its accustomed course, to the injury of other persons. This is a plain proposition, laid down by all the writers on the subject of water rights, and was not denied by the counsel for the appellee.

But he contended that it is confined in its application to the ordinary course of the stream, and that a riparian proprietor may lawfully protect his property from floods, by erecting a dike or other obstruction on his own land, though its necessary effect may be to turn the superabundant water on the land of his neighbor. Such a distinction between the ordinary and extraordinary flow of a stream, is not laid down or recognized by any elementary writer, nor in any adjudged case, so far as I have seen. The utmost extent to which the authorities seem to go in that direction, is, that a riparian proprietor may erect any work in order to prevent his land being overflowed by any change of the natural state of the stream, and to prevent its old course from being altered. Angell on
326 *Water Courses, § 333. But he has no right, for his greater convenience and benefit, to build any thing which, in times of ordinary flood, will throw the water on the grounds of another proprietor, so as to overflow and injure them. Id. § 334. If, in the case of such an obstruction, it appears that the injury therefrom arose from causes which might have been foreseen, such as ordinary periodical freshets, he is liable for the damage. Id. § 349. That the supposed distinction does not exist was expressly decided by the Court of king's bench in Rex v. Trafford, 20 Eng. C. L. R. 498. Tenterden, C. J., in delivering the judgment of the court in that case said, "Now it has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons, to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders cannot be justified. No case was cited, or has been found, that will support such a distinction." Id. 502. The judgment in that case was reversed in the Exchequer chamber. Trafford v. Rex, 21 Eng. C. L. R. 272. But that court agreed in the principle laid down by the court of king's bench, though it did not discover, upon the special verdict, a finding of sufficient facts to warrant its application to the case.

It is often the mutual interest of adjacent riparian proprietors to agree to erect works on their respective lands to protect them against floods, and keep the water at all times in its natural channel. That interest is generally sufficient to bring them to such an agreement. But in the absence of agreement express or implied, or of any statutory provision on the subject,
327 *the law affords no means of compelling the erection of such works, however beneficial they might be to the proprietors or the public, and will not allow one proprietor, by erecting such works on his land, to compel another to erect similar works on his as a necessary means of defense. Each has the exclusive right to judge and act for himself on this subject; taking care not to injure the property of the other.

But the counsel of the appellee further contended that as Burwell has a dike on his land, which has the effect of throwing the water, in freshets, on the land of Willis W. Hobson, the latter has therefore a right to erect a dike on his land to defend it against such inundation.

The correctness of this position depends upon whether the dike of Burwell was lawfully erected, and whether he has a legal right to the protection which it affords him.

It was certainly lawfully erected. It was erected many years ago by Joseph Hobson, under whom both of the parties claim, and who was then the proprietor of the lands of both. He had a perfect right to erect it, as it interfered with nobody but himself. Before he erected it, the water of the creek, in freshets, diffused itself over the land on both sides. He wished entirely to protect his valuable arable land on the south side from inundation, by causing all the super-

abundant water to flow on the north side, the upper part of which was then, as now, in woods, and naturally more capable of resisting high water than open land, as well as less liable to injury from being overflowed. He erected the dike for that purpose; and it had the desired effect. In this state of the property he died intestate, and it was divided by decree of a court of chancery among his heirs; the land on the south side, containing one hundred and twenty acres, being allotted to his son Joseph V. Hobson, and that on the
328 *north, containing one hundred and sixty acres, being allotted to the appellee Willis W. Hobson. The land on the south side was conveyed by Joseph V. Hobson to Thomas L. Hobson in 1834, and by the latter to the appellant Burwell in 1838. The dike has been repaired by the successive proprietors of the land, from time to time since the death of the intestate Joseph Hobson, and is now in the same state in which it then was, except that there are a few breaches in it which need repair.

Then has not the appellant a legal right to the dike, and to the protection which it affords him? Why is he not as much so entitled as he is to any other part of the land on which it stands? What difference is there between an artificial dike lawfully erected, as this was, and a natural mound? There is a natural mound below the dike; which is but an artificial continuation of that mound to a point near the upper line. Until the dike was erected, the proper course of a part only of the superabundant water produced by freshets, was over the northern side; after that erection, the proper course of all that water was over that side; just as if, from natural causes, it had always flowed on that side. The change was made by one who had a perfect right to make it. And the flow of the water can no more be disturbed, to the injury of another, in its new direction, than it could have been in its natural course. Suppose the intestate had changed the ordinary bed of the creek, and made it run entirely through the land on the north side of the natural bed. Could the appellee, by any obstruction of the new bed, turn back the stream to the old, to the injury of the appellant? What difference is there between a change of the course of the ordinary stream and a change of the course of the superabundant water produced by freshets? Suppose a mill had been erected, instead of a dike, on the south side; and the
329 *water thrown back on the land on the north side; would not the appellant have been entitled to the mill and its appurtenances, including the right to overflow the land on the north side? That he would be, is shown by the case of Kilgour v. Ashcom, 5 Har. & John. 82, in which a similar question arose. The children of the intestate, said the court in that case, "took their respective proportions of their father's estate in the same condition, and subject to the same advantages and disadvantages under which he held it."

It is admitted that the commissioners who divided the intestate's land might have given to the lot on the south side the advantages of the dike thereon, and subjected the lot on the other side to the disadvantage of it; but it is said that it should plainly appear on the face of the report, that they intended to do so; otherwise it will be presumed that they did not; and that in this case no such intention appears in the report, nor does it appear therein, or from any extrinsic evidence, that they considered the advantages and disadvantages of the dike in making the division. The dike is not mentioned in the report; and the only evidence it affords that the dike was considered by the commissioners in making the division, is the disparity in the quantity of the two lots. On the other hand the evidence shows that the average value of the land on the south was greater than that on the north side of the creek, but does not show that the value of the land on the south side without the dike, would be equal to that on the north.

But I think that while the commissioners might have directed the dike to be taken down, or allowed the appellee to erect a similar dike on his side of the creek, the presumption, in the absence of evidence on the face of the report to the contrary, is, that they did not intend to do so, but intended to give the dike and all its advantages to the heir on whose lot it stood.
330 *They saw the dike, and knew its advantages and disadvantages. How can it be fairly presumed that they did not consider them in making the division? "It was the duty of the commissioners (said the court in Kilgour v. Ashcom, before cited), and it must be supposed that they did, in dividing the estate of John Keech, to take into consideration all the advantages and disadvantages attending the respective parts, and that they gave to the part allotted to Mary Keech an equivalent for the injury and inconvenience occasioned by the mill dam; and she took it accordingly." These observations are just, and strongly apply to this case.

If the intestate had conveyed the land, with the dike thereon, to the appellant, the latter would have been entitled to the benefit of the dike, and the intestate could not have deprived him thereof, by erecting a dike on the other side. If the heirs had divided the land among themselves by mutual agreement, and interchanged deeds for the lot of each, the deed conveying the lot with the dike thereon would have entitled the grantee to the benefit of the dike, and he could not have been deprived thereof by the act of any of the other heirs. There is no difference in this respect between a partition by suit, and a partition by mutual agreement and the interchange of deeds. In each case the heirs are in effect purchasers of their respective lots, and entitled to hold them as any other purchaser would be.

The appellee in his answer seems to admit that the appellant is entitled to the benefit

of the dike on his land, but claims a right to erect a similar dike on his own land for the purpose of defending it from inundation occasioned by the dike of the appellant. This admission, I think, concedes the whole question in controversy. For if the appellant be entitled to the benefit of the dike, I do not see how it can be taken away from him indirectly, by erecting a counter
331 dike *on the other side. But even if the appellee were entitled to this mere right of defense, it would not justify him in erecting a dike much higher and stronger than that of the appellant. Having erected such a dike, he was compelled to rely on other grounds for his justification, and therefore claimed a right to erect any obstruction on his own land which may be necessary to protect it from floods, though the superabundant water be thereby thrown on the land of his neighbor. This ground is wholly irrespective of the question as to the right of the appellant to the benefit of the dike on his land, and would, if sustainable, be a sufficient justification even if no such dike existed. But I think I have said enough to show that the right so claimed by the appellee does not exist. As to the other ground relied on by him that his dike is necessary to prevent the creek from changing its original bed, I concur in the opinion of the Circuit court that it is not necessary, and was not erected for that purpose.

In any view of the case, it seems to me that the decrees of the Circuit court are erroneous. They not only take away from the appellant the benefit of a dike lawfully erected upon his land, but place him on worse ground than he would have occupied if no such dike had ever existed. They require him to take it down, and leave his land exposed to be overflowed, not only as it was before any dike was erected thereon, but by the whole quantity of water which may at any time overflow the natural bed of the creek, if the appellee should avail himself of the liberty given him of erecting a dike six feet high on his side of the creek, and the appellant should not avail himself of a similar liberty given to him. It would of course be competent for the parties, by their own agreement, to make such an adjustment of their rights as this; but I do not see on what principle it can be decreed without their consent.

332 *Upon the whole, I think that the appellant is entitled to the benefit of the dike on his land, as it stood at the time of the division of the estate of Joseph Hobson among his heirs, and to repair and keep it up; and that the appellee has no right to erect any dike or other obstruction on his land, which will have the effect of injuring the land of the appellant, or the dike thereon.

The evidence clearly shows that the dike which the appellee was constructing, when he was enjoined from so doing in this case, would have the effect of washing away the appellant's dike, overflowing his valuable low grounds, and turning the course of the creek permanently through them; and of thus doing him irreparable injury. This is a wrong which a court of chancery has power to prevent and redress.

I am therefore of opinion that the decrees of the Circuit court are erroneous, and ought to be reversed with costs, and that the injunction ought to be perpetuated with costs, and with liberty to the appellant to apply to the Circuit court to cause an abatement to be made of the dike already constructed on the land of the appellee, or so much thereof as may have the effect of injuring the land of the appellant or the dike thereon.

The other judges concurred in the opinion of Moncure, J.

The decree was in conformity to the opinion.

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333 *Wood v. Humphreys.

April Term, 1855, Richmond.

1. **Doctrine of Perpetuities—Application.**—The doctrine of perpetuities applicable to bequests of personal chattels, does not apply to a bequest of freedom to a slave.
2. **Wills—Emancipation of Slaves—Increase.***—Testator by his will directs that a female slave Nancy shall be freed at the end of twenty years from his death. And he then directs that if she shall have children whilst she continues in servitude, "the children shall serve until they shall become of the age of thirty-one years, and no longer; and so on until they shall become free." Within the twenty years Nancy has a child J, and before J is thirty-one she has a child M. HELD: That at the age of thirty-one M is entitled to her freedom.

Joseph Pierce, of Westmoreland county, died in 1798, leaving a will, which was duly admitted to probat. By one clause of his will he gave a negro woman and her four children to one of his daughters. In another clause he says he has set at liberty five negroes whom he names, and he wishes that they shall continue so. He then names five other negroes, who he says he cannnot think of leaving slaves for life; and therefore they are to be at liberty at the end of five years. The testator then names separately eighteen other slaves, and directs that each of them shall be freed after a certain number of years. One of these is a woman named Nancy who is to be freed at the end of twenty years.

The next clause of the will says: "It is my further desire, that if any of the above named female negroes mentioned in this my last will, shall have children while they continue in servitude, it is my will that the children shall serve until they shall become of the age of thirty-one years, and no longer; and so on until they shall all become free."

334 *The woman Nancy before the twenty years had expired, became the

*See principal case cited in *foot-note* to Osborne v. Taylor, 12 Gratt. 117.

mother of a female child named Julianna; and Julianna before she reached the age of thirty-one years, became the mother of Frances Wood, who after she had attained the age of thirty-one instituted proceedings in the Circuit court of Jefferson county, for the recovery of her freedom, against John Humphreys who held her claiming her as his slave for her life. Upon the trial the foregoing facts were found by the jury in a special verdict; upon which the court gave judgment for the defendant: And upon the application of the plaintiff this court allowed her a supersedeas.

Patton, for the appellant.
Andrew Hunter, for the appellee.

MONCURE, J. The questions arising in this case are, first, Did the testator intend that not only the children of Nancy, but all her remoter descendants, born whilst their mothers continued in servitude, should serve until they became thirty-one years of age, and then be free? And if he did, secondly, Was such intention lawful? I will consider these questions in their order.

First, as to the intention of the testator: It was decided in Maria v. Surbaugh, 2 Rand. 228, that where a female slave is entitled to freedom in futuro, her increase born while she continues in servitude are slaves. That decision has not been universally approved. But it has been recognized and confirmed in many subsequent cases. Isaac v. West's ex'or, 6 Rand. 652; Erskine v. Henry, 9 Leigh 188; Crawford v. Moses, 10 Id. 277; Anderson's ex'ors v. Anderson, 11 Id. 616; Henry v. Bradford, 1 Rob. R. 53; Ellis v. Jenny, 2 Id. 597; Osborne v. Taylor's adm'r, supra 117. The principle of that case may now therefore be regarded as the settled law of the land, except so
335 far as *it has been changed or modified by the Code, which does not apply to this case.

The principle is founded on the rules and policy of the law, and not on the presumed intention of the testator, or other person from whom the right to future freedom is derived. When freedom in futuro is given to a female slave, the donor rarely intends that her increase born in the mean time shall be slaves for life. He generally either intends that they shall follow the condition of their mother, not only in respect to present slavery, but also in respect to future freedom, and does not say so simply because he believes it will follow as a legal consequence of the emancipation of the mother; or he fails to say so merely because the idea does not occur to him. "I have no doubt (says Judge Green in Maria v. Surbaugh) but that if the idea had occurred to him, that she would probably have children before she attained her age of thirty-one, he would have expressly provided that they also should be free; which could have been effected by the addition of these words 'and her increase.' His not having done so satisfies me entirely, that he never thought of or intended to make any provision for the children. And if so, it was a subject in relation to which he had no thought, or will, or intention; and is consequently to be disposed of according to the law of the land." But whether the donor has no intention on the subject, or, having such intention, fails to express it, the subject must, in either case, be disposed of according to the law of the land.

The court, however, has given effect to this presumed intention wherever any words have been found in the deed or will which could faily be construed to express it. In Isaac v. West's ex'or, 6 Rand. 652, the deed was construed as conferring on the slaves a present right to freedom, reserving to the grantor a right to their services during
336 his life, as a condition of the *emancipation; and it was, therefore, held that a child born of one of the emancipated females in the interval between the execution of the deed and the death of the grantor, was free from its birth. In Elder v. Elder's ex'or, 4 Leigh 252; Erskine v. Henry, 9 Id. 188; Anderson's ex'ors v. Anderson, 11 Id. 616; Lucy v. Cheminant's adm'rs, 2 Gratt. 36; and Osborne v. Taylor's adm'r, supra 117, the word "all," and other words of like comprehensive import, used in a will in reference to slaves to whom freedom in futuro was given, were construed to embrace the increase of the females born between the death of the testator and the period when the slaves were to be free.

The change made in the Code, ch. 103, § 10, p. 458, was designed to effectuate in all cases this presumed intention to emancipate the future increase of a female slave to whom freedom in futuro is given. The provision is, that "the increase of any female so emancipated by deed or will hereafter made, born between the death of the testator or the record of the deed, and the time when her right to the enjoyment of her freedom arrives, shall also be free at that time, unless the deed or will otherwise provides." This provision does not alter the condition or status of the mother before that time arrives: Until then she is still a slave. It only presumes in the absence of any intention appearing in the deed or will to the contrary, that the future increase of the female were intended to follow the condition of their mother, not only in regard to present service, but also in regard to future freedom. The owner may direct otherwise; may declare his intention that the future increase of the mother born while she continues to be a slave, shall be slaves for life; and such intention would not be repugnant to the grant of future freedom to the mother.

This case occurred before the Code, and must therefore be governed by the pre-
337 existing law. The testator *directed Nancy to be freed at the end of twenty years. The increase of Nancy born during that period, and their issue, are slaves for life, on the principle of the case of Maria v. Surbaugh, unless the testator has directed otherwise in his will. He has certainly directed otherwise in regard to the children of Nancy born during that pe-

riod, and declared that they should serve until they should become of the age of thirty-one years, and no longer. If the testator had stopped at that point, still the case would have fallen within the principle of Maria v. Surbaugh, in regard to the more remote descendants of Nancy. But it would have been difficult to have accounted for his intention, if it did exist, to emancipate Nancy and her children, but not her more remote descendants. "He might have strong reasons (says Judge Brooke in Maria v. Surbaugh, 2 Rand. 228, 245), for liberating her when she should arrive at the age of thirty-one, which did not apply to her children born before that period." But what conceivable reason could he have had for liberating her children born after his death and before she arrived at that age, which did not apply to her more remote descendants born during the temporary service of their mothers? If he intended to emancipate the former, he must have also intended to emancipate the latter. The idea that the females would probably have children before they attained the age of thirty-one years, certainly occurred to him; for he expressly provided for that event in regard to Nancy. Did he make a similar provision in regard to her female descendants? I think he did. After providing that if any of the females (including Nancy) emancipated in futuro by the previous clause of his will, should have children while they continued in servitude, such children should serve until they become of the age of thirty-one years, and no longer; he added the words, "and so on, until
338 they shall all *become free." These words, I think, indicate, that the testator intended to emancipate the mothers and all their descendants, subjecting such of the latter as might be born while their mothers were slaves only to such a limited period of service as he supposed would fully compensate their temporary owners for the expense of raising them. He wished "all" to become free; thus using that comprehensive word which has been so often held to embrace future increase, and to take a case out of the operation of the principle of Maria v. Surbaugh. He had expressed his wish in regard to children, and declared how long they should serve, and when they should be free: and to avoid repetition in regard to each succession of remoter descendants, he used the general and relative words, "and so on," that is, after the manner and rule prescribed in regard to children, "until they shall all," that is, the females and their descendants, "become free." This, I think, is the natural and rational construction of the words, and the only one which will give them effect. If they have not this meaning, they have none, and the will must be read and construed as if they were not in it; for if the testator only intended to apply the provision to children, his intention is fully and plainly expressed without those words. "The court is bound to give effect to every word of the will, without change or rejection, provided an effect can be given to it, not inconsistent with the general intent of the whole will taken together." 1 Jarm. on Wills 411, note (1). I am therefore of opinion that the testator intended, and has expressed the intention, that not only the children of Nancy, but all her remoter descendants, born whilst their mothers continued in servitude, should serve until they become thirty-one years of age, and then be free; and the next question is,

Secondly, As to the legality of such intention?

Some judges have doubted whether
339 the statute, 1 *Rev. Code of 1819, ch. 111, § 53, p. 433, giving owners of slaves a right to emancipate them, authorized the gift of freedom in futuro. But these judges have admitted that the statute has been long and uniformly construed to give such authority, and that the construction could only be changed by legislative power. Tucker, P., in Crawford v. Moses, 10 Leigh 279; Brooke, J., in Anderson's ex'ors v. Anderson, 11 Leigh 624. The cases which recognize this construction are too numerous to be cited; and it is too well settled to require any citation of cases. Instead of being changed, it has been confirmed and adopted in the Code, ch. 103, § 10, p. 458, before referred to.

It may therefore be assumed that the statute authorized the gift of freedom in futuro: And the only question is, whether the authority was subject to any limitation as to the period when the gift was to take effect; and if it was, whether this case falls within the limitation?

The statute itself was silent on the subject; and if there was a limitation, it resulted from the rule of law in regard to perpetuities. If that rule applies to this case, the plaintiff is not entitled to her freedom, the contingency on which her claim is founded being too remote. But does it apply to the case?

In Pleasants v. Pleasants, 2 Call 319, it was held that the rule does not apply to a case of emancipation, and that persons claiming freedom, under circumstances like those under which it is claimed in this case, were entitled thereto. That case was decided by a court of three judges, to wit, Pendleton, Carrington and Roane. Two only of the three concurred in the decision; and it is therefore not, in itself, a binding authority. Whether it ought to govern this case, must depend on the reason on which it was founded, and the circumstances which attended and followed it. There is a manifest difference between
340 *a gift of freedom and a gift of property. In some respects they are similar, but in most respects different. Many of our judges have admitted and commented upon this difference. Many of our decisions are founded upon it. Maria v. Surbaugh is founded upon it; for the plaintiff, in that case, would not have remained the slave of the testator if there had been a bequest of the mother in remainder, instead of a bequest to her of freedom in futuro. Parks

v. Hewlett, 9 Leigh 511, is founded upon it; for if the female slave in that case had been given to another person instead of being emancipated, her issue born afterwards would have been liable for the debts of the donor, instead of being exempt from such liability. "Emancipation is not strictly a gift of property," as was said by Tucker, P., in that case. It is a renunciation of the relation of master and slave, which the master is permitted by law to make. It is the conjoint act of the law and of the master, with which the slave has nothing to do. Whether his freedom be a boon or not, he cannot refuse it, if it be conferred upon him by his master in the mode prescribed by law. He is not required to give a refunding bond, as a legatee is; "and, in case of deficiency of assets, though the specific legatees may be compelled to abate proportionably, emancipated slaves would only be compelled to abate as between themselves. In other words, all other specific legacies must be swept before an emancipated slave can be subjected to the debts at all." Tucker, P., in Nicholas v. Burruss, 4 Leigh 289, 296. See also Patty v. Colin, 1 Hen. & Munf. 519; and Jincey v. Winfield's adm'r, 9 Gratt. 708. It does not follow, therefore, that the rule in question is applicable to a gift of freedom, because it is applicable to a gift of property. It is applicable to a gift of property, because it is against the policy of the law that property should be
341 rendered perpetually *inalienable. It may not be applicable to a gift of freedom, which is a renunciation of property.

So much for the reason on which Pleasants v. Pleasants seems to be founded; and now in regard to the circumstances which attended and followed it. It was decided in 1800, not very long after the statute was passed making it lawful for masters to emancipate their slaves, and was decided by very eminent judges, who had the best opportunity of knowing the meaning and policy of the statute. Judge Roane, though he based his opinion in favor of the claim to freedom in that case on a different ground, and therefore forbore to express a definitive opinion in regard to the application of the rule in question to that case, yet seemed to think that it was not applicable to the case. "It is clear (he says) that neither the particular species of property now in question, nor the case of a remainderman (if I may so express it) claiming his own liberty, were in the contemplation of the judges, who established the doctrine on this subject; which, therefore, may not apply." The case has never been overruled by any subsequent case; nor has any judge, so far as I have seen, ever questioned its correctness. On the contrary, Judge Stanard, in Crawford v. Moses, 10 Leigh 277, 284, while he forbore to express a definitive opinion on the question, because the decision of the case did not require it, yet said, "The inclination of my mind is against the application of that rule respecting the limitation of property, to cases in which property is not fettered but renounced; in which property is not granted, but extinguished." Since the case of Pleasants v. Pleasants was decided, more than half a century has elapsed; during which there have been several general revisions of our laws, and two revisions of our state constitution. Yet the doctrine of that case remains untouched by legislation; while the doctrine of prospective emancipation has been expressly
342 affirmed, *and the doctrine of Maria v. Surbaugh overruled or changed in favor of the claim to freedom. I am therefore of opinion that Pleasants v. Pleasants ought to govern this case.

It cannot be said that the testator intended to violate the law or its policy. He seems to have intended, bona fide, to avail himself of the power which the act of 1782 conferred upon him, to emancipate his slaves. When his will was made in 1796, and when it was recorded in 1798, there was no law requiring emancipated slaves to leave the state. Such a law was not passed until 1806. What the law authorizes cannot be said to be against its policy. He intended to emancipate Nancy and her future increase, but the convenience of his family required that she should continue in service for twenty years after his death; and he therefore so directed. He would probably have directed that her increase should be free at the same time with her; but he wished to afford a just indemnity to his legatees for the expense of raising such of her children as might be born while she continued in service; and he therefore subjected such children, and their increase born under the like circumstances, to a limited period of service. Had he directed the mother and her increase to be free at the same time and at the end of twenty years, they would all have been entitled to remain in the state as free persons. By subjecting a portion of the increase to a term of service, he did not keep them in the state contrary to law, nor place them in a condition in which they would be more apt to injure the community than they would be in a condition of freedom. That intermediate condition between free persons of color and slaves, which, in the case of Wynn v. Carrell, 2 Gratt. 227, is said to be "a condition unknown to the laws and contrary to their policy," refers to the condition of a person who at the same time is partly bond
343 and partly *free; and not to the condition of a slave entitled to future freedom, who, until the right to freedom accrues, is, to all intents and purposes, a slave; insomuch that, if a female, her issue born before that event were, under the law which existed before the Code took effect, absolute slaves for life.

There is perhaps another ground upon which the plaintiff might be entitled to her freedom, even if not so entitled on the principle of the case of Pleasants v. Pleasants. The testator's general or paramount intent seems to have been to emancipate the mother and her future increase. He had also a particular intent; to subject some of

the increase to a term of service, as a merely incidental means of indemnity for their support. "It is definitively settled as a rule of law (says Lord Eldon in Jesson v. Wright, 2 Bligh's Par. R. 1), that where there is a particular and general or paramount intent, the latter shall prevail, and courts are bound to give effect to the paramount intent." The general or paramount intent in this case was lawful, and ought it seems, to prevail, notwithstanding the particular intent, in whole or in part, may be unlawful. That view would make the increase, as to whom the particular intent might be unlawful, free from their birth.

But both intents ought to prevail, if possible. The principle of Pleasants v. Pleasants will give effect to both, without violating the law or its policy, at least as it existed at the death of the testator; and I therefore rest my opinion on that principle.

I am for reversing the judgment of the Circuit court with costs, and giving judgment for the plaintiff.

DANIEL, J. This case turns on the construction of the 10th clause of the will of Joseph Pierce. In the first clause of the will he bequeaths a number of slaves, with the future increase of the females, to his daughter Mrs. Templeman. In the
344 eighth he states that he had *set certain other of his slaves at liberty, and expresses the desire that they shall continue so. In the ninth he says, of certain others, that "they are to be at liberty at the expiration of five years;" and of others, that "they are to be freed at the time I shall mention;" and then proceeds to specify the different periods at which the several slaves last mentioned shall be set at liberty; and among them is a female slave Nancy, who is to be set at liberty at the end of twenty years.

The tenth clause then proceeds, "It is my further desire, that if any of the above named female negroes mentioned in this my last will, shall have children while they continue in servitude, it is my will that the children shall serve until they shall become of the age of thirty-one years, and no longer; and so on until they shall all become free.

Fanny Wood, the petitioner, is the child of Julianna, who was the child of Nancy mentioned in the ninth clause of the will. Julianna was born before her mother Nancy attained the age of twenty, and Fanny was born before her mother Julianna attained the age of thirty-one; and Fanny had attained the age of thirty-one before the institution of her suit.

In considering her claim to freedom, two enquiries at once present themselves.

1. Are the grand children or remote descendants of Nancy embraced by the provisions of the 10th clause of the will?

2. If not so, can Fanny assert a right to her freedom as the legal consequence of the status of her mother?

It will be more convenient to dispose of the last question first.

And in doing so, it is but proper to note that the language used with regard to the children is slightly variant from that used in regard to their mothers.
345 *The slaves mentioned in the ninth clause are "to be freed," "to be set at liberty," at the periods therein prescribed; and by the tenth clause, if any of the females shall have children while "they continue in servitude," the children "shall serve until they shall become of the age of thirty-one years, and no longer." I think, however, that when we look at the whole scheme of the testator, as developed in these two clauses, it is apparent that it was the purpose of the testator to place the children exactly in the same condition until they attained the age of thirty-one years, with that prescribed for the mothers, until they attained the age of twenty years. What was that condition?

In the case of Pleasants v. Pleasants, 2 Call 319, Judge Roane construed such bequests as conferring a complete right to freedom, with a postponement as to the time of its enjoyment. Persons so situated were, he held, "in the case of persons bound to service for a term of years, who have a general right to freedom, but there is an exception out of it by contract or otherwise." This view, however, did not prevail in the case of Pleasants v. Pleasants, and is condemned by repeated decisions of this court.

In Maria v. Surbaugh, 2 Rand. 228, the testator bequeathed Mary (the mother of Maria) to his son, with a declaration that she should be free as soon as she arrived at the age of thirty-one years, saying nothing as to the increase. Maria was born after the death of the testator and before her mother attained the age of thirty-one years. The court there held that the idea that Mary was free from the death of the testator, and only held to service till she attained the age of thirty-one, was wholly inconsistent with the obvious intention of the testator. The will declared her to be free only when she should arrive at the age of thirty-one years; and until she attained that age she remained a slave. And the rule with
346 respect to the increase is *thus briefly and clearly stated by Judge Brooke: "Their claim (he said) is to liberty and not to property. The rule partus sequitur ventrem is a rule of property not of liberty, applicable to questions of property decided by this court, and has no application to the question now to be decided. The rule that the children shall be bond or free, according to the condition of the mother, is a rule of a different character, and has received a different exposition. It imports the condition at the time of the birth, in exclusion of any future right to liberty. It does not include a remote event which may never happen, nor any right of which the mother is not in the enjoyment at the time of her birth." And Maria was held by the whole court (consisting of Brooke, Green and Cabell) to be a slave.

The same construction has been given to

like bequests, and the same rule applied to those claiming freedom under them, in the cases of Crawford v. Moses, 10 Leigh 277; Henry v. Bradford, 1 Rob. R. 53; Ellis v. Jenny, 2 Rob. R. 517.

And I can see nothing in the case of Isaac v. West's ex'or, 6 Rand. 652, at all at variance with these decisions. In that case, the deed in terms spoke of present manumission; and its plain intent and effect were, as was said by Judge Green (the other members of the court concurring), to renounce all the right and title of the grantor as master from the moment of the execution of the deed, reserving a right to claim the personal services of the slaves to himself only, as a condition of the emancipation. If the condition to serve the grantor (the judge said) was against law as inconsistent with the right granted, it could not frustrate the grant. And as by the terms of the grant the mother was entitled to present freedom, her child born after the execution of the deed was necessarily free at the moment of its birth.

The bequest to Nancy and her chil-
347 dren was, I think, *plainly not a bequest of freedom, with a condition annexed of serving for certain terms of years, but a bequest of freedom at the end and expiration of the periods specified in the will. The case then, therefore, so far as it depends on the solution of the enquiry which we have been considering, is ruled by Maria v. Surbaugh. Fanny being born before her mother's right to freedom accrued, in other words, whilst her mother was a slave, is herself a slave, unless her right to freedom can be made to appear in the answers to be given to the first enquiry, and to such other questions as may necessarily arise out of its consideration.

The counsel for the appellee argues, that the words of the will may be fully satisfied by confining the bequest of freedom to the children of those mentioned in the ninth clause. I do not think so. We cannot so restrict the operation of the will without violating one of the cardinal rules for the interpretation of such instruments, and treating, as idle, language adequate to the expression of a most important purpose. The addition of the words "and so on until they shall all become free," was not essential to the completeness of the bequest in favor of the children. The intention in respect to them had already been plainly expressed: And the obvious design of the testator in the use of these additional words was to extend the bequest of freedom to the children of the children and their descendants to the remotest generation, all of whom are, in the same manner, with the children, to be free as they severally attain the age of thirty-one years.

The case does therefore fairly present for our decision one of the questions involved in the case of Pleasants v. Pleasants, before cited, viz: Whether such a bequest falls within the influence of the rules relating to perpetuities, and restricting executory bequests to certain limits.

The clause of the will of John Pleas-
348 ants, under *which the question in that case arose, was as follows: "My further desire is, respecting my poor slaves, all of them as I shall die possessed with, shall be free if they choose it, when they arrive to the age of thirty years, and the laws of the land will admit them to be set free without their being transported out of the country—I say all my slaves now born or hereafter to be born whilst their mothers are in the service of me or my heirs, to be free at the age of thirty years, as above mentioned, to be adjudged of by my trustees their age." And the court decided, that so far as the freedom of the slaves was made to depend on the subsequent passage of a law authorizing their emancipation, it would be too rigid to apply to the case the rule respecting the limitation of the remainders of a chattel upon too remote a contingency with all its consequences; but that a reasonable principle ought to be adopted to suit its peculiar circumstances; and that such a limitation was good in the event of the passage of the law while the slaves remained in the possession of the family, without change by the intervention of creditors or purchasers. And therefore, as the law had passed, that all of the negroes who at the date of the decree were above the age of thirty years, were free; and that all who were then under the age of thirty, and who were born before their mothers had attained that age, and all their future descendants born before their mothers had attained the age of thirty, should be free when they severally arrived at thirty years of age.

It must be admitted that the precise question under consideration was necessarily decided in the decree rendered in that case. The court, however, who rendered it was composed of but three members, and the decree was in fact the decree of but two of the number.

Judge Roane was of opinion that even if the claim of the paupers to their
349 freedom should be treated as *that of ordinary remaindermen claiming property in them, it could not be defeated on the ground of the remoteness of the event of the passage of the law on which it depended. After stating that the utmost limits allowed by law for the vesting of an executory bequest was the term of a life or lives in being, and twenty-one years after, and admitting that it was a fixed canon of property which should not be lightly departed from, and that an executory bequest was only good when the event must happen, if at all, within the prescribed limits, as he proceeded to apply the rule to the case, and said "the passing of a law to authorize emancipation standing singly, is too remote, as it may not happen within a thousand years. But when the testator goes on further and means the benefit of it to persons in esse (for they are the objects of his bounty, and unless it happened within their lives, it might as well, as to them, not happen at all), this restrains the hap-

pening of the contingency, and makes the executory devise good, at least as to all who are within the legal limits."

Judge Pendleton, on the other hand, was of opinion that if the claim of the paupers was to be governed by the rules with respect to the limitation of chattel interests, it could not be sustained. "To consider (he said) this freedom in the light of a limitation of the remainder of a chattel upon a contingent event, it would seem to assimilate to the case of such remainder limited over upon a general dying without issue, and therefore void; since the legislative permission might never be given; might be afforded one hundred years after; or at any earlier period. And the will in the other case is allowed to be the rule of judgment unaltered by the event, although the dying without issue shall happen in a reasonable time; all being involved in one fate." He then proceeded to express the opinion that it would be too rigid to apply the rule to the
350 *case without assigning any other reason than that it was one of a claim to freedom and not to property.

Judge Carrington, on this branch of the question, observed, "I think that these devises are sustainable and not liable to the rule respecting chattel interests, limited on more remote contingencies than the law allows. For the subjects of the devises are different; inasmuch as in the devise of chattel property only is concerned; but liberty is devised in this case. Both sacred rights indeed; but the rules of limitation not necessarily the same with regard to them."

In regard to those not in esse at the time of the passage of the law, Judge Roane was of opinion that they were free from their birth, because descended from persons who became free on the passage of the law, and who were thereafter in the condition of apprentices or persons bound to a temporary service. This view of the subject, he said, dispensed with the necessity of his considering whether the doctrine of prepetuities could apply to cases where human liberty is challenged. "It is clear (he proceeded to remark), that the restraints rightly imposed on the alienation of inheritances to prevent perpetuities are founded principally if not solely on considerations of public policy and convenience: That these restraints have gradually been extended to terms for years and chattel interests, and that the utmost tolerable limits in such cases have not been settled, till after much investigation and a considerable lapse of time. It is also clear that neither the particular species of property now in question, nor the case of a remainderman (if I may so express it) claiming his own liberty, were in the contemplation of the judges who established the doctrine on this subject; which therefore may not apply. But this is an extensive question, and if it were necessary to be now decided (but it is not), it would be proper to weigh the policy of authorizing or encouraging
351 *emancipation (a policy which has certainly received in many instances, and partly by the act of 1782, the countenance of the legislature, at least from the era of our independence, and which must always be dear to every friend of liberty and the human race), against those secondary considerations of public policy and convenience, which appear to have supported and established the doctrine of the law on the subject of perpetuities, as relative to ordinary kinds of property." The two other judges held that the negroes in esse at the passage of the law became free only on attaining the age of thirty years, and that their children born before the last mentioned period, and their descendants born before their mothers arrived at the age of thirty years, would be free also on arriving at that age; but they assigned no reason for holding (as they necessarily did in their view of the case), that the doctrine in regard to perpetuities could not be applied to bequests of freedom, however remote.

From this exhibition of the opinions of the judges, it is manifest that the decision in Pleasants v. Pleasants is of no binding force in the adjudication of the question under consideration: And I know of no other case in this court, and of none in the courts of any other of the slave states, in which the precise question has been expressly decided. It is true that in the cases of Elder v. Elder's ex'or, 4 Leigh 252; Erskine v. Henry, 9 Leigh 188, and Lucy v. Cheminant's adm'r, 2 Gratt. 36, the increase of females entitled to freedom at the expiration of a number of years, or on the termination of a particular state, born during the limited servitude of their mothers, succeeded in the assertion of their claim to freedom. But in each case the claim of the increase was sustained under the provisions of a will construed to embrace them; and in each case the time, at which their right to freedom under the will would accrue, was within the limits allowed to
352 *executory bequests. In each case the bequest was such, that had it been a bequest over of the increase as property, instead of a bequest of their freedom to themselves, it would have been good. These cases therefore do not rule the question before us.

In the case of Crawford v. Moses, before cited, the question seems to have been discussed at the bar; but the report does not furnish us with any note of the argument. The case was however decided on other grounds, and none of the judges, except Judge Stanard, gave or intimated any opinion on the question. Judge Stanard said, that the inclination of his mind was against the application of the rule respecting executory bequests of property to cases in which property is not fettered but renounced; in which property is not granted but extinguished. But he further said, that he had formed no definitive opinion on the question.

In this state of things we are left free to consider the question untrammeled by any authoritative decision. And in doing so it

is obvious to remark that bequests of freedom do in some respects differ from bequests of property: For no man can enjoy or acquire a right of property in himself. But it does not thence necessarily follow, that in considering the legal effect of testamentary efforts to emancipate, we are to regard testators as freed from all the restraints that control the disposition by them of their slaves as property. In the exercise of the right, recognized or granted by the legislature, to free their slaves, the owners are not at liberty to disregard the rights of others or to violate well established rules of law. Their power over the subject of emancipation is not unlimited. Slaves are property: And we shall find numerous instances in which the courts have held that bequests to them of their freedom were not only subject to the laws which protect the rights of third parties, but also to
353 those *general principles of public policy regulating the transmission and acquisition of property.

Thus, by the act of 1792, emancipated slaves are, by express provision, made subject to the debts of the owners, contracted before the emancipation is made. But in a case arising under the act of 1782, in which there is no such provision, this court held that such was the law, independent of legislative enactment. Woodley v. Abby, 5 Call 336, 342. Judge Roane said that at the time of the passage of the act of 1782, the owners of slaves, though entirely free from debt, were not permitted to emancipate them except in a particular mode, and for meritorious services. It was deemed even as between master and servant, and in relation to the safety and policy of the state, improper that this should be done. A degree of liberality (he proceeds) however, began to manifest in favor of human rights at this epoch, and the act of 1782, in which the former policy of this country was relaxed, was the result. The mischief complained of was that conscientious persons were not permitted, even as between master and servant, to emancipate their slaves; and the act ought to be taken as only commensurate with this evil. The boon (he further observes) was not easily and readily obtained: And it is certain that the extension of the request, to the disregard of the rights of creditors, would have endangered and rendered abortive the request altogether. The right to emancipate (he concluded) must be subservient to the well acknowledged principles of law and justice, preferring the creditors to all voluntary donees.

But it is not in this class of cases only that the rules respecting bequests of property have been applied to testamentary emancipation. We shall find that the courts have applied them in cases very similar to the one in hand. Thus, in the case of Williams v. Ash, 1 How. Sup. Ct. R. 1,
354 the testatrix by her will gave *certain slaves to her nephew, with a proviso that he should not carry them out of the state of Maryland, or sell them to any one; in either of which events, the negroes were to become free for life. The nephew sold one of the slaves, and the question was whether the slave was not thereupon entitled to his freedom? Chief Justice Taney, in delivering the opinion of the court, after stating that by the laws of Maryland, as they stood at the date of the will and at the time of the death of the testatrix, any person might by deed or will declare his slave to be free after any given period of service, or at any particular age, or upon the performance of any condition. or the event of any contingency, proceeded to observe, "The contingency upon which the petitioner was to become free must, by the terms of the will, have happened in the lifetime of G. T. Greenfield; and if he had died without selling him or conveying him out of the state of Maryland, the petitioner would have continued a slave for life. The event, therefore, upon which he was to become free, was not too remote."

"It is said, however, that this was a restraint or alienation inconsistent with the right of property bequeathed by the will. But if, instead of giving freedom to the slave, he had been bequeathed to some third person, in the event of his being sold or removed out of the state by the first taker, it is evident, upon common law principles, that the limitation over would have been good. Now, a bequest of freedom to the slave stands upon the same principle with a bequest over to a third person."

And in the case of Harris v. Clarissa, 6 Yerg. R. 227, the court, in rendering its opinion, stated, as an objection to a particular construction of the will contended for at the bar, that such a construction would result in a perpetuity of slaves for a term of years.

And in the case of Peggy v. Legg,
355 6 Munf. 229, the *testator bequeathed his slaves (in the year 1790) severally to his children, with a proviso, "that none of them be sold out of the families to whom devised; if offered for sale by any of them out of the family of my wife, my daughter and sons, that they be immediately liberated, and I do hereby desire they may be free to all intents and purposes." A son of the testator, to whom a female slave was bequeathed, being in possession by virtue of the bequest, died intestate, and she came into the possession of a grand daughter, by whose husband a child of the said slave was sold to a stranger, to be carried out of the state. It was decided that said child was not entitled to her freedom. No reason was given by the court for its opinion; but in the argument of the case, the counsel for the pauper contended that the right to emancipate by will was given by act of assembly, and that the claim of the pauper was under a will emancipating on a condition which had actually happened; that a condition not to alienate except to particular persons was good; that the condition in the will, therefore, was not repugnant to the estate; and that if it were, it would still be good, for that the law allowed the destruction of an estate in slaves. They

argued further to show that the contingency was not too remote; and they relied on Pleasants v. Pleasants to show that bequests of freedom to slaves are not subject to the restrictions concerning bequests of chattels on remote contingencies. Yet the court unanimously affirmed the judgment of the court below, denying the claim.

If the opinion of Chief Justice Taney in the case of Williams v. Ash, just cited (in which the whole court concurred), be correct, it is obvious that the decision in Peggy v. Legg cannot be sustained except on grounds utterly at war with the main principle on which the case of Pleasants v. Pleasants rests. For in that view this court must have rejected the claim of Peggy on
356 *no other ground than that the contingency on which her freedom was made to depend was too remote.

I regard the case as a strong one in support of the proposition that the legislature did not mean to exempt bequests of freedom from the influence of the well settled and wholesome restraints imposed on bequests of property. And I cannot perceive the force of the arguments pleaded in behalf of such exemption.

The right to emancipate slaves is by the law conferred upon those upon whom only it could have been properly conferred, viz: upon their masters and owners. The right in the owner, under the sanction of the law, to give freedom to his slave, springs out of his ownership and control over him as property. His right is to emancipate his slave. And in what legal sense can a bequest of freedom by a testator to a slave to be born centuries hence, be called a bequest of freedom to his slave? The control of the testator over his slave terminates at a period fixed by the law. Is he not, to all intents and purposes, seeking to exercise that control when he undertakes to declare that the slave shall thenceforward be free? Let it be that the emancipation of a slave is to be treated as a renunciation or destruction of property. Still, does not the renunciation of a right necessarily imply the existence of it in him who renounces? And who else, besides the owner, can lawfully undertake to destroy property or the rights of property?

A bequest of slaves and their increase to the child of the unborn child of a stranger would be void. But a bequest of freedom to the remotest descendants of slaves, it is said, violates no rule. The legatee, it is true, in the latter case, does not receive property. But is not the act of emancipation, so far as the testator is concerned, a granting away of property or of the rights of property? Indeed, so far as the testator is concerned, it is not only a granting
357 away of his *rights of property, but it is something more. The renunciation of his right is accompanied by a declaration, which has the effect to transmute the right of property formerly held by himself, into a right to personal freedom, to be thenceforward enjoyed by the slave. The act of emancipation, in fact, must, from its very nature (if justly made), proceed from one who not only owns the property in the slave, but who also, for the occasion, represents the sovereignty of the state. For, as was very justly remarked by Catron, J., in Fisher v. Dabbs, 6 Yerg. R. 125, "manumission is an act of sovereignty just as much as naturalizing the foreign subject. The highest act of sovereignty a government can perform is to adopt a new member, with all the privileges and duties of citizenship. To permit an individual to do this at pleasure, would be wholly inadmissible." And in the case of Thrift v. Hannah, 2 Leigh 300, 319, Judge Brooke said, "that it was one of the highest acts of sovereignty to elevate a slave from his degraded state to the rank of a freeman."

So far, I have been considering the case upon the supposition that the law allows prospective emancipation. In the view, however, which I take of the provisions on the subject, I have not been able to bring my mind to the conclusion that prospective emancipation was in the mind of the legislature at all. I concur with Judge Brooke in the opinion expressed in Thrift v. Hannah, and with Judge Tucker in the views presented by him in the case of Crawford v. Moses. The act of 1782 looks obviously to gifts of freedom in presenti, and makes no provision for the probat of deeds and wills conferring future freedom. It declares it lawful for any person, by his last will, or by any other instrument in writing under his hand and seal, attested and proved in the county or corporation court by two witnesses, or acknowledged by the party
358 in the court *of the county where he resides, to emancipate his slaves, who shall thereupon be entirely and fully discharged from the performance of any contract entered into during servitude, and enjoy as full freedom as if they had been particularly named and freed by this act. No language could well have been employed showing more plainly than the terms used, that the emancipation contemplated by the legislature was to be complete on the probat of the deed or will conferring freedom, and consequently that the legislature were providing only for the probat of such instruments as were designed to effect immediate manumission.

So again, the act provides that all slaves so emancipated, not being, in the judgment of the court, of sound mind and body, &c., are to be supported and maintained by the person so liberating them, or by his estate; and that in case of neglect to do so the sheriff of the county, by order of the court, is to distrain and sell so much of such person's estate as shall be sufficient for the purpose. This provision also looks plainly to a state of things arising on an act of immediate manumission, and has no reference to gifts and bequests of freedom, to take effect at a remote period, when in the nature of things, there can be no estate of the grantor or testator in the control of the court.

So again, the clause requiring that the

person emancipating, if by written instrument in his lifetime, or his executor, if by will, shall deliver to the slave a copy of the instrument of emancipation, attested by the clerk, who is to receive a fee for the same, to be paid by the person emancipating, looks obviously to immediate emancipation.

If the act of 1782 could be regarded as one proceeding from a legislature convinced of the evil of slavery, and providing for its gradual removal by encouraging voluntary emancipation by the owners of slaves, there would be strong motives and arguments *on which to rest that construction of the act which allows of future manumission and discards the restraints imposed on donations and bequests of property, to take effect on the happening of remote events. So to construe the act as to suppress the supposed mischief, and to advance the remedy, would then be the leading duty of the courts in administering the law. And such would seem to have been the views entertained by some of the judges in the earlier cases.

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I cannot, however, perceive any thing in the provisions of the act justifying such views of its origin or purpose: And when we look to its history, as given by Judge Roane in Woodley v. Abby, it is, I think, made most apparent that it was passed not to invite and encourage the liberation of slaves, but was granted as a reluctant concession to the conscientious scruples of the owners of slaves who, by the existing laws, had no power to free them except for meritorious services. And without further specific reference to the history of our legislation, I think it may be safely affirmed, that there are few states which have more fully acknowledged the wisdom of restraining within reasonable limits prospective limitations of property, or shown a greater repugnance to every disposition of it, savoring of a perpetuity, than this; few which have shown a more lively sense of annoyance at the presence of its free negro population or a greater anxiety for its removal; and none in which the legislature have manifested a firmer or more consistent purpose to uphold and cherish the institution of slavery.

Entertaining these views, I cannot discover in the act of 1782 any warrant for supposing that it requires the courts to disregard well established general rules in order to give effect to bequests of freedom that cannot be sustained without their violation.

Instances of prospective emancipation, as well by will as by deed, have however so frequently received *the sanction of this court, that it is now no longer in its power to retrace its steps. Still believing as I do that the doctrine had its origin (to use the language of Judge Brooke) "in the spirit of humanity, rather than in the spirit of the law," I feel under no obligation to extend it to any class of cases in which it has not been already established by authoritative decisions.

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The case of Pleasants v. Pleasants, is as yet the only case in which a bequest of freedom to take effect on an event or at a period more remote than that which a testator is permitted to extend his control over the slave as property has been sustained. The case is of no force as authority in this particular, and I have endeavored to show it is not a correct exposition of the law. I do not feel bound to follow it. It violates, as I conceive, a wise and well established principle, and gives unlimited reach to a doctrine pregnant with mischief to the best interest of the state. The love of property, the sense of the duty to provide for the wants and comforts of their own families, and the liability to have their estates subjected to the maintenance and support of such freedom as are unable, from mental or bodily infirmity, to support themselves, might so far operate to restrain the owners of slaves in their use of a power to grant present freedom, as to render the power thus restricted productive of no serious evil.

In recognizing the doctrine of prospective emancipation, this court has, I think, already done much to weaken and impair the force of these restraints. Still, no binding precedent has as yet placed the power wholly beyond the reach of such influences. If, however, we recognize the claim now asserted, we free the exercise of the power from all restraint; we necessarily declare that no event is too remote, no period too distant, for the vesting of gifts and bequests of freedom. Under the law so construed, every owner of slaves may first carve out of his estate in them and their increase an interest for the benefit of himself and his family, nearly equal in value to the absolute estate, and bequeath to the remote descendants of the slaves their freedom, to take effect at a period far beyond the limits to which his control over them as property can extend. Thus first reaping all the benefits which he or his family could by law derive from the slaves as property, and then, without any liability, visiting the commonwealth with all the evils which flow from their presence as freemen. Such a power is adequate to the defeat of the whole policy of the state in regard to its slave and free negro population; and no act of the legislature ought to be taken to confer it, unless couched in terms necessitating such a construction. We cannot, in my opinion, sustain the claim of the petitioners, without recognizing the existence of such a power. I cannot consent to do so, and am for affirming the judgment.

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ALLEN, P. I do not regard the case of Pleasants v. Pleasants as of itself a binding authority, it being the decision of a majority only of a bare court. The right to emancipate in futuro, one of the principles affirmed in that case, has been frequently recognized since; and though I think it was an erroneous construction of the statute, the legality of such prospective emancipation cannot be questioned at this

day. But I do not understand any of the subsequent cases as having affirmed the right of the master to attach a condition or quality to slaves so to be emancipated in futuro, which will follow their posterity through all succeeding generations. Regarding them as property merely, such a principle would violate the doctrines of the law against perpetuities. But looking at them as human beings, and the act as one by which they are to be elevated into the condition of free persons, I think
362 *there is nothing in the statute which empowers the owner of slaves to create this new status, by which his slaves and their posterity through all time shall occupy this anomalous position of being slaves up to the prescribed age, and free persons thereafter.

Under the decisions of this court, the issue of the slaves prospectively emancipated by the will, born before the period of emancipation arrived, were born the slaves of his estate, and if not emancipated, would have been slaves for life. The will shows that the testator so regarded them, and did not intend to leave them to pass to his distributees as so much property undisposed of, or to bequeath them as property to others. On the contrary, I think the leading intent was to emancipate them as well as their parents, and that the words used do emancipate them. A condition and quality was annexed contrary to the principles of the law in regard to perpetuities, and against the policy of the law in reference to this portion of our population; creating a distinct class intermediate between slaves for life and free persons through all future time, which, it seems to me, nothing but an express act of the legislature could effect. The condition, I think, was void as against law, and inconsistent with the grant of freedom. I think, therefore, that all the descendants of the slaves born after the death of the testator, were either born free, or entitled to their freedom when their ancestors in existence when the will took effect became entitled to freedom. I incline to the opinion that such after born descendants were free at the time of their birth. In either event, the appellant was entitled to freedom, and I therefore concur in the reversal of the judgment.

LEE and SAMUELS, Js., concurred in the opinion of Moncure, J.

Judgment reversed.

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363 *Snoddy v. Haskins & als.

April Term, 1855, Richmond.

(Absent ALLEN, P.)

1. **Statute of Limitations—Application—Fraud.***—The act, Code, ch. 149, § 13, p. 593, limiting the period in which suits may be brought to set aside conveyances or transfers of property, on considerations not deemed valuable in law, does not apply to cases of actual fraud.†

2. **Purchaser for Value—Widow Receiving Distributive Share of Husband's Personalty.**—A widow having received her distributable share of the personal estate of her husband, is not a purchaser for value, so as to be entitled to set up the defense of purchaser for value without notice.

3. **Same—Same—Statute of Limitations—Fraud—Case at Bar.**—In such case the husband having obtained slaves by a conveyance fraudulent as to the creditors of the grantor, and one of these slaves having been allotted to the widow, the slave in her possession may be taken in execution at the suit of a creditor of the grantor, though the husband and those claiming under him have been in possession of the slave more than five years.

4. **Court of Appeals—Jurisdictional Amount—Quære.**‡—The execution is for less than five hundred dollars, but the slave is allotted to the widow at a valuation above that sum. She having obtained an injunction to the sale under the execution which is afterwards dissolved: QUÆRE: If the Supreme court of appeals has jurisdiction of the case.§

In November 1852, Martha L. Snoddy obtained an injunction to restrain the
364 sale of a slave in which she *claimed a life estate, and which had been levied upon under an execution issued in the name of Haskins and Terry against William M. Tyree for two hundred and sixty-three dollars, with interest thereon from the 19th of February 1841, until paid. In her bill she stated that Robert W. Snoddy died in 1845 intestate, leaving her his widow and three children. That John C. Snoddy qualified as administrator upon his estate; and in 1849 he had a division of the estate under an order of the County court of Buckingham, when certain slaves were allotted to her, among which was a man named Shadrick, valued to her at six hundred and fifty dollars. That long since the division, to wit, in 1852, Haskins and Terry levied an execution on said slave as the property of William M. Tyree, and had executed an indemnifying bond to the sheriff for the purpose of having said slave sold under their execution, upon the pretense that

*Statute of Limitations—Fraud.—See principal case cited in Hunter v. Hunter, 10 W. Va. 343; Thornburg v. Bowen, 37 W. Va. 546, 547, 550, 16 S. E. Rep. 828, 829.

†The act says, "No gift, conveyance, assignment, transfer or charge, which is not on consideration deemed valuable in law, shall be avoided, either in whole or in part, for that cause only, unless within five years after it is made suit be brought for that purpose, or the subject thereof, or some part of it, be distrained or levied upon by or at the suit of a creditor as to whom such gift, conveyance, assignment, transfer or charge is declared to be void by the second section of the one hundred and eighteenth chapter."

‡Court of Appeals—Jurisdictional Amount.—See principal case cited in Rymer v. Hawkins, 18 W. Va. 316. See also, *foot-note* to Harman v. Lynchburg, 33 Gratt. 37; *foot-note* to Winch., etc., R. R. Co. v. Colfelt, 27 Gratt. 777.

§The act, Sessions Acts 1852, ch. 61, § 9, p. 53, after stating a specific ground of jurisdiction in the court, adds, "or in any civil cause where the matter in controversy, exclusive of costs, is not less in value than five hundred dollars."

Robert W. Snoddy had come into possession of the slave by a fraudulent purchase from Tyree. That she knew nothing of the purchase; but had heard that Tyree was largely indebted to her husband, and in part payment of said debt had sold him the interest of said Tyree in certain dower slaves of which his wife was entitled to a share, and had executed a deed of trust on other slaves to secure the balance of said debt. That afterwards the trustee had sold the slaves, and that her husband had purchased them. That this sale was made in 1842: That the slaves had been in possession of her husband for several years before his death, and of his representative and herself ever since, a period of ten years; and she relied upon the length of possession to protect her in the possession of said slaves.

She insisted further that if she was to be deprived of this slave, she was entitled to be reimbursed by the distributees of Robert W. Snoddy. And making Haskins and Terry, the administrator of Robert
365 W. Snoddy, *and his distributees, parties defendants, she prayed for an injunction to restrain the sale of the slave, and for general relief.

Haskins and Terry alone answered the bill. They admitted that Robert W. Snoddy died in possession of the slave Shadrick; but denied that he was ever the property of Snoddy, or had ever been claimed by him as such. They say that a short time before Snoddy's death he admitted that this and the other slaves of Tyree held by him were held upon a secret trust for Tyree, to be returned to him whenever he came back to Virginia. They charged that at the time Tyree made the deed of trust, he was considerably indebted, though not to the value of his property; that he did not owe to Snoddy the amount stated in the deed; and that the deed was made to hinder and delay the creditors of Tyree. And they say they have been informed that although John C. Snoddy qualified as administrator of Robert W. Snoddy in 1845, and settled his administration account in 1846, he never would have any of these negroes appraised as part of the estate until December 1849.

There was proof that Robert W. Snoddy repeatedly admitted that Tyree, who had left the state, was to have the slaves again when he returned, and that Robert W. Snoddy was to hire out the slaves, and when Tyree's debts were paid from the hires, they were to be returned to him.

When the cause came on to be heard, the court held that although the plaintiff was entitled to contribution from the distributees of Snoddy, yet that the conveyance was fraudulent as to Tyree's creditors; and dissolved the injunction. And from this decree the plaintiff applied to this court for an appeal, which was allowed.

Irving and Johnston, for the appellant.
The Attorney General, for the appellees.

366 *SAMUELS, J. A question is made whether this court has jurisdiction to try this cause under the statute, Sessions Acts of 1852, p. 53, § 9. The slave, on which the execution is levied, is alleged to be of the value of six hundred and fifty dollars; but the debt, interest and costs, for which the execution issued, make an amount less than five hundred dollars. It has been said that the appellant, and those having the like interest with her, may relieve the slave from the lien of the execution, by payment of a sum less than five hundred dollars; and further, that the price of the slave, if sold, being first applied to discharge the execution, the residue will go to the appellant; that thus the only amount in controversy is the amount of the execution. The reply to these objections I conceive to be obvious and conclusive. The appellant sought by injunction to restrain the sale of a slave under an execution for the benefit of the appellees Haskins and Terry; the slave is alleged to be worth six hundred and fifty dollars; if the appellees had not been restrained they would have caused the slave to be sold; thus the complainant, if her right be good, as alleged, is in danger of having the slave converted into money. If complainant would be able at law to recover every dollar for which the slave may sell, or to recover his real value, without regard to the price sold for, or to recover the specific slave, still the remedy by injunction is appropriate. At one time it was held in this court that an injunction to a sale of slaves could not be sustained, unless it was averred and proved that such slaves were of some peculiar value, for which money would not be an adequate compensation. Allen v. Freeland, 3 Rand. 170; Randolph v. Randolph, 6 Rand. 194. More recent decisions, however, have settled the law otherwise. Harrison v. Sims, 6 Rand. 506; Sims v. Harrison, 4 Leigh 346; Kelly v. Scott, 5 Gratt. 479. If, then, the object of retaining a specific slave,
367 rather than receive his *value in money, or to recover him by suit at law, be in itself a cause of suit in equity, the appellant is rightly before this court. If she have a title to this slave, she may assert it, and this without reference to the amount of money the appellees may propose to give her in lieu of him.

If appellant have the better right, it is error to give her that right, upon terms of paying money, however small in amount; she should not be put to an election to give up such better right, or to enjoy it upon condition of paying money not properly chargeable upon the subject. I am of opinion the court here has jurisdiction to try the cause: The court of four members, however, being equally divided in opinion on the question, the decision must be regarded as settling the law of this case only.

The merits of the case I hold to be with the appellees. The deed of trust given by Tyree to secure a pretended debt to Robert C. Snoddy, and another pretended debt to John C. Snoddy, was made with express intent to delay, hinder and defraud Tyree's creditors. The sale by the trustee and the

purchase by Robert C. Snoddy was but the second step in the plan of fraud concocted between Tyree and Robert C. Snoddy. Although this deed and the sale under it may bind the parties to the fraud, yet as against Tyree's creditors, they have no effect whatever. After Snoddy's death his administrator succeeded to the title of his intestate, to be applied in the due course of administration; this title, as already said, was good against Tyree, but void against his creditors. I do not understand the appellant's counsel to insist that this succession of itself gave the title any additional strength. It is insisted, however, that events occurring since Snoddy's death, have perfected the title held by his distributees; that the possession of the slave for five years by the administrator him-
368 self gives *title under the statute of limitations; or if the administrator held for less than five years, his possession may be added to that of the distributee the appellant, and thus make five years, the limit prescribed by the statute. It is further insisted that the appellant, having received the slave as part of her share in the distribution of her husband's estate, without notice of fraud, must be regarded as a purchaser for value without notice, and be protected as such.

The bar prescribed by the statute, Code of Virginia, ch. 149, § 13, p. 593, cannot be relied on in this case. The legislature thereby intended to protect mere volunteers chargeable with fraud only by construction of law, after five years. But if actual fraud exist, and thereby a creditor have right for a "cause," other than "want of consideration deemed valuable in law," to impeach the transaction, the plain terms of the statute leave this right as it was before the Code was enacted. That the title of Snoddy is tainted with actual fraud, is alleged in the answer and shown by the proof; and thus the case is not affected by the statute last referred to.

It is somewhat difficult to understand how and against whom the appellant's counsel propose to apply the statute of limitations. It cannot be against Tyree; his title as between himself and Snoddy had passed by the deed and the sale under it: He had no cause of action which could be asserted at any time. The statute cannot be said to bar a cause of action, if such cause never existed. It cannot be against the appellees Haskins and Terry. If their rights in regard to the property shall be held to date from April 1848, when their judgment was obtained, or shortly thereafter when their execution was issued, five years had not elapsed when the levy was made; and for this reason, if no other existed, it must be held that the statute does not apply.

Without pointing out other difficulties
369 *in the way of the attempt to apply the statute, I am of opinion to rest the case upon the ground so clearly stated by Judge Leigh in the opinion reported in Wilson v. Buchanan, 7 Gratt. 334, 343. Although the case just cited was one growing out of a voluntary conveyance, and thus fraudulent only by construction of law, and although a case like it might now be decided otherwise, under the statute, Code of Virginia, p. 593, § 13, yet at the time it was decided constructive frauds and actual frauds stood upon the same ground, and the decision gave the same rule in regard to both. Actual fraud is not protected by the statute last cited; and thus the authority to that decision applies in all its force to the case before us. Notwithstanding the opinions of some of the judges in the case of Hutson's adm'r v. Cantril, 11 Leigh 136, the case cited from 7 Gratt. should be adhered to as well because of its intrinsic justice, as of the unanimous sanction given to it by this court.

The appellant's pretension that she is to be regarded as a purchaser for value without notice is without warrant. This alleged purchase rests upon the single fact that she took this slave as part of her distributive share in her husband's personal estate, thus leaving his value to be applied for the benefit of the other distributees out of the other personal estate. If the distributees were mistaken in regard to the value of the distributable surplus, in holding the slave in question to belong to the estate, the obvious remedy is to correct the mistake, not to perpetuate it. The appellant had her rights in the true surplus only; this surplus, upon the facts appearing in the record, is ascertained by deducting the amount of the lien on the slave from the larger and mistaken amount which had been distributed. By erroneously including this slave the surplus and her interest are made to appear larger than they ought to be.

370 *The case of Huston's adm'r v. Cantril, 11 Leigh 136, relied on by the appellant's counsel, affords no support to the case of their client. If we should concede all that was said by all or any of the judges in that case, yet the facts of this case are so widely different from those in that, as to deprive that case of all weight in the decision of this. In the case from 11 Leigh the conveyance alleged to be fraudulent was made before the marriage, and, as supposed by some of the judges, may in some degree have induced the marriage; in our case it is not alleged that the conveyance was made before the marriage, and it is probable at least, it was made afterwards. In the case from 11 Leigh, the husband claimed, as purchaser by marriage, the absolute title to the slaves; in our case the widow does not claim to have the absolute title but only a life estate in one-third part of her husband's slaves. In our case it is not alleged that marriage entered or could enter into the consideration at all, but the only consideration alleged is the giving up a claim on other portions of the estate, and having received in lieu thereof this slave as part of her distributive share. This is the same as to say that distributees (mere volunteers) of the fraudulent grantee, by foregoing part of a claim on a surplus which includes the fruit of the fraud, in consideration of

the property fraudulently acquired thereby, became purchasers. This pretension keeps out of view the fact that the whole personal estate of such grantee may be held liable to make good to creditors any injury done to them by the fraud. In the case before us the alleged consideration and subject of sale might both be held liable to the creditors, if necessary for their indemnity; and it is clearly wrong to permit the distributees to divide the estate into two parcels between themselves, calling one a consideration, the other a subject of sale, and thus withdraw those parcels, or either of them, from their liability to the superior claims of the creditors.

371 *I am of opinion that neither the statute of limitations nor the alleged purchase should prevent the levy of the execution, and that the decree should be affirmed.

DANIEL, J., concurred in the opinion of Samuels, J.

MONCURE and LEE, Js., thought this court had no jurisdiction of the case. But on the merits they concurred in the opinion of Samuels, J.

Decree affirmed.

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372 *William & Mary College v. Powell & als.

April Term, 1855, Richmond.

(Absent ALLEN, P.)

1. **Postnuptial Settlements—Consideration—Competency of Witnesses.***—A postnuptial settlement is made by a husband upon his wife. The wife afterwards dies; and then a bill is filed by a creditor of the husband, against her children, to set aside the settlement as fraudulent as to the creditor. The husband is not a competent witness to prove the consideration upon which the settlement was made.

2. **Same—Same—Dower Relinquished†—Evidence—Re-**

*Husband and Wife—Witnesses—Competency.—See the principal case cited in Warwick v. Warwick, 31 Gratt. 77; Fink v. Denny, 75 Va. 669; Smith v. Bradford, 76 Va. 765; Marks v. Spencer, 81 Va. 753; DeFarges v. Ryland, 87 Va. 404, 12 S. E. Rep. 805; Swann v. Housman, 90 Va. 818, 20 S. E. Rep. 830; Oliver v. Hayes, 1 Va. Dec. 188. See also, *foot-note* to Warwick v. Warwick, 31 Gratt. 70. See, further on this subject, monographic *note* on "Husband and Wife."

†**Postnuptial Settlements—Consideration—Relinquishment of Dower Rights.**—It seems well settled that the relinquishment of the wife's right of dower constitutes a valuable consideration to support a postnuptial settlement, as against the creditors of the husband, to the extent of the value of the dower; nor will the fact that such settlement was fraudulently made affect this. See the principal case cited as authority for this proposition in Burwell v. Lumsden, 24 Gratt. 443, 446, and *foot-note*, where there is a collection of cases in point; Davis v. Davis, 25 Gratt. 588; Gatewood v. Gatewood, 75 Va. 413; Strayer v. Long, 86 Va. 559, 10 S. E. Rep. 574; Ficklin v. Rixey, 89 Va. 834, 17 S. E. Rep. 325; Flynn v. Jackson, 93 Va. 347, 25 S. E. Rep. 1.

And in Glascock v. Brandon, 35 W. Va. 91, 12 S. E. Rep. 1104, the court makes use of the following language: "Blanton v. Taylor, Gilmer, 209, was decided in November, 1820. It decides that 'provision in lieu of dower will not be disturbed as fraudulent, as far as it is only equivalent to dower.' It was preceded by Quarles v. Lacy, 4 Munf. 251, and by Gosden v. Tucker's Heirs, 6 Munf. 1; the latter holding that a parol agreement between husband and wife that, in consideration of her joining him in a conveyance of a parcel of her lands, he would purchase certain other lands, etc., for her, is good and enforceable in equity against his heirs. Blanton v. Taylor was followed by Harvey v. Alexander, 1 Rand. (Va.) 219 (1822), which decides that, 'where a deed is made in consideration of natural love and affection, and the further consideration of one dollar, parol proof may be admitted of other valuable considerations.' 'A wife parting with her dower right in real property forms a sufficient consideration for a subsequent deed conveying other property for her benefit.' In Taylor v. Moore, 2 Rand. (Va.) 563 (1824), the question was fully considered and discussed. The court holds that 'if a married woman relinquishes her dower in lands under a promise that other property shall be settled on her as a compensation, such settlement will be good, although made after the relinquishment,'—here five years after the verbal agreement; 'but, if the value of the property settled exceeds the value of the dower relinquished, the deed should be set aside as to the excess and supported as to the residue.' In the case of *William & Mary College v. Powell, 12 Gratt. 372-385* (1855), the cases are discussed, and the doctrine reaffirmed. Therefore we may conclude that the rule of law with us is that a postnuptial settlement by the husband in favor of the wife, or wife and children made in pursuance of a fair and definite contract, by parol or otherwise, and for a valuable consideration, such as the relinquishment of dower actually made by the wife, will be held good against his general creditors. 'And although it may have been made under such circumstances that it must be pronounced fraudulent and void as to the creditors of the husband, yet, if the wife has relinquished her interest in property on the faith of such settlement, it will be held good to the extent of a just compensation for the interest which she may have parted with; and this, though the settlement may have been made subsequent to the relinquishment.' LEE, J., in *William & Mary College v. Powell, 12 Gratt. 385.*"

See monographic *note* on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348; monographic *note* on "Dower" appended to Davis v. Davis, 25 Gratt. 587.

Same—Same—Same—Presumption.—If the deed in which the wife relinquishes her dower right in the land thereby conveyed contains a recital of an agreement of her husband to settle other property to her use in consideration of such relinquishment, then the deed of settlement subsequently made will be presumed to be in the fulfillment of that agreement. A like presumption will arise if the deeds are contemporaneous or about the same time, so as to constitute one transaction, or if the relinquishment and settlement are by the same instrument, or if the deed of settlement is first made purporting on its face to be in consideration of her re-

citals in Deeds.‡—Such a settlement is made, which recites that the consideration in part is the agreement by the wife to unite in a conveyance of land, a part of which is her own derived from her father, and in another part of which she has a right of dower, for the purpose of paying a debt of her husband; and she does afterwards unite in the conveyance. The deeds themselves are proofs of the consideration, and the settlement will be sustained to the extent of the value of the interests she conveys.

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linquishment in the other deed, and such deed of relinquishment follows the settlement. But where the relinquishment of the wife's interest has been first made by deed containing no recital of an agreement to make a settlement in consideration thereof, and a subsequent settlement, made two years afterwards, as in this case, is sought to be set up, there must be distinct proof of the previous agreement. Fink v. Denny, 75 Va. 669, citing Blow v. Maynard, *supra*; Price v. Thrash, 30 Gratt. 515 (which cites the principal case); Campbell v. Bowles, *Id.* 652. See, in accord, the principal case also cited in Beecher v. Wilson, 84 Va. 818, 6 S. E. Rep. 209; Keagy v. Trout, 85 Va. 401, 7 S. E. Rep. 329; Strayer v. Long, 86 Va. 561, 10 S. E. Rep. 574, the latter case citing also Taylor v. Moore, 2 Rand. 563; Lee v. Bank, 9 Leigh 200; Harrison v. Carroll, 11 Leigh 484; Burwell v. Lumsden, 24 Gratt. 446; Davis v. Davis, 25 Gratt. 590.

The burden of proof is on the wife to prove the previous agreement. See the principal case cited in Perry v. Ruby, 81 Va. 323; Campbell v. Bowles, 30 Gratt. 663 (citing also Blow v. Maynard, 2 Leigh 29; Price v. Thrash, 30 Gratt. 515).

‡**Same—Same—Evidence of—Recitals in Deed.**—Recitals in a postnuptial settlement as to the consideration, though admissible as against the grantor and persons claiming under him, are not evidence against a creditor of the grantor by whom the fairness and validity of the deed is assailed. The principal case was cited as authority for this proposition in Price v. Thrash, 30 Gratt. 523; Brockenbrough v. Brockenbrough, 31 Gratt. 597 (citing also Blow v. Maynard, 2 Leigh 29); Perry v. Ruby, 81 Va. 325; Flynn v. Jackson, 93 Va. 346, 25 S. E. Rep. 1.

See generally, monographic *note* on "Deeds" appended to Fiott v. Com., 12 Gratt. 564.

Same—Presumption of Fraud.—In Yates v. Law, 86 Va. 119, 9 S. E. Rep. 508, it is said: "In a long line of cases, beginning with Blow v. Maynard, 2 Leigh 29, this court has decided, with respect to postnuptial settlements, that although such a settlement will be supported where it appears to have been made in execution of a fair contract, founded upon a valuable consideration, yet, from the relative situation of the parties and the convenient cover which such settlements afford a debtor to protect his property and impose upon the world, they are always watched with jealousy. Every such settlement, therefore, where the settler is indebted, is, as against his existing creditors, presumed to be voluntary and fraudulent, and will be so declared, unless those claiming under it can show the contrary; and this must be done, if at all, by legal and disinterested evidence, their own answers not being evidence in their favor, where no discovery, by way of evidence, is sought of them. *William & Mary College v. Powell, 12 Gratt. 372*; Price v. Thrash, 30 *Id.* 515; Fink, Brother & Co. v. Denny, 75 Va. 663; Hatcher v. Crews, 78 *Id.* 465; Perry v. Ruby, 81 *Id.*

3. **Deeds of Trust—Equitable Lien§—Case at Bar.**—A husband conveys a tract of land, one part of which is his own and the other part is his wife's maiden land, in trust to secure a debt. Afterwards the husband and wife unite in a conveyance of the land to a third person, upon the consideration of five hundred dollars, and that the grantee will pay the debt to secure which the land had been conveyed in trust by the husband. The creditor has an equitable lien upon the land under this last deed, which is good against parties claiming under the grantee. And if the five hundred dollars has not been paid, it will be postponed to the creditor's lien.
4. **Same—Sale by Trustee—No Memorandum of Purchase—Effect.**‖—A trustee sells land and bids it in for the creditor, but no conveyance or memorandum in writing of the purchase is made, nor is possession taken, but the possession remains in the former owner, under an agreement, as it is said, with the trustee, who is the agent of the creditor, that the said owner shall take it at the bid. The purchase is not valid, and the creditor will not be charged with the land at the price at which it was bid in.
5. **Principal and Surety—Reversion of the Relationship—Case at Bar.**—There is a principal and a surety in a bond; and the principal conveys land to the surety in consideration that the surety will pay the debt. This does not convert the surety into the principal and the principal into the surety in respect to the creditor; so that the original principal may be released by the dealing of the creditor with the original surety.

373 *Thomas J. Powell being indebted to William and Mary college, he executed his bond, bearing date the 25th day of April 1836, with George N. Powell as his surety, to the college, for one thousand five hundred dollars, payable on demand: And on the same day he executed a deed by which he conveyed to Edmund Christian, who was the bursar of the college, a tract of land in the county of King William, described as containing three hundred and ninety acres, in trust to secure the payment of said debt. One moiety of this land in quantity, and that part of it on which was the dwelling-house, was the property of Powell's wife, of which he was tenant by the curtesy; the other moiety Powell had purchased of one of the heirs of Mrs. Powell's father. Her moiety was much the most valuable.

317; Witz v. Osburn, 83 *Id.* 227, 2 S. E. Rep. 33; Rixey v. Deitrick, 85 Va. 42, 6 S. E. Rep. 615." See, in accord, Keagy v. Trout, 85 Va. 401, 7 S. E. Rep. 329. See also, principal case cited in Lewis v. Mason, 84 Va. 738, 10 S. E. Rep. 529. See monographic *note* on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348. For further information on this subject, see monographic *note* on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348.

§**Equitable Mortgages.**—See principal case cited in Atkinson v. Miller, 34 W. Va. 121, 11 S. E. Rep. 1008.

‖**Sale of Realty—Statute of Frauds.**—Where a sale of realty is made by a trustee, and no memorandum is made in writing by the trustee, such sale is void under the statute of frauds. Ralphsnyder v. Shaw, 45 W. Va. 687, 31 S. E. Rep. 956.

By deed bearing date the 1st of April 1841, Thomas J. Powell and Mary E. his wife, in consideration of the sum of five hundred dollars in cash, and for the further consideration that George N. Powell should pay Christian, agent of William and Mary college, the debt aforesaid of one thousand five hundred dollars, with its accruing interest, conveyed to said George N. Powell the said tract of land, described as containing three hundred and three acres.

In 1841 George N. Powell had become personally indebted to the college; and on the 27th of September of that year, he executed to the college his bond for six hundred and forty-eight dollars and ninety-one cents; payable one-sixth thereof annually, with interest payable annually, from the date of the bond.

In 1846 Christian, the agent of the college, instituted actions on both the above mentioned bonds in the Circuit court of King William county. The process in the first case was not served upon Thomas J. Powell, who had then removed from the county, but it was served on George N. Powell; and judgments were recovered against him.

374 *Whilst these actions were pending, George N. Powell, by deed bearing date the 6th day of April 1846, conveyed to Frances W. Scott the tract of land which had been conveyed to him by Thomas J. Powell and wife, and describing it as that land, and also other lands, slaves, and indeed all his property, in trust to secure numerous creditors named in the deed. These creditors were divided into three classes. The first embraced a number of persons, to whom he stated he owed small debts, and a debt of five hundred dollars stated to be due to James H. Powell. The second class embraced debts stated to be due to his children, amounting to upwards of four thousand dollars. And the third class embraced the two debts due to William and Mary college. Scott, the trustee, was about to proceed to sell the trust property, when the college obtained an injunction to the sale, from the judge of the Circuit court of King William county: The bill was sworn to by Christian, the bursar of the college. It set out the debts aforesaid due from the Powells to the college, and stated that judgments had been recovered upon them, and that the same were still due. It stated the conveyance by Thomas J. Powell in trust to secure the debt he owed; and the subsequent deed by Thomas J. Powell and wife to George N. Powell, and also the deed of the latter to Scott; and charged that the two last were fraudulent and void as to the college. And the prayer of the bill was for an injunction, and for a receiver. That the said trust deed might be declared void, and the property applied to the plaintiffs' debts, and for general relief.

George N. Powell, in his answer, did not question that the debt of one thousand five hundred dollars was due, but he denied that the deed from Thomas J. Powell and wife to him was fraudulent; and insisted that his deed to Scott did not deprive the college of their lien under the deed of trust

375 from Thomas J. *Powell to secure his debt to the college, but that that land was primarily liable to that debt. He also denied that the deed to Scott was fraudulent, or that the debts stated to be due to his children were simulated.

In November 1847 a decree was made in this cause by consent, by which the property was directed to be sold; and it was provided, that should the plaintiffs become the purchasers of the land conveyed by Thomas J. Powell to Edmund Christian, to secure the debt of one thousand five hundred dollars, the commissioner was to take a written memorandum of the sale signed by the plaintiffs or their agent, without further security, and return the same with his report. Under this decree this land was sold, and was purchased by Christian for the college at seven hundred and two dollars, and the sale was reported to the court: And it does not appear in this record what further has been done in that cause.

By deed bearing date the first day of January 1839, Thomas J. Powell conveyed to James Bosher a tract of between eighteen and nineteen acres of land lying in the county of Henrico near the city of Richmond, four slaves and some household furniture, in trust for the separate use of his wife Mary E. Powell during her life, with a general power of appointment; and if she should make no appointment, to her heirs. And Mrs. Powell was authorized to direct a sale and reinvestment of any part of the trust property. This deed recited that Mary E. Powell was the owner of the tract of three hundred and three acres of land in King William, before mentioned, and had theretofore agreed that it might be sold by her husband, and that she would join in the conveyance thereof, on the condition of a settlement to her separate use of property equivalent therefor; and that with an understanding that the land mentioned in this deed should be thus settled,

she did theretofore by the said James

376 Bosher as her next *friend, out of her own private funds or pin money, pay the sum of six hundred dollars to William A. Carter, in part for the purchase of the same. And upon these considerations, as well as of natural love and affection, the settlement was made. This deed was executed by Thomas J. Powell, Bosher the trustee, and Mrs. Powell. At the time of the execution of this deed Thomas J. Powell was in embarrassed circumstances, and became insolvent.

The land conveyed in the deed of January 1839 was sold by the direction of Mrs. Powell, and the proceeds were invested in a lot in the city of Richmond. Mrs. Powell died prior to 1805, leaving ten children, and without having exercised her power of appointment: And in November 1850 Bosher the trustee conveyed the trust property to her children. He afterwards purchased three of the interests of the children in the property.

In 1851 the parties interested in this property instituted a suit in the County court of Henrico for the purpose of having it sold and divided; and a decree was made appointing Herbert A. Claiborne a commissioner to sell and distribute the proceeds. The sale was made, and the net proceeds of the slaves amounted to one thousand eight hundred and ninety-eight dollars and thirty-five cents. The lot sold for one thousand dollars.

Before the proceeds of the sale aforesaid were paid over to the parties, William and Mary College filed a bill in the Circuit court of Henrico against Thomas J. Powell, Bosher and the children of Mary Powell, in which they state the indebtedness of Thomas J. Powell to the college, and the deed of trust given to secure it, the conveyance by George N. Powell to Scott, and their suit in the Circuit court of King William, the consent decree and their purchase of the King William land; the in-
377 solvency of Thomas J. *Powell, and his deed of the 1st of January 1839 to Bosher, the subsequent sale of the land in Henrico, and reinvestment of the proceeds, the death of Mrs. Powell, and the proceedings in the County court of Henrico, as hereinbefore detailed. They charge that the settlement upon Mrs. Powell is fraudulent and void as to the creditors of Thomas J. Powell; and insist that the said property in the hands of the voluntary donees, is liable to satisfy their debts. And they pray that the deed of the 1st of January 1839, and the subsequent deeds made by the defendants conveying that property, may be declared null and void as to the plaintiffs; and that the said property, or its proceeds in the hands of the commissioner Claiborne, may be subjected to satisfy the debt due to them from Thomas J. Powell.

Bosher answered the bill, and after admitting the facts as to the settlement, as before stated, alleged that after the trust had terminated, and the trust subject had been conveyed to the children of Mrs. Powell, he had purchased the interest of one of the children, which he had afterwards conveyed to Alexander Houchins, who had married a daughter of Mrs. Powell; and that he had afterwards purchased the interests of two other of the children, for which he had received a conveyance. That he had never heard it questioned, until the filing of the plaintiffs' bill, that the settlement was for valuable consideration; and he was still satisfied that there was no reasonable ground for the attempt then made to subject the trust subject.

The children of Mrs. Powell also answered. They insist that the settlement of January 1st, 1839, was for valuable consideration. They state that after the conveyance of the King William land by Thomas J. Powell and wife to George N. Powell, that land was put up for sale by Edmund Christian, as the bursar of the college, when the sum of one thousand seven
378 hundred *dollars was bid for it by a highly respectable gentleman; and that thereafter, Christian bid it in at the price of one thousand seven hundred and five dollars.

And they insist that the debt of one thousand five hundred dollars should be credited for this sum.

In February 1853 the cause came on to be heard, when the court directed one of its commissioners to ascertain and report the nature and extent of the consideration paid and surrendered by Mary E. Powell for the settlement made upon her by the deed of the 1st day of January 1839 from Thomas J. Powell to James Bosher.

The defendants introduced before the commissioner Thomas J. Powell as a witness, and he was objected to as incompetent by the plaintiffs, on the ground that he was the husband of Mary E. Powell as well as grantor in the deed. He stated that previous to the execution of that deed, there was an agreement between himself and his wife. That having purchased the tract of eighteen acres of land conveyed in the deed for one thousand six hundred dollars, and finding he could not pay for it by six hundred dollars, and still owing the college a debt, Mrs. Powell told him that she had about six hundred dollars, which she had made from the sale of turkeys, and work, and other savings, which she had been laying up for several years, and that if he would make her a right to this tract of land, she would pay the six hundred dollars, and convey her interest in the land she had inherited from her father, and in some other lands he had bought adjoining the same, for the express benefit of the college. And he stated that the deed afterwards executed by himself and his wife to George N. Powell was intended to carry out this agreement. The witness valued the four slaves conveyed in the deed at from five hundred to six hundred dollars; he stated that slaves then sold very low, and that both the men were confirmed invalids;
379 *and that one of them had been valued when received at fifty dollars, and was since dead. Of the other two one was a woman, and the other her infant. The furniture he valued at about one hundred and ninety dollars. He also stated that Christian informed him that he had purchased the King William land for the college at one thousand seven hundred and five dollars, and that he had let it off to George N. Powell; and that witness told him that he had done wrong, and that witness considered himself exonerated, as he had done that. This sale took place in 1841 or 1842.

The only witness, beside Powell, who spoke of the purchase of the land by Edmund Christian, was Warner Edwards. He says that Major Christian offered for sale at public auction, at King William courthouse, a tract of land formerly owned by Thomas J. Powell, proclaimed by the crier to be the property of George N. Powell. That witness was authorized by Dr. Lemuel Edwards to bid as high as seventeen hundred dollars for him, for the tract of land,

which he did, and he was overbid by Major Edmund Christian five dollars; and the land was knocked out to him. That it was the land on which Thomas J. Powell lived at the time he removed from King William. That he considered Dr. Edwards able to pay for the land at the price bid for it: And that the sale was in 1841. The witness knew nothing about the land, and only knew that the crier stated it was the land of George N. Powell.

The commissioner made his report, in which he set out the principles on which he had estimated the value of Mrs. Powell's dower interest in the land of her husband, and also in her maiden land of which her husband was tenant by the curtesy. Mrs. Powell being forty-seven years old and her husband forty-nine; and his land in which she had a dower interest being valued at six hundred dollars, he estimated her
380 *dower interest at one hundred and sixty-four dollars and seventy-three cents; and her land being valued at fifteen hundred dollars, he valued her interest in it at four hundred and twenty-three dollars and twenty-six cents: the two interests making five hundred and ninety-seven dollars and ninety-nine cents. And if she was to be allowed for the six hundred dollars paid out of her savings, the value of her interest in the trust property would be eleven hundred and ninety-seven dollars and ninety-nine cents. The property conveyed in trust for her, the commissioner estimated at two thousand, one hundred and eighty-seven dollars and nineteen cents, making the sum received by Mrs. Powell more than was surrendered and paid by her, nine hundred and eighty-nine dollars and twenty cents. The commissioner made two statements of the debt due by Thomas J. Powell to the college, in one of which he credited the amount for which the King William land sold under the decree in the suit pending in that county, seven hundred and two dollars; and in the other he credited the sum of seventeen hundred and five dollars, for which sum it was insisted by the defendants, Christian had purchased the land for the college.

The plaintiffs excepted to the report: first, to any allowance whatever in the way of consideration paid by Mrs. Powell for the deed of settlement of the first of January 1839; and second, to the credit of seventeen hundred and five dollars, allowed in the second statement of the debt due to the college. And the defendants excepted, so far as the calculation of the wife's interest in real estate is founded upon Wigglesworth's tables.

The cause came on to be finally heard on the 26th of March 1853, when the court held, that the deed of January 1st, 1839, from Thomas J. Powell to Bosher, having been made when Powell was indebted to
381 the *plaintiffs, was, as to them, null and void, except to the extent of the interests surrendered by Mrs. Powell in relinquishing her right of dower in the lands of her husband, and her right to her own land. And the court further held that the deed of the first of April 1841 from Thomas J. Powell and wife to George N. Powell was not fraudulent and void, inasmuch as the deed fully recognizes the plaintiffs' debt, and increases the security for its payment, by making the whole land liable therefor. The court further held that the debt due to the plaintiffs from Thomas J. Powell, should be credited by the sum of seventeen hundred and five dollars, as of the 19th of October 1841, the date of the sale, when the land was bid in by Christian for the plaintiffs. And the court confirming the commissioner's report, so far as it was consistent with these views, and overruling all exceptions in conflict therewith, decreed that Herbert A. Claiborne, the commissioner who had sold the settled property, out of the funds in his hands, should pay to the plaintiffs the sum of four hundred and eighty-eight dollars and sixty-five cents, with legal interest on two hundred and ninety dollars, part thereof, from the 19th of October 1841, and their costs. From this decree the college applied to this court for an appeal, which was allowed.

Daniel, for the appellants.
Griswold & Claiborne, for the appellees.

LEE, J. The settlement of Thomas J. Powell upon his wife of the 1st of January 1839, having been made when he was heavily indebted to the appellants, and as it would seem, insolvent, being of his whole estate except perhaps his interest in the King William land, which was already incumbered beyond its value by the deed of trust of 1836, and being upon a con-
382 sideration *not at all adequate in value to the property settled, must be held fraudulent and void as to creditors, except so far as it may be sustained for the purpose of rendering to the estate of Mrs. Powell a just equivalent for any interests which she may have surrendered on faith of it. We are therefore to enquire what were the interests, if any, so surrendered, and whether to the extent of those interests the settlement can be held good. And on making this enquiry we are at once met by the objection to the testimony of Thomas J. Powell.

Now it is a pervading principle of the law of evidence, that a husband or wife cannot be a witness in a cause, civil or criminal, in which the other is a party; not for that other, because the law considers them as one person, and their interests as identical; nor against that other, on grounds of public policy, because of the mutual confidence subsisting between them, and for fear of sowing distrust and dissensions and of giving occasion to perjury. Co. Litt. 6 b; Stark. Ev. part iv, p. 706; Barker v. Dixon, Cas. Temp. Hardwick 264; Bentley v. Cooke, 3 Doug. R. 422; Robin v. King, 2 Leigh 141, per Carr, J.; Stein v. Borman, 13 Peters' R. 209; Fitch v. Hill, 11 Mass. 286.

The rule prevails in equity as well as at law. Sedwick v. Watkins, 1 Ves. jr. R. 49;

Vowles v. Young, 13 Ves. R. 140; City Bank v. Bangs, 4 Paige's R. 285. And if an estate be settled upon a wife for her sole and separate use, exempt from the debts or control of the husband, the legal identity of interests is regarded as still subsisting, and the husband will not be admitted to testify touching such separate estate, though there may be other parties in respect of whom he would be a competent witness. Windham v. Chetwynd, 1 Burr. R. 424; Davis v. Dinwoody, 4 T. R. 678; Langley v. Fisher, 5 Beav. R. 443; Snyder v. Snyder, 6 Binn. R. 483. So a hus-
383 band is not a competent *witness to prove the execution of a deed conveying property for the benefit of his wife, for the purpose of registration. Johnston v. Slater, 11 Gratt. 321. Nor is it material that the relation of husband and wife no longer exists when the party is offered as a witness, for the incompetency still remains though the marriage have been dissolved by death or a divorce a vinculo matrimonii. Aveson v. Lord Kinnaird, 6 East's R. 188; Coffin v. Jones, 13 Pick. R. 441; Stein v. Borman, 13 Peters' R. 209; Ratcliff v. Wales, 1 Hill's R. 63; McGuire v. Malony, 1 B. Monr. R. 224.

This case falls clearly within the rule ascertained by the cases cited. Thomas J. Powell is offered as a witness in support of the settlement made by him upon his wife. By his testimony it is sought to make out the consideration in favor of those now claiming under the wife. For this purpose he was clearly incompetent, nor was his competency restored (as we have seen) by the death of his wife. That he was not himself personally interested because he was bound for the college debt in any event, or that his interest was the same either way, does not vary the case. The authorities cited show that his incompetency does not rest upon the narrow ground of a personal and direct interest in himself but upon other and different principles. Indeed the incompetency has been maintained even in cases in which the husband's interest was the other way. Thus in an action by the trustee for a wife against the sheriff for taking goods which were her separate property, under an execution against the husband, the husband was held to be an incompetent witness for the plaintiff (the wife being regarded as the real plaintiff), although he had an interest on the other side, in having his debt satisfied by the levy of the execution. Davis v. Dinwoody, 4 T. R. 678; see also Bland v. Ansley, 5 Bos. & Pul. 331.

The cases of Kevan v. Branch, 1
384 Gratt. 274, and Patteson *v. Ford, 2 Gratt. 18 (cited by the counsel), do not touch the question here. They merely affirm the competency of the grantor as a witness for the grantees in an action by them as relators upon an indemnifying bond taken when the property was levied upon under an execution against the grantor, in favor of other creditors of the common debtor. They decide that the party's being such grantor does not of itself disqualify him as a witness; but do not reach the case where the grantee is the wife of the grantor, and the parties interested are claiming under her.

Rejecting then the testimony of Thomas J. Powell, there is no evidence supporting or explaining the item of six hundred dollars claimed as part of the consideration of the settlement. It is true it is recited in the deed that this was part of Mrs. Powell's private funds or "pin money" paid towards the purchase of the property settled. But the recitals in a post nuptial settlement as to the consideration, though admissible as against a person claiming under the settler, are not evidence against a creditor by whom the fairness and validity of the deed is assailed. Nor are declarations of the wife at the time of executing a deed, or at other times, that it was executed in consideration of a promise of the husband to make a settlement upon her, or because he had made such a settlement, sufficient evidence of a contract to support such a settlement, if made, even to the extent of a reasonable compensation for a right of dower relinquished by her. Blow v. Maynard, 2 Leigh 29; Lewis v. Caperton, 8 Gratt. 148. I think it clear therefore that the claim to this six hundred dollars as part of the interest to the extent of which the estate of Mrs. Powell can under any circumstances be indemnified, cannot be maintained. Indeed if we look at the testimony of Thomas J. Powell, it would appear that this six hundred dollars was in fact his money, though called Mrs. Powell's, and that
385 *her alleged right was not such as under the circumstances surrounding the parties and the transaction at the time of executing the settlement, can sanction its withdrawal from the fund subject to the debts of Powell, and its appropriation to the benefit of his wife.

But although the claim to this six hundred dollars must be abandoned, I am of opinion that the settlement of the 1st of January 1839 may and should be sustained to the extent of securing to the estate of Mrs. Powell a just and reasonable compensation for the interests in the real property belonging to her, which were surrendered by the deed of the 1st of April 1841. That a post nuptial settlement in favor of a wife, made in pursuance of a fair contract for valuable consideration, will be held good, is a doctrine supported by abundant authority: And although it may have been made under such circumstances that it must be pronounced fraudulent and void as to the creditors of the husband, yet if the wife have relinquished her interest in property on faith of such settlement, it will be held good to the extent of a just compensation for the interest which she may have parted with; and this though the settlement may have been made subsequent to the relinquishment. 1 Eq. Cas. Ab. 19; Ward v. Shallet, 2 Ves. R. 16; Prec. in Chy. 113; Cottle v. Fripp, 2 Vern. R. 220; Clerk v. Nettleship, 2 Levinz R. 148; Chapman v.

Emery, Cowp. R. 278; Lady Arundell v. Phipps, 10 Ves. R. 139; Jones v. Marsh, Cas. Temp. Talbott 63; Quarles v. Lacy, 4 Munf. 251; Blanton v. Taylor, Gilm. 209; Taylor v. Moore, 2 Rand. 563; Wickes v. Clarke, 8 Paige's R. 161; Fonbl. Eq. B. 1, ch. iv, § 12 and n. In Harrison v. Carroll, 11 Leigh 476, Judge Stanard says, "It is not questioned by me that the dower interest of the wife may constitute a valuable consideration that will support a post nuptial settlement, and that such settlement,

386 *made in consideration of the surrender of such dower interest, may be supported against the claims of creditors." And in Blow v. Maynard, 2 Leigh 29, Judge Carr says, that "if the parting with these contingent interests (such as a jointure, dower, &c.) by the wife will support such settlements, it follows a fortiori, that her parting with her own estate, or making a charge upon it for her husband's benefit, will support them."

It is no valid objection to the settlement that there was no previous agreement in writing between Powell and his wife, nor (the testimony of Thomas J. Powell being rejected) any competent proof of even a parol agreement between them before the settlement. The agreement here must be regarded as contemporaneous with the settlement itself. The settlement upon its face purports to be in consideration of her surrendering her interest in the King William land; and her conveyance of her estate in that land is made after the settlement was executed and admitted to record. The settlement was executed by Mrs. Powell and by Bosher the trustee, as well as by Thomas J. Powell. It is a very different case from that in which the relinquishment of the wife's interest has been first made, and a subsequent settlement sought to be set up. In the latter case distinct proof of a previous agreement may properly be called for. Here when the conveyance of the King William land was made, it will be fairly and legitimately intended that it was made in reference to and on faith of the previous settlement made upon the wife professedly in consideration of such conveyance. What need of any specific, independent proof to this point? Res ipsa loquitur. And it would be most unjust to disappoint the wife wholly of the settlement on faith of which she must be supposed to have made her relinquishment, and yet hold her to the latter as valid and obligatory. See Anon. Prec. in Chy. 101.

387 *It would be a sufficient answer to the charge of fraud on the part of Powell and wife in executing the deed of settlement, to say, that if there were fraud and she participated in it, still it will not be imputed to her by reason of her coverture. Blanton v. Taylor, Gilm. 209; Taylor v. Moore, 2 Rand. 563, 580. But in truth there is no just room to attribute any fraudulent purpose on the part of Mrs. Powell or any complicity in, or knowledge of any such purpose (if such there was) on the part of Thomas J. Powell. The settlement was made avowedly in consideration of her agreeing to convey the whole of the King William land, and such conveyance would of course pass both her own maiden land and her dower right in that of her husband. She subsequently in good faith carries out the agreement by conveying the same to George N. Powell; and the deed recites that a part of the consideration on which it was made was the agreement of George Powell to pay the college debt.

The interest of Thomas Powell in the land was already bound for the debt by the deed of trust of the 20th of April 1836; and George Powell's agreement to pay it, and his acceptance of the deed for the land with that stipulation on its face, would undoubtedly create an implied equitable lien upon the part which had belonged to Mrs. Powell, which could not be defeated or impaired by the deed of trust executed on the 6th of April 1846. For that deed in fact refers to the deed from Thomas J. Powell and wife to George Powell, and describes the King William land (though stated to contain 309 acres) as the same land conveyed by that deed: And thus gives full notice of the charge for the college debt. So that in effect by the transaction the security of the college debt is increased and improved instead of being diminished or impaired. That the deed recites the payment of five hundred dollars to the grantors as part of the consideration

388 *will not affect the character of the transaction; for whether that were a nominal sum merely, or if a real sum, whether it had been paid or were yet to be paid, the right of the college will not be varied. The whole land remained bound for the whole college debt, for the payment of which George Powell was also bound personally, as security for Thomas Powell; and if the five hundred dollars was yet to be paid to Thomas Powell, he would of course be postponed to the college, and could only come in after its debt had been satisfied.

Nor is there any thing in the circumstance that the deed of settlement describes the King William land as the property of Mrs. Powell, to justify any serious imputation against the transaction. It is true the whole of the tract was not her individual property, but a part of it, one hundred and fifty acres, and much the more valuable portion, being that on which the mansion-house stood, and which would seem to have been in a fine state of improvement, was her maiden land derived from her father; and it might very well happen that the whole might have been called her property by a mistake of the scrivener. Thomas J. Powell had already conveyed his interest in the whole by the deed of 1836, and Mrs. Powell's deed whenever properly made, would have precisely the same effect in passing her interest in the whole, whether described as wholly belonging to her, or partly to her and partly to Thomas J. Powell. It can scarcely be supposed that this erroneous description was made will-

fully and with a premeditated purpose of fraud by enhancing the supposed value of the subject which was to be relinquished in consideration of the settlement. The parties must have known that the facts were too readily ascertainable to render a resort to so flimsy an expedient at all safe or expedient; and I think, looking to all the circumstances, that it will be
389 *fairer to attribute the erroneous recital to carelessness or mistake rather than to any fraudulent contrivance or design.

To the extent therefore of a just compensation to the estate of Mrs. Powell for her maiden land surrendered by the subsequent conveyance, and for her contingent dower interest in the land of her husband (to be estimated as of the date of the transaction), I think the settlement of 1839 may and must be held good. And of this the creditors of Thomas Powell can have no just cause to complain. They are not injured because they get precisely what they would have been entitled to if there had been no settlement, and no relinquishment by Mrs. Powell of her own land, and of her interest in that of her husband. In the latter case her own estate and her dower right would have remained to her, and the just value of these and no more is what she is now to receive under the settlement.

Another and an important question relates to the credit of one thousand seven hundred and five dollars allowed by the decree upon the debt of Thomas and George Powell, as of the 19th of October 1841.

The claim to this credit is sought to be maintained upon two grounds: first, that the appellants should be treated as the purchasers of the King William land at the sale alleged to have been made by Christian in October 1841, and at which it is claimed the property was purchased for them by Christian, at the price of one thousand seven hundred and five dollars, to be applied as a credit upon their debt; secondly, that Thomas Powell should be regarded as a mere surety for the debt, and that Christian so conducted himself towards George Powell, the real principal as now supposed, as to discharge the surety from the debt either in the whole or at least to the extent of the one thousand seven hundred and five dollars.

390 *As to the first ground, the objection at once occurs that its effect is to enforce a contract for the sale and purchase of land without any note or memorandum in writing, signed by the party, or any agent for him, in direct contravention of the statute of frauds. It is not pretended that any conveyance was made or any written memorandum of the sale signed by any body. The whole matter rests in parol and upon the testimony of a single witness, that of Thomas J. Powell upon this point being of course inadmissible. Nor is there the slightest proof of any such part performance by delivery of possession or otherwise, as would induce the Court of chancery upon its principles, to take the case out of the operation of the statute. Nor could the wisdom and sound policy of the statute be perhaps better vindicated than in this case. The claim here must be sustained, if at all, upon the testimony of Edwards who speaks of a transaction, that took place upwards of eleven years previously, and of what was said by the different parties at the time. All the information he had at the time was evidently from his own showing, extremely meagre and imperfect, and the subject has been still further obscured by the mists of years since elapsed. The account which he gives is in some respects contradictory, in others, confused and unintelligible, and in all, unsatisfactory; and to receive such evidence to charge a party with the responsibilities of a contract would be fraught with all the mischiefs which it was the very design of the statute to remedy.

The other ground upon which it is sought to sustain this credit is equally untenable. There is nothing to support the pretension of Thomas Powell, that the relations in which he and his surety George Powell stood with respect to the college debt, were changed with the consent of Christian, and that George Powell became the prin-
391 cipal debtor while he remained *bound as security merely. On the contrary, in the King William bill filed in 1847 and sworn to by Christian, he treats the debt as one in which Thomas Powell is principal and George Powell the surety, and he assails the deed of trust to Scott in 1846 as fraudulent, and claims that the land is then still liable, primarily, to the college debt. In the answer of George Powell, it is not pretended that Christian had assented to any arrangement changing the relations of the parties, or that any thing had been done to exonerate the land or discharge either Thomas Powell or himself from the debt or any part of it. Nor does he pretend that any such sale had ever taken place as that now alleged to found the claim to the credit of one thousand seven hundred and five dollars. On the contrary, he impliedly admits that the whole original debt is still owing by both the parties, and he expressly claims that the King William land is still primarily liable to the payment of the whole debt. All this is equally and utterly at war with the pretension now made of a purchase by Christian at a sale made by himself as trustee in 1841, on account of this debt, and with the notion, now brought forward for the first time, that Thomas Powell had been in some way exonerated from the debt. In truth, Christian seems to have done nothing except to give these parties the most liberal and continued indulgence; and if the land was suffered to go to waste while in the possession of George Powell, it was the fault of Thomas Powell and not of Christian. It was Thomas Powell who trusted George Powell: he conveyed the land to him absolutely and placed him in possession. If the property suffered whilst in his possession, Thomas

Powell cannot complain; and if he were as he now alleges merely the security of George Powell, he had the right by a proper proceeding to have had the land sold at any time for his indemnity. Stephenson v. Tavenners, 9 Gratt. 398.

392 *I am of opinion that the appellants may very well claim to charge the King William land primarily with the payment of their debt in preference to any of the other creditors secured by the deed of trust of the 6th of April 1846, without in any manner impairing their right to hold Thomas Powell personally responsible for any balance that may remain unsatisfied, and that nothing is shown in the cause to exonerate him or any property which would have been otherwise liable to the appellants' demand.

And while I am of opinion that this credit of one thousand seven hundred and five dollars must be rejected, I think it would be premature at this time to undertake to pronounce what credit should be given on account of the King William land. The land was sold, it seems, under a consent decree in the King William suit, and was purchased in on account of the college debt at the sum of seventeen hundred and two dollars. This sale appears to have been made on the 25th of January 1848, but it no where appears that it has ever been confirmed; and by the terms of the decree the proceeds were to await the event of the suit. So far as this record discloses, that suit is still pending, and non constat but that this sale may be disaffirmed and a new sale directed. Nor can we anticipate with certainty that the King William court will direct the application of the proceeds of the sale to the college debt, although we may think, judging from the record before us, that such application will be right and proper. But neither the trustee nor the creditors named in the deed of trust of 1846, are parties in this cause; and they are the parties to be prejudiced by this application of the proceeds of this land, and whose interest it is to contest it; and for obvious reasons it would be improper to direct that the college debt should be credited by the amount of these proceeds except by a decree which would be binding upon the

393 *creditors named in that deed. The subject of this credit then should await the action of the King William court, unless the appellants shall sooner consent that it may be given.

The defense set up in the answer of Bosher, of a purchase by him of the shares of some of the heirs of Mrs. Powell, for valuable consideration without notice of any vice or defect in the settlement of 1839, does not appear to have been passed upon by the Circuit court, nor has it been adverted to in the argument here: and as in the view I take of the case, the cause must go back to the Circuit court, it is not necessary to express any opinion in regard to it at this time. It may be made the subject of proof if the parties shall be so advised, and of further consideration in the Circuit court.

I am of opinion to affirm so much of the decree as declares the deed of settlement of the 1st of January 1839 void as to the appellants, except to the extent of the just value of the interests surrendered by Mary E. Powell, in conveying her maiden land and relinquishing her right of dower in the lands of her husband; and also so much of the same as declares the deed from Thomas J. Powell and wife to George N. Powell of the 1st of April 1841, to be not fraudulent nor void; but in all other respects to reverse the same, with costs to the appellants; and to remand the cause to the Circuit court, with directions further to proceed in the same according to the principles hereinbefore declared.

The other judges concurred in the opinion of Lee, J.

Decree reversed.

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394 *Taylor v. Cullins.

April Term, 1855, Richmond.

(Absent ALLEN, P.)

1. **Case Approved.**—The principle of the case of *Maria* v. *Surbaugh*, 2 Rand. 228, recognized and enforced.
2. **Wills—Emancipation of Slaves—Increase—Case at Bar.***—Testator gives all his estate to his two daughters for life, or until they marry; and directs that his slaves whom he names, shall be free on the happening of either event; and he gives them all the property which should then remain. One of the slaves has a child, and dies during the life of the daughters. The child is not freed by the will, but is embraced in the bequest to the slaves: And by the act of March 15th, 1832, Sup. Rev. Code 246, the bequest of the child to the emancipated slaves is void.†

John Cullins, late of the county of Powhatan, died in 1833, leaving a will which was duly admitted to probat. In the third clause of his will he says, "I give to my daughters Henley Cullins and Polly Cullins all my estate, both real and personal, provided they never marry. If my daughter Henley should die before my daughter Polly, it is my desire that Polly should have the whole of my property; or if my daughter Polly should die before my daughter Henley, it is my desire that my daughter Henley shall have the whole of the property. And it is my desire, that at the death of my daughters Henley and Polly, that the following slaves shall be set free: Nancy, Jane, Sally, Judith and America. And whatever property there may be left at the death of my daughters Henley

395 *and Polly, it is my wish and desire that it may be equally divided between the above named slaves."

*See *foot-note* to Osborne v. Taylor, 12 Gratt. 117.

†The act says, "No free negro or mullato shall hereafter be capable of purchasing or otherwise acquiring permanent ownership, except by descent, to any slave, other than his or her husband, wife or children; and all contracts for any such purchase are hereby declared to be null and void."

The testator then provides that if one of his said daughters marries, the other shall have the property; and if both marry, that the said slaves shall be set free: And he gives them the property upon this event as upon the death of the daughters.

Neither of the daughters married, and Henley survived Polly.

In 1846 Henley Cullins, in consideration of a debt which she owed to Creed Taylor, and that he would pay all other debts which she owed, and would furnish her a home, and support her comfortably for her life, conveyed to him all her property. Taylor states in his answer that this contract had been made some time previous to 1846, when the deed was executed.

In the lifetime of Henley Cullins, Nancy, one of the slaves mentioned in the will of John Cullins, died, leaving a child named Martha: and all of the slaves seem to have gone into the possession of Taylor.

In 1850 the surviving slaves mentioned in the will of John Cullins, filed a bill in the Circuit court of Powhatan against Taylor and John C. Stratton, administrator de bonis non with the will annexed of John Cullins deceased, setting out the will, the death of Henley Cullins, and of Nancy, and that Martha was in the possession of Taylor who was about to sell her; and claiming that she was a part of John Cullins' estate which was bequeathed to them; and asking for an injunction to restrain the sale, and that she and the other property of John Cullins, after payment of his debts, might be delivered to them.

Taylor answered, insisting upon his title to the slave under the conveyance from Henley Cullins, and that the administrator of John Cullins had assented to the bequest.

Stratton answered, denying that he
396 had assented to *the bequest in favor of the daughters of John Cullins; and saying that the estate of John Cullins was indebted to him in the sum of forty dollars, and owed another small debt.

When the cause came on to be heard, the court held, that Henley and Polly Cullins took but a life estate in the slaves and other property of John Cullins, except such as was consumed in the use: That the slaves emancipated by the will were free on the death of Henley Cullins, but that their children born after John Cullins' death and during the lifetime of Henley Cullins, were slaves, and a part of John Cullins' estate; which by the terms of the will were given in remainder to the emancipated slaves. And Taylor was decreed to deliver Martha and any other of the children of the emancipated slaves born since the death of John Cullins, and before the death of Henley Cullins, to Stratton the administrator, who was directed to hold them subject to the future order of the court. From this decree Taylor applied to this court for an appeal, which was allowed.

Patton, for the appellant, insisted:

1st. That the slave Martha was not emancipated by the will of John Cullins. That the slaves emancipated were named, and there was not a word indicating an intention that the children born during the life estate should be free. That the case of Maria v. Surbaugh, 2 Rand. 228, had been repeatedly recognized and reaffirmed by this court. And the distinction between this case and the cases which would be relied on, on the other side, is, that in these last cases there was some expression in the will which included the slaves born during the existence of the particular estate in the gift of freedom.

2d. That the whole estate except the slaves emancipated, having been given ab-
397 solutely to the daughters, *and the increase of the slaves born during the lives of the daughters being included in that gift, the contingent limitation in favor of the emancipated slaves, being only of such property as should be left at the death of the surviving daughter, such limitation was repugnant to the estate given to the daughters, and void for uncertainty. And he cited Riddick v. Cohoon, 4 Rand. 547; Lightfoot v. Gill, 1 Bro. Par. Cas. 250; Curtis v. Rippon, 5 Madd. R. 434; Kidney v. Cousmaker, 1 Ves. jr. R. 436, 445; Shermer v. Shermer's ex'ors, 1 Wash. 266; Goodwin v. Taylor, 4 Call 305; Burwell's ex'ors v. Anderson, 3 Leigh 348; Melson v. Cooper, 4 Leigh 408; Ross v. Ross, 1 Jac. & Walk. 154; Cuthbert v. Purrier, 4 Cond. Eng. Ch. R. 191.

3d. That the plaintiffs were free negroes claiming under a will made in 1833; and were forbidden to hold slaves, except a wife, or husband or child. Supp. Rev. Code 246.

Rhodes and Macfarland, for the appellees, endeavored to distinguish this case from that of Maria v. Surbaugh. In that case nothing was given by the will to the slave but her freedom; here they are made the legatees of the whole property after the termination of the life estate. They cited Lucy v. Cheminant, 2 Gratt. 36; Elder v. Elder, 4 Leigh 252; Anderson v. Anderson, 11 Leigh 616.

They insisted further that under the act of assembly a free negro was entitled to hold as a slave his child, and that here Nancy the mother of Martha was one of the legatees, and she having died after the death of the testator, hers was a vested interest, and therefore passed to her administrator. They insisted further that the act did not intend to forbid a bequest to free negroes.

DANIEL, J. It appears that the
398 negro girl Maria, *the subject of this suit, was born after the death of the testator, and in the lifetime of Henley Cullins: And by the terms of the will the bequest of freedom to the slaves Nancy, Jane, Ann, Sally, Judith and America was to take effect only at the death or marriage of both of the testator's daughters Henley and Polly, of whom Henley was the survivor.

Such a bequest, according to the decisions of this court, confers no right of present

freedom on the legatee. On the contrary, the well established doctrine is, that where a person by deed or will declares his slave to be free at any particular age, or on the termination of a particular estate, or after a given period of servitude, or on the event of any contingency, the condition or status of the slave remains unaltered until such age is attained, or estate is terminated, or period of servitude has expired, or event has happened: And that any child born during such temporary servitude of the mother, follows the condition of the latter at the time of its birth, and is a slave. Maria v. Surbaugh, 2 Rand. 228; Crawford v. Moses, 10 Leigh 277; Henry v. Bradford, 1 Rob. R. 53; Ellis v. Jenny, 2 Rob. R. 597.

The cases of Elder v. Elder, 4 Leigh 252, Erskine v. Henry, 9 Leigh 188, and Lucy v. Cheminant's adm'r, 2 Gratt. 36, are not at all in conflict with these decisions. In each of these last mentioned cases the children born before their mother's right to freedom accrued, were adjudged to be free, not because of the prospective gift or bequest of freedom to the mothers, but because of some clause, in the deed or will, construed by the court, as extending the gift or bequest of freedom to the children themselves. In other words, the children derived their title to freedom not by descent but by purchase, as donees or legatees under the same instrument which gave freedom to their mothers.

Martha having been born during
399 the servitude of *her mother Nancy, was consequently born a slave. And there being no clause in the will which, by any fair construction, can be taken as intending a bequest of freedom to her, she remains a slave. And as all the property remaining at the death or marriage of the survivor of the two daughters of the testator, is given over to the freedwomen, it would have been necessary, in order to determine the title to Martha, to enquire into the nature and extent of the estate given to the two daughters, and the validity of the title which the appellant Taylor asserts under the deed from Henley Cullins of the 26th June 1846, were it not for the provisions of the act of assembly of the 15th March 1832. But by the third section of this act (see Sessions Acts 1831-2, page 21), it is declared that no free negro or mulatto shall thereafter be capable of purchasing or otherwise acquiring permanent ownership, except by descent, to any slave, other than his or her husband, wife or children; and all contracts for any such purchase are thereby declared to be null and void.

Nancy, the mother of Martha, was the only one of the legatees in remainder who (upon the supposition that the bequest was in other respects good) could, under the exception in the statute, have acquired any title to Martha by virtue of said bequest. As she died in the lifetime of Henley Cullins, it is obvious that the other freedwomen have no legal concern about or interest in the title to Martha. None, as legatees in remainder, because of the provisions of the statute, and none by descent as next of kin to Nancy, inasmuch as she died before any right to freedom or property under the will accrued.

It seems to me, therefore, that there is manifest error in so much of the decree of the 12th of July 1853, as decrees Taylor to deliver to Stratton, administrator de bonis non with the will annexed of John Cullins,
the slave Martha, and any other of
400 the children *of the emancipated slaves born since the death of said John Cullins and before the death of Henley Cullins, which he may now hold: And that instead of so much of said decree, the Circuit court ought to have rendered a decree dissolving the injunction, and dismissing the bill as to Taylor, with costs to Taylor.

No one but Taylor has appealed; and it is therefore unnecessary to express any opinion as to the other portions of the decree, with which he has no concern.

The other judges concurred in the opinion of Daniel, J.

The decree was in conformity with the opinion.

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401 *Puryear v. Taylor.

April Term, 1855, Richmond.

(Absent ALLEN, P.)

1. **Fieri Facias—When Lien Commences—Upon What a Lien—When It Ceases.***—A *fieri facias* is a lien from the time it goes into the hands of the officer to be executed, upon all the personal estate of the debtor, including debts due to him, with the exception stated in the statute; and this lien continues after the return day of the execution; and only ceases when the right to levy the execution, or to levy a new execution upon the judgment, ceases or is suspended by a forthcoming bond being given and forfeited, or by a *supersedeas* or other legal process. See Code, ch. 188, § 3 and 4, p. 717.†

*__Fieri Facias—When Lien Commences—Upon What a Lien—When It Ceases.__—See *foot-notes* to Charron v. Boswell, 18 Gratt. 216; Evans v. Greenhow, 15 Gratt. 153. In addition, see the principal case cited and approved in B. & O. R. R. Co. v. Wilson, 2 W. Va. 554.

†Code, ch. 188, § 3. "Every writ of *fieri facias* hereafter issued shall, in addition to the effect which it has under ch. 187, be a lien from the time that it is delivered to the sheriff or other officer, to be executed, upon all the personal estate of or to which the judgment debtor is possessed or entitled, (although not levied on, nor capable of being levied on under that chapter,) except in the case of a husband or parent, such things as are exempt from distress or levy by the thirty-fourth section of chapter 49, and except that as against an assignee of any such estate for valuable consideration, or a person making a payment to the judgment debtor, the lien by virtue of this section shall be valid only from the time that he has notice thereof. This section shall not impair a lien acquired by an execution creditor under ch. 187."

§ 4. "The lien acquired under the preceding section

2. **Same—Attachment—Priority.**—The lien of a *fieri facias* of prior date, has priority over an attachment of subsequent date.

On the 25th of October 1851, William N. M. Taylor instituted an action of debt in the Circuit court of Mecklenburg county against Richard H. Daly for four hundred and two dollars and four cents, with legal interest thereon from the 27th of March 1849.

402 The *summons was made returnable to the November rules; and was returned "no inhabitant."

On the same day, an affidavit having been made as prescribed by the statute, Code, ch. 151, § 1, p. 600, an attachment was issued to attach the effects of the defendant to the amount of the debt; and it was served on J. J. Daly on the 27th of the same month.

On the 15th September 1852, judgment was recovered against the defendant for the amount of the debt; and on the motion of the plaintiff, it was ordered that J. J. Daly, the garnishee in the attachment, be summoned to appear at the next term of the court, to say on oath whether he owed debts to, or had effects in his hands belonging to, the defendant. This summons was issued on the 10th of January 1853, and was served on the 8th of February following.

At the March term of the court J. J. Daly appeared and made a return to the summons, by which it did not appear that there was any certain sum in his hands belonging to Richard H. Daly, though it was stated that he had an interest in two estates of which J. J. Daly was the administrator.

At the September term the garnishee was permitted to amend his return, and he then stated that the interest of Richard H. Daly in the two estates of which the garnishee was administrator, amounted to seven hundred and ninety-four dollars and seventy-eight cents, on the day of his return; which amount he stated was not sufficient to pay the indebtedness of Richard H. Daly to the plaintiff, and to Richard C. Puryear, surviving partner of A. B. Puryear & Co. who had a summons pending in the same court against J. J. Daly as garnishee of Richard H. Daly. And he asked the court to decide which of the creditors had the preference, so as to protect him.

At the same term of the court Richard C. Puryear filed his petition in the case,

403 setting out his proceedings *against Richard H. Daly, and the garnishee, and claiming the fund in the hands of the latter. It appears that Puryear recovered a judgment against Richard H. Daly in May 1844, for one thousand and ninety-six dollars and seven cents, with interest from the 1st of January 1842. Upon this judgment an execution was issued in the same month, and returned, "no effects." That afterwards, on the 9th of December 1850, he sued out another execution on his judgment; which was also returned "no effects." And on the 10th of March 1853 he sued out another execution, upon which there was the same return.

On the 11th of March 1853, Puryear having made a suggestion in pursuance of the act, Code, ch. 188, § 10, p. 718, that by reason of the lien of his fieri facias issued on the 9th day of December 1850, there was a liability on J. J. Daly who had money and effects in his hands belonging to Richard H. Daly, a summons was issued to J. J. Daly to appear at the next September term of the Circuit court of Mecklenburg, then and there to declare on oath whether he had any money or effects in his hands belonging to the said Richard H. Daly, and what amount. This summons was served on the same day: And at the September term J. J. Daly made a return similar to that made by him in the case of Taylor.

At the same term of the court the case came on to be tried, and the parties dispensing with a jury, the court held that as no suggestion had been made of a lien under the execution which issued in favor of Richard C. Puryear against Richard H. Daly on the 9th of December 1850, until the 11th of March 1853, after the return day thereof, the said Richard C. Puryear had no lien on the funds in the hands of J. J. Daly by virtue of that execution. But that he acquired a lien by virtue of his execution which issued on the 10th of March 1853, which lien was subsequent

404 *to that of Taylor. It was therefore ordered that Taylor's debt, admitted to be five hundred and twenty-four dollars and eighty-two cents, should be paid out of the funds in the hands of J. J. Daly; and that the balance of that fund, amounting to two hundred and sixty-nine dollars and ninety-six cents, should be paid to Puryear, in part satisfaction of his judgment. From this judgment Puryear applied to this court for a supersedeas, which was allowed.

Patton, for the appellant:

The single question in this case is, whether the attachment of Taylor or the suggestion of Puryear is entitled to preference; the fieri facias having been issued and returned before the attachment was served. Both of the laws under which these parties proceeded are new in Virginia.

By the act, Code, ch. 188, § 2, p. 716, the execution against the body of the debtor was abolished; and this chapter was intended to give the creditor all that the issue of a capias ad satisfaciendum, the arrest of the debtor and his discharge under the insolvent laws, would afford him, with one exception, which is not in favor of the attaching creditor. The third section gives the execution creditor a lien on all the property of the debtor, though the execution could not be levied upon it; with the special exceptions stated in the section. The fourth section shows when the lien is to cease. That is when the right to levy an execution

shall cease whenever the right of the judgment creditor to levy the *fieri facias* under which the said lien arises, or to levy a new execution on his judgment, ceases or is suspended by a forthcoming bond being given and forfeited, or by a *supersedeas* or other legal process."

ceases, or is suspended by a forthcoming bond being given and forfeited, or by supersedeas or other legal process.

The act provides that it shall not impair a lien acquired by an execution creditor under chapter 187: Thereby showing that it is preferable to an attachment lien, and of all execution liens except when levied under ch. 187, § 11. Then the effect of an

405 *execution returned "no effects," under chapter 188, is to give a lien on all the property of the debtor. But if another execution is afterwards issued and levied upon property of the common debtor, which is subject to levy, that is good against the first lien; and the exception in this case proves the rule. When it is intended to protect creditors, the act so provides.

But it is said that the proceeding provided by ch. 188 must be taken before the execution expires. If this be so, it is not what was intended, and is in fact nonsense and useless. There is no doubt the fieri facias is at an end as to all property on which the execution may be, and is not, levied under ch. 187. The sheriff gets his authority from the precept, and when that expires his authority expires. But the act, ch. 188, was intended to continue the lien, and it is wholly useless unless it has this effect; for ch. 187 had not only given the lien but the right to levy. That act, § 11, says the execution shall bind as to creditors and purchasers for value without notice only from the time it is delivered to the sheriff. It must then bind from that time. The act, ch. 188, § 3, says, in addition to the effect the execution has under ch. 187, it shall be a lien on all the property of the debtor, whether levied on or not, or whether or not it can be levied on, except as to a purchaser, assignee or other execution creditor. And by § 17 of this chapter, the creditor may avail himself of the remedies provided by it; and yet without impairing his lien under it, may from time to time, under ch. 186 and ch. 187, issue other executions upon his judgment until the same be satisfied. If he has no lien after the return day of the execution, why provide that it shall not be impaired by the issue from time to time of other executions upon his judgment? And I would ask too how a creditor can know whether or not an execution will be levied until it is returned; and therefore how

406 *he can proceed to subject his debtor's property, as provided in ch. 188, before his execution expires?

There is certainly no reason in justice or sound policy, why the lien of an attachment should be preferred to the lien of an execution: The attaching creditor is not an assignee for value: There are good reasons why such an assignee without notice should be protected; and the act protects him. And indeed the act expressly protects all those who have any right to protection: The attaching creditor has none.

Rhodes and Macfarland, for the appellee.

We do not concur in that construction of the statute by which it would give to an execution the effect of a continuing, indefinite lien. It is true that the act extends the range of the lien. Subjects not before liable are now subjected to it. But it is not pretended that there is any change in the lien as to the subjects before embraced in it; and therefore unless a creditor has two distinct liens, it must be limited throughout as it was under the former law.

The counsel for the appellant relies upon the third section of ch. 188 of the Code. But that section must be construed with reference to the 11th section of ch. 187. This last section extended the operation of the execution to current money and bank notes. The 3d section of ch. 188 provides that the execution shall bind all property, though it is not levied on or capable of being levied on, except as therein stated. It does not say what shall be the attributes of the lien; and we are left to look to the common law to ascertain what is intended by it. But at common law the lien of a fieri facias only existed whilst the execution was in existence; and when the return day of the execution was passed, the lien was gone. It is therefore wholly opposed to the idea of a continuing, indefinite lien created by an execution which has long since ex-

407 pired. *See Bac. Abr. Execution, letter D; Payne v. Drew, 4 East 523.

SAMUELS, J. The statutes of Virginia in force prior to the 1st of July 1850, afforded to a judgment creditor the means of obtaining satisfaction of his claim out of the estate, real, personal or mixed, of the judgment debtor. On and after the day named, when the Code of Virginia went into operation, whilst the creditor retained his right to satisfaction, the process by which he was to attain it was greatly changed by the Code. It is only necessary in this case to advert to the rights and remedies of the creditor in regard to debts due from other persons to the judgment debtor, inasmuch as the subject in controversy here is a debt due from J. J. Daly to Richard H. Daly, the judgment debtor. Under the law as it stood before July 1, 1850, a subject of this nature was reached by causing the debtor to be arrested under a writ of capias ad satisfaciendum, and committed to jail, there to remain until discharged under the insolvent laws. Before such debtor could be so discharged, he was required to surrender every thing of value (with a few specified exceptions) owned by him, including debts due to him, to be applied in a designated mode to the satisfaction of the creditor's demand. If the debtor failed to surrender his estate as the law required, still, by mere operation of law he was divested of all title thereto, and the estate applied, in a way pointed out, to discharge the debt. Section 2, ch. 188, abolishes the writ of ca. sa. in all cases except those provided for in § 1, of which the claim before us is not one.

It was obviously the purpose of the general assembly to save to the creditor the rights which he might have acquired if the former laws had continued to exist, and to give

him a new and adequate remedy to enforce his rights. The revisors in their re-
408 port to the *general assembly, p. 926, say, that "This chapter (188) is framed to provide for the creditor (in place of taking the debtor under a capias ad satisfaciendum, and compelling him to take the oath of insolvency) as efficient remedies (in cases not provided for by the 1st and 2d sections) against all estate not subjected to other process, as he now has when the debtor is discharged by taking the oath of insolvency." The revisors accordingly reported a section of the statute giving the creditor the remedy indicated by them; and the general assembly in substance adopted the suggestion, which is found embodied in § 3, ch. 188. This section gives to the fi. fa. a capacity to bind mere choses in action, by making it a lien thereon, with some exceptions, not material in this case. Section 4 prolongs the lien beyond the return day of fi. fa.; it is directed to cease "whenever the right of the judgment creditor to levy the fi. fa. under which the lien arises, or to levy a new execution on his judgment, ceases or is suspended by a forthcoming bond being given and forfeited, or by supersedeas or other legal process." Section 17 provides for repeated executions, without impairing the lien attaching under the first execution.

It clearly appears in the section last cited, that the legislature intended the lien to continue after the return day of the fi. fa.; otherwise, it would have been useless to provide for preserving a lien if the lien should be regarded as already lost. Looking as well to the intention as to the plain words of the statute, I am of opinion that the lien of Puryear's fi. fa. was in full force when he filed his suggestions under section 10, to make it productive. This lien commenced December 10th, 1850, the day on which the fi. fa. was delivered to the sheriff.

The suit brought by Taylor against Richard H. Daly was brought 25th of October 1851; and on the same day he sued out an attachment under the statute, Code
409 *of Virginia, ch. 151, § 1. This attachment was served on J. J. Daly as garnishee October 27, 1851. Thus the liens of Puryear's fi. fa. and Taylor's attachment are brought in conflict. These liens are both given by statute, and are merely legal. It is perfectly obvious that Puryear's lien, being first in point of time, must take precedence of Taylor's. See Erskine v. Staley, 12 Leigh 406.

I am of opinion to reverse the judgment in favor of Taylor, and to render judgment in favor of Puryear.

The other juges concurred in the opinion of Samuels, J.

Judgment reversed.

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410 *Peers v. Barnett & Others.*

April Term, 1855, Richmond.

1. **Sale of Land by Acre—Subsequent Agreement—Estoppel.**—Land is purchased by the acre; but after the survey is commenced the vendee agrees to take it at the quantity for which the vendors held it, and the survey is stopped, He is concluded by his agreement, and is not entitled to an abatement from the purchase money on account of a a deficiency in the quantity.

2. **Equity Practice—Sale of Land to Pay Purchase Money—Cloud on Title.**†—A court of equity will not decree a sale of land for the payment of the purchase money, whilst there is a cloud upon the title. But if the cloud is removed before the hearing, the vendor is entitled to a decree for the sale.

3. **Sale of Land—Cloud on Title—Laches—Case at Bar.**‡—Land is sold and conveyed in 1828, and a bond is given by the vendors with condition to perfect the title. In 1834 a bill is filed by the vendors to subject the land to sale for payment of the purchase money. The vendee answers, and objects that the title has not been perfected. The cause lingers on the docket, partly by the fault of the vendee, until 1852. Although at the filing of the bill the defects in the title would have forbidden the sale of the land, yet the lapse of time and the uninterrupted possession of the vendee under the deed, the absence of any suggestion of disturbance, or the assertion of any adverse claim up to the time of the hearing, quieted the vendee's title, and cured the defects therein: And a decree for the sale was therefore proper.

4. **Same—Same—Same—Decree for Costs.**—In such case, as the vendee was not in default when the suit was commenced, he is entitled to a decree for his costs.

5. **Same—Set-Off against Purchase Price—Failure to Submit to Commissioner—Case at Bar.**—The vendee claims a credit for payment upon and set-off against the purchase money; and a commissioner is directed to state an account of them; but he contumaciously refuses to present his vouchers and evidence before the commissioner; but when the report is returned, filed exceptions to it. Though it is probable he may be entitled to some credits not allowed him, yet having refused to submit them to the commissioner where they might have been properly investigated, they will not be allowed.

Some time previous to 1809 William Bar-

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*For monographic note on Laches, see end of case.

†**Equity Practice—Sale of Land—Cloud on Title.**—In McClaugherty v. Croft, 43 W. Va. 275, 27 S. E. Rep. 248, it is said: "Though a title be defective at the commencement of a suit, yet if, pending it, it become free of lien, or clear, so as to be good to the purchaser, the court may go on to decree. Core v. Wigner, 32 W. Va. 277, 9 S. E. Rep. 36; *Peers v. Barnett, 12 Gratt. 410.*" See also, citing the principal case, Max Meadows, etc., Co. v. Brady, 92 Va. 84, 22 S. E. Rep. 845; *foot-note* to Faulkner v. Davis, 18 Gratt. 651.

‡**Same—Laches.**—In Amick v. Bowyer, 3 W. Va. 7, it is said: "The material question arising for determination in the case is: Can a vendee who enters under a title bond from his vendor and holds the land under that title till the statute of limitation would bar a recovery against him by an adverse title, set up defect of title in his vendor existing at the date of sale to him, as ground of injunction to a judgment for the purchase money. I think he cannot. *Peers v. Barnett, 12 Gratt. 410;* Piedmont Coal and Iron Company v. Brant and Others, decided at the present term." See also, citing the principal case, Hurt v. Miller, 95 Va. 42, 27 S. E. Rep. 831.

nett died, leaving a widow and eight children, and possessed of a tract of land in the county of Goochland containing, according to an old survey, two hundred and
411 fifty-seven *acres. The widow seems to have had a life estate in the land, and to have died previous to the year 1828. One son, George C. Barnett, seems to have died after his father, intestate and unmarried; and his brothers and sisters were his heirs. On the 4th day of January 1828, Robert F. Barnett, George Southworth and Elizabeth his wife, Cisley Pollack, in her own right and in right of Mayer Pollack, as far as she had title, Nancy Nuckols, by her agent William Nuckols, Turner R. Henley and Hannah his wife, and Nelson Martin and Eliza A. his wife, describing themselves as legatees of William Barnett deceased, in consideration of nine hundred and seventy-six dollars and sixty-six cents, conveyed this tract of land to Alexander M. Peers with general warranty. At the same time they executed a bond to Peers in the penalty of one thousand dollars, with a condition to make to Peers a complete title to the interest of Elisha Barnett and others in said land. The purchase money was payable in four equal annual installments, for which Peers executed his bonds; and to secure the same executed a deed of trust on the land and also an adjoining tract which he owned.

In August 1834 the parties who had sold the land to Peers instituted a suit in equity in the Circuit court of Goochland county, and in their bill they stated the sale and conveyance to Peers, and his execution of the bonds and deed of trust. They alleged that Peers had failed to pay the purchase money, and that the trustees had refused to execute the trust. And making them and Peers parties defendants, the plaintiffs asked that the trustee might be compelled to execute the trust, and out of the proceeds to pay what was due upon the bonds; or if they refused to execute the trust, that a commissioner might be appointed to do it, and for general relief.

Peers answered the bill. He stated
412 that he purchased *the land at three dollars and eighty cents per acre; and that upon a survey of the land it fell short of the quantity at which it was estimated some twenty acres. That after his purchase the vendors were about to have the land surveyed, but as they were anxious to get home, and from assurances made to him that the land would fully hold out, if not overrun, and as they wished to place him as nearly as practicable in their shoes touching a disputed line, he did agree to take the land by the old survey. And this he was still willing to do if the parties would make good to him the boundaries called for by the old title papers relating to the land; or if an allowance was made to him for the deficiency in the quantity sold to him.

He stated further, that the title was defective as to the interests of Elisha Barnett, Mrs. Turner H. Henley, Mrs. Robert F. Barnett (who did not execute the deed) and George C. Barnett; and he insisted that he should not be required to pay more of the purchase money than he had already paid. That Elisha Barnett had never conveyed to him any title, nor could he do it, having sold his interest in the land, of which the defendant was ignorant at the time of his purchase. That Mrs. Henley's title could not be made good to him, as he had been informed that she and her husband had conveyed her interest in the estate previous to the defendant's purchase. That Mrs. Robert F. Barnett had never conveyed her title: Nor had the interest of George C. Barnett been conveyed to him; but as he had been informed, said Barnett had conveyed it away.

He further insisted, that if his accounts were allowed him, independent of the title bond which he exhibited, he had not retained enough of the purchase money to indemnify him against the defects of the title: And he exhibited with his answer an account of his payments and off-sets to the purchase money. Among the items in this ac-
413 count was one of seventy *cents "paid for recording William Nuckols' power of attorney for Nancy Nuckols."

The deposition of Elisha Barnett was taken, and he stated that he sold his interest in the land to Mayer Pollock in 1807. Several witnesses proved that upon the purchase of the land by Peers, the parties commenced to survey it, and ran some of the lines, when Peers told them they might stop the survey, and he would take the land at what they held it, or by the old survey. The two chain carriers did not remember which of these expressions he used; two other witnesses said he used the first expression. It appeared that the first bond was discharged, but there was some dispute whether this was done by the application of certain credits to which he was entitled, or otherwise.

In October 1835, the cause came on to be heard, when the court directed a commissioner to take an account of all the payments which had been made by the defendant Alexander M. Peers towards the discharge of his bonds given for the purchase money of the land, and make report to the court: And upon the application of Peers, leave was granted him to have a survey of the land at his own costs, upon giving the plaintiffs reasonable notice of the time of making the survey.

The commissioner having reported that Peers had failed and refused to attend and submit his vouchers to the commissioner, so as to enable him to execute the order made in the cause, a rule for an attachment was made upon Peers, returnable to the next term. But the rule was to be discharged if he should in the mean time, when notified by the commissioner, appear before him with his accounts and vouchers. And similar rules were made upon Peers in April 1838 and October 1839, without effect.

In April 1842, the death of the plaintiff George Southworth was suggested, and
414 William Southworth, *his administrator, made himself a party plaintiff. In

January 1843, the court made an order for an account similar to that made in October 1836. And in July 1843 the commissioner returned his report. He presented three statements of the account. In all of them the first bond was considered as paid off, and a credit of one hundred and twenty dollars endorsed on the second bond was allowed. These were the only credits allowed in the first statement; and that statement the commissioner considered the correct one. The second statement allowed a credit of seventy-eight dollars, for cattle which Peers alleged he had let Southworth have; and in the third statement he allowed the further credit of forty dollars and sixty-nine cents on each of the three bonds on account of Henley's interest in the land. These credits Peers had claimed in the account filed with his answer, but of which he furnished no proof to the commissioner; nor indeed did he appear before the commissioner, but the statements were made at the instance of Southworth's administrator, who stated that he knew nothing about the credits, and required proof of them.

After the return of the report Peers filed fourteen exceptions to it. And he filed evidence to sustain his exceptions. The third exception was for the failure to allow him a credit for a deficiency of fifty-three acres in the quantity of land. And he filed the report of the surveyor made under the order in the cause; from which it appeared that this quantity of land embraced within the bounds of the survey, was included in the tracts of the adjoining proprietors, and was in their possession. The fifth exception related to Henley's interest in the land, which Peers alleged he had purchased, and which the evidence filed sustained. The tenth and eleventh exceptions were for the application of credits to which he was entitled, to the satisfaction of the first bond, which he insisted had been discharged
415 *otherwise. The thirteenth and fourteenth exceptions were for defects in the title. The evidence on this subject is stated by Judge Allen in his opinion.

On the 28th of September 1852, the cause came on to be heard, when the court sustained the fifth exception, and overruled the others; and a statement having been made correcting the first statement of the commissioner in that respect, showing that there was due on the said bonds on the 7th day of March 1843, the sum of eight hundred and thirty-three dollars and twenty-three cents, of which four hundred and eighty-five dollars and seventy-two cents was principal, it was decreed that unless the defendant Peers should pay that sum, with interest on the principal, within six months from the decree, the trustees in the deed, who were appointed commissioners for the purpose, should proceed to sell the land embraced in the deed, in the mode and upon the terms prescribed in the decree, and make report to the court. And the rights of Peers under the title bond executed to him by the parties were reserved to him. From this decree Peers applied to this court for an appeal, which was allowed.

Stanard and Bouldin, for the appellant.
Day, for the appellees.

ALLEN, P., delivered the opinion of the court:

A distinction seems to have been taken by some of the reported cases, as to the relief a court of equity will extend to a vendee who has accepted his deed with covenants of general warranty, where he seeks to enjoin a judgment for or the collection of the purchase money, and the case where the vendor, instead of proceeding against the vendee personally, is attempting to sell the land under a deed of trust or by a bill in equity; that although the facts may
416 not *authorize the court to enjoin the collection of the purchase money by a proceeding against the vendee at law, yet, as a court of equity reprobates a sale of land when clouds are hanging over the title, it will for the benefit of the parties, and the security of the purchaser at any sale of the subject, enjoin or refuse to decree a sale of the land until the title is cleared up. The case of Beall v. Liveley, 8 Leigh 658, is a case of the first class. It was there decided that where a vendee is in possession of land under a conveyance with general warranty, and the title has not been questioned by any suit prosecuted or threatened, such vendee has no claim to relief in equity against the payment of the purchase money, unless he can show a defect of title respecting which the vendor was guilty of fraudulent concealment or misrepresentation, and which the vendee had at the time no means of discovering. In Ralston v. Miller, 3 Rand. 44; Koger v. Kane, 5 Leigh 606; Clarke v. Hardgrove, 7 Gratt. 399, this court has extended the relief to cases where the vendee, placing himself in the position of the superior claimant, can show clearly that the title is defective.

The principle that a court will not sell or permit a sale of land with a cloud hanging over the title, is affirmed in Lane v. Tidball, Gilm. 130; Gay v. Hancock, 1 Rand. 72; Miller v. Argyle, 5 Leigh 460.

In the present case, which was a bill filed to subject the land to sale for payment of the purchase money, in consequence of the refusal of the trustees to sell, the appellant resisted the sale, first, upon the ground of a deficiency in the quantity; and secondly, because the complainants had failed to make a clear title to the land sold and conveyed by them.

The first ground is not assigned as error in the petition, and is clearly untenable. The vendors offered to survey the land.
417 A survey was in part actually *made in the presence of all the parties, when the appellant stopped the survey, declaring himself willing to take the land at what they held it, be it more or less. The contract was then consummated; the deed, and a deed of trust to secure the purchase money were executed, both bearing date on the 4th of January 1828.

That this was after the partial survey, is shown by the testimony of Robert Sneed,

from which it appears that at the time of the purchase, William Sanders was to become surety for the purchase money, and who it seems had an interest in the purchase; that when they met to survey, Sanders refused to become surety, and the appellant agreed to give a deed of trust on his own land and the land purchased, on Sanders' consenting to relinquish his interest in the purchase; and thereupon they commenced the survey as aforesaid. Whatever right the appellant may have had to the survey under the first purchase, he then waived it.

As to the title, the appellant did not agree to rest upon the covenants of his deed alone. The parties contracted with a full knowledge of the facts in regard thereto; and on the same day the deed and deed of trust were executed, the appellant took from the appellees, his vendors, a bond in the penalty of one thousand dollars, with a condition which recited they had sold to the appellant the land formerly belonging to William Barnett deceased, in which land Elisha Barnett's interest was not conveyed; and binding the parties to make a complete title to said Elisha Barnett's and others interest.

Under this obligation the appellant could have sued, if the obligors failed to make a title in a reasonable time: He was not bound to wait until evicted. The vendors, in executing a deed with covenants of warranty, had not fully acquitted themselves of all obligation to active effort to get a clear title for the vendee. The burden of proof did not devolve on him to show
418 *an eviction or a suit threatened or prosecuted, or that the title was clearly defective. The defect of title was admitted, and it was the duty of the appellees to have cured it, before they instituted their suit or called on the trustees to sell. The conveyance was executed, and the appellant gave his notes for the purchase money on the 4th of January 1828, the last installment falling due on the 1st of January 1832; and the suit was brought on the 21st of August 1834. At that time the appellees were the defaulting parties, as they claimed the whole purchase money, and asked for a sale of the whole tract, notwithstanding their failure to make a clear title to Elisha's share. The appellant was well warranted in resisting such sale until the title was made. He however did not ask for a rescission, but objected to paying for the land until his title was perfected according to the terms of the deed from the complainants to him. In this state of the case, if the appellees had procured the proper deeds and releases at any time before final decree, they would then have been entitled to a decree for their purchase money and for a sale of the land to pay it; for then the principle settled in the cases referred to would not have applied; the court would not have been decreeing a sale of land with a cloud hanging over the title. But time and possession may effect the same thing that an actual release or conveyance would have done. The conveyance was executed, and as it would seem, possession taken under it as early as 1828. Owing to the delays in the progress of the suit, caused in part apparently, by the claims to credits asserted by the appellant, and his contumacy in resisting the orders of the court to produce his vouchers before the commissioner, no decree for a sale was rendered until the 28th of September 1852, upwards of 24 years after the sale and conveyance. Our statute, Code, ch. 149, § 1, p. 590, limits the right of entry to
419 fifteen years after *the right to make such entry shall have accrued; and furthermore allows ten years within which persons laboring under disabilities may enter or sue, next after the time such person shall have ceased to be under disability.

The appellant did not suggest in his answer that he had been disturbed in the enjoyment of the property. No suggestion of any disturbance was made before the interlocutory decree. And after such a lapse of time, it is not reasonable to suppose that there could be any danger of such disturbance.

It seems there were nine heirs or devisees to whom the land descended or was devised. The answer alleges that Elisha Barnett's share has never been conveyed. Elisha Barnett is examined as a witness, and deposes that he had conveyed his right, title and interest in the land belonging to his father, to Mayer Pollack; and a deed from him to Mayer Pollack for his ninth part of said land, dated and recorded in 1809, is filed as an exhibit. Cisley Pollack, who was one of the heirs or devisees, united in the deed to the appellant, conveying in her own right, and in right of Mayer Pollack deceased, as far as she had title. Under this conveyance the appellant entered; and no person claiming under Mayer Pollack appears to have asserted any adverse claim; and unless they labored under disability, which is not alleged, the presumption is that Mrs. Pollack had title, as she undertook to convey something; or that those entitled have acquiesced in her act. Another of the heirs, George C. Barnett, seems to have united with Elisha in a deed of trust dated and recorded in 1811, conveying their interests in the estate, real and personal, of their father, to secure certain debts. There is nothing to show that any action ever took place under that deed, or that any claim was ever asserted under it. And after a lapse of forty-one years, it is not to be presumed that any such
420 *claim could be asserted successfully. George C. Barnett seems to have left the country and died unmarried; and his interest to have passed to the other heirs, and their deed conveyed it to the appellant, except the part which descended to Elisha; and as he seems to have lived in the country, and not to have labored under any disability, his deposition having been taken as late as 1835, time would bar his claim.

It is further objected that Mrs. Turner R. Henley, who with her husband united in the deed to the appellant, and acknowledged

it when she became a widow, had previously united with her husband in a conveyance to another. No such deed is filed. There is a certificate of the clerk of Goochland county that Turner R. Henley has executed a deed of trust conveying all the interest of Henley and wife in the real and personal estate of William Barnett deceased, to secure a debt of one hundred and six dollars and thirty-four cents due to R. K. Dabney. The inference from the certificate is, that Mrs. Henley did not unite in it. There is also a deed filed purporting to be a deed from John V. Miller to John Thompson, jr., dated 20th July 1844, conveying the interest of Henley and wife in the land and personal estate of William Barnett deceased; reciting that it is the same conveyed to said Miller by William Gray and William Miller, trustees, for the benefit of R. K. Dabney, in a deed of trust executed by Henley and wife to them, by deed duly recorded on the 21st of September 1829. This would be anterior to the regular acknowledgment by Mrs. Henley of the deed executed by the heirs to the appellant. But in reference to this share, it is sufficient to say it does not appear she ever signed or acknowledged the deed of trust referred to. It does appear she has regularly executed the deed to the appellant; that he has held possession under it for his own use, and such possession would bar any claim under the deed of trust.

421 *The parties seem to have treated this matter as clear from doubt. The appellant claimed to be entitled as assignee for value of T. R. Henley of his entire interest in the purchase money for the land. His exception to the report of the commissioner for not allowing him credit for this interest, was sustained, and the credit allowed in the decree.

It is further objected that Mrs. Robert F. Barnett did not unite with her husband, who was a legatee, in the conveyance to the appellant. The contingent right of dower in one-eighth of a tract of two hundred and fifty-seven acres of land of no great value, is too uncertain and trifling to create such a cloud over the title as to affect its price, if sold under the decree.

It does not appear that Betsy Southworth, wife of George Southworth, was ever examined privily and apart from her husband. But she was a plaintiff in this suit. On the death of her husband she continued to prosecute it, and the interlocutory decree for a sale is in her name as widow. A sale would bind her right, and upon the coming in of the report and final decree, an order could be made directing her to execute a conveyance, if required.

Mrs. Nuckols, another of the heirs, seems to have acted by her attorney in fact or agent William Nuckols. No objection is taken in the answer on this ground; and in the account filed by the appellant, and his exceptions, he claims credit for a fee paid for recording a power of attorney from Mrs. Nuckols to William Nuckols. The objection probably was not made because the parties knew of the existence of the power.

I think, upon the whole, that at the time the decree was rendered, in the absence of any suggestion that the purchaser in possession had ever been disturbed, time had effected what it was originally the duty of the vendors to have done, quieted the title. That there was no danger, after such

422 long exclusive enjoyment, *that the vendee or any purchaser at the sale could ever be disturbed by the assertion of any of the adverse claims relied on in the answer, and that there was no error in subjecting the land to sale when the decree was rendered.

It is furthermore objected to the decree that the commissioner and the court erred in refusing the appellant various credits claimed by him. The appellees held his bonds, and the duty of showing payment devolved on the appellant. As early as October 1835, the cause was referred to a commissioner, to take an account of payments; and from that time down to 1843, when a report was made, repeated efforts were made to compel the appellant to appear before the commissioner to submit his accounts and vouchers for examination. The appellees, for some reason, perhaps because they desired a hearing, seemed to think it devolved on them to have these vouchers exhibited, and therefore moved for rules against the appellant to show cause why he should not be attached for his failure to exhibit his vouchers of payment, if he had any. Their efforts were unsuccessful, and the commissioner was at last constrained to make up his account from the evidence then in the record. The commissioner rejected some claims set forth in an account filed by the appellant with his answer, because no evidence was adduced to sustain them: and none has been adduced since. As to the application of the credits to the first bond; if the appellant had appeared with his proof before the commissioner, it is possible he might have shown that some of the credits applied by the commissioner to the bond lifted by him, were applicable to the second bond with which he has been charged. But these were questions which should have been raised before the commissioner, who, with the parties before him, and when the transactions were fresh, and the parties concerned in them still

423 living, might have arrived *at a just conclusion. As the case stood before him, he could make no other application of the credits than he did; and if the appellant is injured thereby, it is the consequence of his own obstinacy in contumaciously refusing to obey orders entered in fact for his own benefit.

I think the decree was correct on the merits at the time it was rendered: But I am further of opinion, that as the appellant was in no default when the bill was filed, he was entitled to his costs in the court below; and that the decree in giving costs against him is erroneous; and under the authority of Ross v. Gordon, 2 Munf. 289, and other cases since, should be reversed as to the costs, with costs in this court to

the appellant; and affirmed in all other respects.

The decree was as follows:

The court is of opinion, that at the time the bill was filed the appellant was in no default in resisting a sale of the land conveyed to him until his vendors had complied with the terms of the contract appearing in the condition of the bond dated the 4th January 1828, filed as an exhibit with the answer.

The court is further of opinion, that as the parties might have perfected the title at any time before the hearing, so as under the pleadings to have entitled them to a decree sujecting the land to sale; the lapse of time, the uninterrupted enjoyment and possession of the land under the deed, the absence of any suggestion of any disturbance or the assertion of any adverse claim had at the time the decree was entered, quieted the title in the appellant, and cured all such defects in the title set forth in the answer or disclosed by the record, as should operate to prevent the court from subjecting the land conveyed to sale for the payment of the residue of the purchase money. The court is therefore of opinion, that there is no
424 error in so much *of the interlocutory decree as directs the sale of the land therein mentioned.

The court is further of opinion, that there was no error in refusing to allow the appellant, for the alleged deficiency in the quantity of the land sold, or in overruling his exceptions so far as the same were overruled, and in ascertaining the balance of purchase money due from him. But the court is of opinion, that as the appellant was in no default in objecting to a sale when the suit was instituted, he was entitled to his costs; and that said decree was erroneous in awarding costs against him. It is therefore decreed and ordered, that so much of said decree as awards costs against the appellant be reversed and annulled, that the residue of said decree be affirmed, and that the appellees pay to the appellant his costs by him expended as well about his defense in the Circuit court, as in the prosecution of his appeal aforesaid here, and the cause is remanded for a sale, and further proceedings in order to a final decree: which is ordered to be certified.

LACHES.

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Cross References to Monographic Notes.

Adversary Possession, appended to Nowlin v. Reynolds, 25 Gratt. 137.
Deeds, appended to Fiott v. Com., 12 Gratt. 564.
Payment.

I. DEFINITION, SCOPE AND GENERAL APPLICATION.

Definition.—Laches is the neglect or omission to do something which a party ought to do, which will warrant the presumption that he has abandoned his claim. Mere lapse of time unaccompanied by some circumstance affording evidence of such presumption, is not considered laches. The doctrine never prevails when this presumption is outweighed by opposing facts and circumstances. Claims are considered stale only where gross laches is shown with unexplained acquiescence in the operation of an adverse right. Bell v. Wood, 94 Va. 677, 27 S. E. Rep. 504; Wissler v. Craig, 80 Va. 22; Coles v. Ballard, 78 Va. 139; Alexander v. Byrd, 85 Va. 690, 8 S. E. Rep. 577.

Scope of Article.—The divisions of the doctrine of laches are as different and various as are the rights recognized by law, and there are no fixed rules by which the defence of laches may be applied, as each case must of necessity be decided according to its own particular circumstances. Hence it would be impracticable to attempt to classify all the applications of the rule which have arisen in the decided cases. The purpose of this article is to treat as far as possible the general principles of the doctrine, after which it has been necessary merely to digest the cases on the subject.

Applies to All Trusts Not Express.—Express trusts, cognizable only in equity, are alone free from limitations created by laches or statute. All other trusts, whether legal or equitable, are subject to the statute of limitations or liable to be barred by

laches. Woods v. Stephenson, 43 W. Va. 149, 27 S. E. Rep. 309.

Not Applicable to State—Laches is not imputable to the state. State v. Sponaugle, 45 W. Va. 415, 32 S. E. Rep. 283.

Has No Application to Ground Rents Reserved in Deeds.—The doctrine of laches has no application to a claim for ground rents, which have been reserved upon estates granted by deeds, and no presumption of payment will arise from lapse of time, if it appear that no part of the rents has ever been paid. Mulliday v. Machir, 4 Gratt. 1.

II. REASON OF THE RULE.

General Principles—Nothing can call forth the activity of a court of equity in granting relief except conscience, good faith and reasonable diligence. Where these are wanting the court will do nothing, and will always discountenance neglect and laches where a party has slept upon his rights and acquiesced in the assertion of adverse rights for a great length of time. Doggett v. Helm, 17 Gratt. 96, and *foot-note* containing a full collection of authorities.

Thus, courts ought not, upon sound principles of equity, as well as of public policy, to open their doors to parties who have slept on their rights for an unreasonable length of time, unless perhaps in cases of fraud; and where an amended bill, which was virtually a new suit to recover legacies due more than fifty years ago, tended strongly to show that these claims had been satisfied, the lapse of time was an insuperable bar to the claims. Anderson v. Burwell, 6 Gratt. 405.

And it may be laid down as a general rule that equity will not without strong reasons, rip up old transactions or settle stale accounts. Coleman v. Lyne, 4 Rand. 454.

For Consideration of Public Policy and Justice.—It is an inherent doctrine of courts of equity, that relief should be refused where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights. This principle, as it is founded upon considerations of natural justice and public policy, is firmly enforced, especially in cases involving transactions to which the immediate parties are dead. Hatcher v. Hall, 77 Va. 573; Gibboney v. Kent, 82 Va. 383, 4 S. E. Rep. 610.

Equity will sometimes, in cases not barred by statute, refuse to interfere after lapse of time, from considerations of public policy, and the difficulty of doing justice when the original transactions have become obscure by time, and the evidence may be lost, and from the consciousness that the repose of titles and the security of property are mainly promoted by an enforcement of the maxim, *vigilantibus non dormientibus jura subveniunt.* Justis v. English, 30 Gratt. 565.

For Peace and Repose of Society.—Where matters sought to be revived have been allowed to sleep unasserted until a generation nearly had passed away, and until, in the nature of things, all recollections of many of the transactions had either been obliterated, or so faded from the memory of the principal actors as to become almost, if not entirely untrustworthy, a court of equity will refuse to interfere for the peace of society to aid in the assertion of such antiquated demands. In such cases the court acts sometimes by analogy to the law, and sometimes upon its own inherent doctrine. Bell v. Moon, 79 Va. 341; Hill v. Umberger, 77 Va. 653; Updike v. Lane, 78 Va. 132; Coles v. Ballard, 78 Va. 139.

Hence, the rule is that parties having equitable demands, must prosecute their rights with reasonable diligence; otherwise courts of equity will refuse to interfere. This is a rule essential to the repose and welfare of society and ought to be firmly enforced. Morgan v. Fisher, 82 Va. 417.

The courts have uniformly and wisely held, where there is a long and unexplained delay in the institution or prosecution of a suit for the recovery of a debt, especially where there is no allegation of fraud or trust, that the allaying hand of time shall be deemed to have composed all strife, and quieted all contention, so that "men who are mortals shall not permit controversies to become immortal." Covington v. Griffin, 98 Va. 124, 34 S. E. Rep. 974.

For Safe Determination of Suit.—It is a principle sustained in a long line of decisions, that those who invoke the jurisdiction of a court of chancery must do so within a reasonable time, instead of lying by until by their supineness and negligence there can no longer be a safe determination of the controversy. Perkins v. Lane, 82 Va. 59, citing numerous cases.

Probability of Injustice to Defendant.—Lapse of time alone does not protect delinquents from claims. In order to be protected in equity other circumstances must exist, such as where the transaction is old, the account unsettled, the amount sought to be delivered uncertain, depending upon the testimony of witnesses who may be dead, upon vouchers lost, or where from the death of parties, all knowledge of the true state of the accounts has passed into oblivion, and when any effort to settle and adjust the accounts would probably result in doing great injustice to the defendant. Winston v. Street, 2 P. & H. 169.

Presumption of Abandonment of Right.—Lapse of time is permitted, in equity, to defeat an acknowledged right, on the ground only of its affording evidence of a presumption that such right has been abandoned. It therefore never prevails, when such presumption is outweighed by opposing facts and circumstances. Equity is not fond of taking advantage of forfeitures arising merely from a lapse of time. Nelson v. Carrington, 4 Munf. 332.

And where the delay and negligence of parties appealing does not amount to an abatement of their case, and does not break any of the rules adopted by equity courts to incite diligence and discourage laches, it does not justify the imposing of penalties upon the appellants by depriving them of having an erroneous decree reversed, which would result in the loss of important rights. Chinn v. Murray, 4 Gratt. 348.

But delay in the assertion of a right, unless satisfactorily explained, even where it does not constitute a positive statutory bar, operates in equity as evidence of assent, acquiescence or waiver, and especially is such the rule in a suit to set aside transactions on account of fraud or infancy. Trader v. Jarvis, 23 W. Va. 100.

III. DOCTRINE DEPENDS ON CIRCUMSTANCES OF EACH CASE

General Rule.—The equitable doctrine of laches, whereby courts refuse to aid the enforcement of stale demands, where the party has slept upon his rights an unreasonable length of time, is a well-recognized and salutary rule. Whether, however, lapse of time will be sufficient to bar recovery, must of necessity depend upon the peculiar circumstances of each case. Hence where there was no loss of evidence or lapse of time as to make it likely

that injustice would be done, the transaction was not obscure, and the sum sought to be recovered was not uncertain, there had been no such laches as would prevent a recovery. Houck v. Dunham, 92 Va. 211, 23 S. E. Rep. 238. See Lamer v. Hale, 79 Va. 147.

Thus, it is a well-established principle governing a court of equity that nothing can call it forth into activity, except conscience and reasonable diligence; where these are wanting the court is passive. There is no precise limit of time prescribed in which a demand must be enforced, but each case depends on its circumstances, and destruction of records, loss of evidence and death of parties and witnesses are circumstances which will be weighed in connection with the delay. Stamper v. Garnett, 31 Gratt. 550, and *foot-note.*

Defendants Must Not Acquiesce in Delay in Prosecution.—Delay and laches in the prosecution of a suit after it has been commenced, are not generally matters of which the defendants can complain or avail themselves, where the record fails to show that they have made any effort in the court below to expedite the cause, but have acquiesced contentedly in the delay. Fisher v. McNulty, 30 W. Va. 186, 3 S. E. Rep. 593.

May Arise within Statutory Period.—Although the period during which a party neglects to assert his rights, does not constitute a statutory bar to the claim asserted, yet the attending circumstances may justify the dismissal of the plaintiff's bill. Wissler v. Craig, 80 Va. 22, citing Foster v. Rison, 17 Gratt. 335; Harrison v. Gibson, 23 Gratt. 212. See Cheatham v. Aistrop, 97 Va. 457, 34 S. E. Rep. 57.

Discretionary with the Court.—So the application of the doctrine of laches is for the sound discretion of the court, and does not depend on the conviction of the court against the original justice of the claim or on any specific ground of defence, but upon its belief that it is too late to ascertain the merits of the case under the circumstances. Smith v. Thompson, 7 Gratt. 112, 54 Am. Dec. 126.

Where Complaint Is of Fraud.—The question of delay is much affected by reference to the particular circumstances of each case. A delay which might have been of no consequence in one case may be amply sufficient to bar relief in another; thus, it is the duty of a man complaining of fraud to make his complaint at the earliest possible time. He cannot be allowed to remain passive, prepared to affirm the transaction if it should be a prosperous one, or to repudiate it if that should prove advantageous to him. Jeffries v. Southwest Va. Imp. Co., 88 Va. 862, 14 S. E. Rep. 661.

In Confirming Judicial Sale.—Again, what is unreasonable delay in the confirmation of a judicial sale must depend upon the circumstances of each case, and is subject to the sound judicial discretion of the court in the interest of fairness and the rights of all parties. It has been held that a sale which was not confirmed for more than three years after the day of the sale was not a proper case for the court of appeals to confirm. Hyman v. Smith, 13 W. Va. 744.

Creditor's Claim against Surviving Partner.—There is no fixed or definite rule by which to measure the delay and negligence of a creditor of a partnership in prosecuting his claim against the surviving partner, which will deprive him of his remedy against the estate of the deceased partner. Each case depends upon its own particular circumstances, and will be judged by them. Jackson v. King, 12 Gratt. 499.

Foreclosure of Mortgage.—Where a bill was brought to foreclose a mortgage, satisfaction or release will be presumed from the lapse of twenty years, especially where such presumption was corroborated rather than rebutted by other circumstances. Jones v. Comer, 5 Leigh 350.

For an Accounting.—Appellees are not entitled to relief when they have slept upon their rights for a long period after the disability of infancy was removed, and no excuse has been offered for their unreasonable delay. The limitation for going into an accounting rests in the exercise of a sound discretion arising on the circumstances of each case. It will be refused where the transactions have become obscure and involved; or where insuperable difficulties or great inconvenience would arise in hunting up testimony; or where from the loss of vouchers or death of witnesses, any injury will likely result; or where from the relation of parties to each other a presumption of satisfaction fairly arises upon the whole case. Aylett v. King, 11 Leigh 486.

Same—Partnership Transactions.—Where a bill is filed by a surviving partner against the administratrix of a deceased partner nine years after the dissolution of the partnership, and four years after the death of the other partner, if the circumstances of the case do not show such laches on the part of the plaintiff as to deprive him of the right to have an account, the plaintiff will not be barred from obtaining a settlement of the partnership, as he has not placed the defendant in a condition to suffer irremediable mischief, if the account should be ordered. Marsteller v. Weaver, 1 Gratt. 391.

IV. ELEMENTS OF LACHES.

General Statement.—The doctrine of laches rests upon the broadest principles of equity, and implies injury to the party pleading it as a defence. Lapse of time often makes it impossible to discover the truth, and it would be unjust to enforce a demand after many years of delay, especially so where a party has altered his situation, believing he had a right to do so. Delay alone does not necessarily preclude relief, but the defence must be tested on substantial equitable principles. The decided cases show that the most important considerations in support of this defence are: *first*, the death of parties to the original transaction, or the intervention of the rights of third persons; *second*, the loss of evidence, rendering it difficult to do justice; and *third*, the character of evidence by which it is sought to establish the demand, for instance, by parol testimony depending on the mere recollection of witnesses. Where these elements or some of them exist, the courts have denied relief after a lapse of much less than twenty years. Cranmer v. McSwords, 24 W. Va. 594.

1. DELAY.

a. WHEN VALUES HAVE CHANGED.

To Rescind Contract for Sale of Land.—Where a vendor sued to rescind a contract for the sale of land after the property had almost doubled the contract price in value, which suit was dismissed, and he made no offer to give possession or make a deed, and made no demand for performance until four years after the sale, and three years after the last of the purchase money was due, and when the property had fallen to one-third of the contract price, specific performance will not be enforced at the instance of

the vendor. Gish v. Jamison, 96 Va. 312, 31 S. E. Rep. 521; Simmons v. Palmer, 93 Va. 389, 25 S. E. Rep. 6.

To Reopen Confirmation of Sale after Twenty-Five Years.—One who was defendant in an action to subject property to the payment of a judgment against him may not, after a lapse of twenty-five years from the decree of sale and its confirmation, when the land has increased in value and the condition of the parties has changed, reopen the case, and relitigate the matters which had been fully adjudicated by a court of competent jurisdiction. Culbertson v. Stevens, 82 Va. 406, 4 S. E. Rep. 607.

Judicial Sales—Report Delayed by Act of Parties.—A court by confirming a sale will not compel a purchaser to take land purchased at a judicial sale, where by the acts of the parties to the suit, action on the report of sale by the court has been delayed for such an unreasonable time, that confirmation would most probably cause him loss, if he has not been in default, or guilty of laches or fraud, and has not acquiesced in the delay, where it appears that during this unreasonable delay the property has depreciated in value. Hyman v. Smith, 13 W. Va. 744.

Reorganization of Street Railway Objected to after Many Years Delay.—A street railroad company executed a deed of trust in 1870 to secure its bonds, but became insolvent and was suspended in 1873. The holder of a great majority of the shares was elected president, and expended a great deal of money in improving the situation. He then became the purchaser, but failing to comply with the terms of the sale, there was a subsequent sale. In 1886 the plaintiff, who owned three shares, for the first time objected to the reorganization and the sale, alleging informality of notice, on which trustees were substituted, the property in the meantime having become very valuable. The plaintiff was guilty of gross laches in the assertion of his claim by waiting until by a change of circumstances that which was worthless had been made valuable. He delayed too long and his right to relief was lost. Godwin v. Whitehead, 88 Va. 600, 14 S. E. Rep. 344.

b. LENGTH OF TIME UNREASONABLE.

Claim of Interested Party for Devoting Time to Prosecution of Suit.—Many cases are found which hold that mere lapse of time may act as a bar, and that it frequently gives rise to a conclusive presumption against the validity of a stale claim. So where one of several parties interested in a suit attended to its prosecution and devoted much time and labor to it, but did not make any claim for compensation for eighteen years, he was considered as having abandoned it. Tebbs v. Duval, 17 Gratt. 349.

Creditor Proceeding against Estate of Co-obligor.—The alleged laches of a creditor in a proceeding against the estate of a co-obligor was wholly unsustained where it appeared that the surviving obligor and principal debtor was living for some years after the death of the obligor, and where within two years after his death a creditors' suit was brought against his estate. After the institution of the suit the creditor had asserted his debt in every proper way and was entitled to have the payment of his debt out of the real estate of the debtor, the evidence disclosing no laches on his part. Scott v. Ashlin, 86 Va. 581, 10 S. E. Rep. 751.

To Set Aside Sale under Trust Deed.—To set aside a sale under a deed of trust for inadequacy of price, irregularity in, or want of sufficient notice of the sale, or because of encumbrances on the land at the time of the sale, the party must proceed without unreasonable delay. A delay of more than fifteen years was held unreasonable in Fowler v. Lewis, 36 W. Va. 112, 14 S. E. Rep. 447.

Ward Barred from Suing Guardian after Six Years Delay.—A ward after arriving at full age made an agreement with a party, to whom his guardian had loaned money, to take a less sum than was loaned, and gave his guardian a receipt in full for the money in his hands. After waiting six years the ward sued his guardian for the entire amount which was in his hands. He could not recover by reason of estoppel and of his laches in asserting his claim. Kelly v. McQuinn, 42 W. Va. 774, 26 S. E. Rep. 517.

After Nearly Five Years Deed Will Not Be Disturbed for Fraud or Misrepresentation without Proof.—An aunt conveyed by deed her whole estate, real and personal subject to her life estate, to her nephew who had been for many years living in her family and managing her business affairs. A bill was filed by the grantor to set aside the deed after the death of the grantee, and nearly five years after its date upon the ground of misrepresentation and fraud of the grantee. On the plaintiff's failing to prove such misrepresentation or fraud, a court of equity refused to grant any relief in the case, after such unexplained delay in bringing the suit. Curlett v. Newman, 30 W. Va. 182, 3 S. E. Rep. 578.

Settlement between Trustee and Beneficiary.—Where a *cestui que trust*, who was *sui juris*, had a settlement with her trustee, and quietly enjoyed the fruits of her bargain for a quarter of a century, without uttering a word of complaint, she will not be permitted to repudiate the contract so solemnly entered into and acquiesced in, though some of her rights may have been violated. Farish v. Wayman, 91 Va. 430, 21 S. E. Rep. 810.

Will of Lands Probated for Seven Years.—According to the course of judicial decisions, a will of lands which had been admitted to full probate, cannot be controverted after the lapse of seven years. Street v. Street, 11 Leigh 498.

Commissioner's Report Confirmed for Two Years.—The report of a commissioner is conclusive, in the absence of proof to the contrary, of facts which he is directed to ascertain, and where parties wait more than two years from the confirmation of the report to complain for the first time, such gross laches and acquiescence will lose them their rights, if any they had. Corey v. Moore, 86 Va. 721, 11 S. E. Rep. 114.

Suit against Cashier and Director of Bank for Collusion, Brought in Five Years.—Where a director of an insolvent banking corporation by fraud and collusion with the cashier received from him for his deposits discounted bills and notes without the authority of the board of directors, and although suit was not brought therefor until nearly five years after such transaction, the doctrine of laches did not apply. Lamb v. Cecil, 25 W. Va. 288.

Bill of Exchange Withheld from Circulation Sixteen Days.—The laches of the plaintiff in withholding a bill of exchange from circulation for sixteen days, was sufficient, in the absence of all testimony showing a reasonable excuse therefor, to release the drawer from all liability upon the bill. Thornburg v. Emmons, 23 W. Va. 325.

Suit to Set Aside Deed for Fraud Maintained in Two and a Half Years.—One commencing a suit within two and a half years after the making of a deed to set it aside for fraud was not precluded by laches from

maintaining such suit, when it was not barred by the statute of limitations, as the defence of laches is in equity only permitted to defeat an acknowledged right on the ground of its affording evidence that the right has been abandoned. Cottrell v. Watkins, 89 Va. 801, 17 S. E. Rep. 328, 37 Am. St. Rep. 897, 19 L. R. A. 754.

Supersedeas—No Bond—Six Years Delay Cures Omission.—A supersedeas was allowed without requiring a supersedeas bond, when one should have been required, and the cause was docketed without objection after a lapse of six years from the time it was awarded; this was held not to be a good cause for its dismissal. Pugh v. Jones, 6 Leigh 299.

Same—Application Refused Ten Years after It Was Awarded.—A supersedeas was awarded to a judgment two years after its date, and a bond was executed; but the office of clerk being vacant no supersedeas was issued. A clerk was soon after appointed. Ten years afterwards the plaintiff applied for a writ, which was refused. After such a lapse of time it was improper to award a supersedeas, and it ought to be quashed. Anderson v. Lively, 6 Leigh 77.

Same—Agreement to Reconsider Motion Cannot Be Renewed after Three Years.—Where the court agreed to reconsider a motion for a supersedeas, which had been rejected at the same term, but by inadvertence no entry was made setting aside the order denying the supersedeas, a motion to reconsider renewed more than three years afterwards cannot be entertained. Emory v. Erskine, 7 Leigh 267.

Dismissal of Bill of Review after Two Years—No Appeal.—When a bill of review was predicated on the sole ground of after-discovered evidence, and during the pendency of said bill of review more than two years elapsed after the date of the decree sought to be reviewed, and said bill of review was then dismissed, an appeal from the decree sought to be reviewed was barred. Wethered v. Elliott, 45 W. Va. 436, 32 S. E. Rep. 209.

Delay of Five Years in Attacking a Deed for Incapacity of and Undue Influence on Grantor.—Where an aged woman, by giving a deed, disinherited her son, an unexplained delay of five years after her death before an attempt was made to set aside the conveyance for incapacity and undue influence, defeated such equitable right of the son. Hale v. Cole, 31 W. Va. 576, 8 S. E. Rep. 516.

Beneficiaries under Trust Estopped after Twenty Years Acquiescence in Voidable Sale.—A suit by a widow and children, who were beneficiaries in a testamentary trust, against the grantee of the trust, to recover the property conveyed, could not be maintained, in the absence of fraud, where the sale was voidable, and not void, and the widow and children had enjoyed the proceeds thereof for over twenty years, and had not instituted proceedings to avoid the sale until more than three years had elapsed since the youngest child became of age, and had not offered to return the consideration which they received for the land. McClanahan v. Roanoke Iron Co., 95 Va. 552, 28 S. E. Rep. 955.

Relief from Judgment—Fraud.—Where a bill to obtain relief against a judgment on a bond, which it alleged was procured by fraud, was not filed until six years after the perpetration of the fraud, relief was refused on the ground of unreasonable delay. Barnett v. Barnett, 83 Va. 504, 2 S. E. Rep. 733.

Same—Usury.—So after a lapse of eighteen years a court would not set aside a judgment on the ground of usury, where the bill simply stated that the debt was usurious, and the defendant denied the usury, and the charge was not sustained by competent evidence; especially where no circumstances of fraud or surprise or undue advantage were proved or suggested. Terry v. Dickinson, 75 Va. 475.

Bill to Set Aside Deed for Undue Influence—Delay of Nine Years Although Evidence Available All the Time.—The grantor of a deed executed in 1883 was the father of the plaintiff, the grantee being a younger brother. The grantor died a month after the execution of the deed, and the grantee held possession until his death in 1888. In a bill filed in 1892 to set aside the conveyance on the ground of undue influence, it was alleged that the plaintiff was unable to secure the necessary evidence prior to that time; but it appeared that the witnesses upon whom he relied were members of his own family, the family servants and physician. The plaintiff was consequently guilty of gross laches, and the dismissal of the bill was justified. Orr v. Pennington, 93 Va. 268, 24 S. E. Rep. 928.

2. KNOWLEDGE.

General Rule.—It is a well-settled rule of equity jurisprudence that laches cannot be predicated of those who are ignorant of their rights. Such a defence is only permitted in equity to defeat an acknowledged right on the ground that it affords evidence that the right has been abandoned. Massie v. Heiskell, 80 Va. 789; Nelson v. Carrington, 4 Munf. 332; Rowe v. Bentley, 29 Gratt. 763; Jameson v. Rixey, 94 Va. 342, 26 S. E. Rep. 861; Moorman v. Arthur, 90 Va. 455, 18 S. E. Rep. 869.

Same—Depends on Circumstances of Case.—Hence, neither laches nor acquiescence can be justly imputed in the absence of all knowledge of the facts of which it is predicated, and whether lapse of time is sufficient to bar a recovery must of necessity depend upon the particular circumstances of each case. Lamar v. Hale, 79 Va. 147.

Estoppel.—Estoppel from acquiescence must rest upon actual knowledge of the wrongful act, its injurious effects and unreasonable delay. Moorman v. Arthur, 90 Va. 455, 18 S. E. Rep. 869; Green v. Thompson, 84 Va. 411, 5 S. E. Rep. 507. See also, Tunstall v. Withers, 86 Va. 892, 11 S. E. Rep. 565.

Applies to Equitable Demands Not Legal.—While ignorance of law does not prevent the bar of the statute of limitations, which depends upon law, and not good conscience, the same rule does not apply as regards the lapse of time to a purely equitable demand in a court of equity. Cranmer v. McSwords, 24 W. Va. 594.

Of Fraud—Begins on Discovery.—It is true that "no length of time can prevent the unkenneling of a fraud," but the rule is subject to the qualification that the party complaining must not have slept upon his rights after he has acquired knowledge of them, and time begins to run from the discovery of the fraud. Terry v. Fontaine, 83 Va. 451, 2 S. E. Rep. 743.

Fraud or Mutual Mistake.—No lapse of time, and no delay in bringing the suit, however long, will defeat the remedy in cases of fraud or mutual mistake, provided the injured party during all this interval is ignorant of the fraud or mistake without fault on his part. The duty to commence proceedings to assert his rights can only arise upon the discovery of the fraud or mistake, and the possible effect of his laches will begin to operate only from that time. Craufurd v. Smith, 93 Va. 623, 23 S. E. Rep. 235.

Of Mistake.—One who would set aside a decree by reason of mistake must proceed within a reasonable time after knowledge of it, else he will be barred of

relief by laches. Seymour v. Alkire (W. Va.), 34 S. E. Rep. 953.

Corporations—Repudiation of Subscription for Fraud.—Laches, as a bar to a subscriber's right to repudiate his subscription to the capital stock of corporation for fraud, begins to run only from the time when the subscriber is first chargeable with notice that a fraud has been perpetrated upon him. After his suspicions are reasonably aroused, it is his duty to investigate at once, and the burden of proof is upon the corporation to show notice of the fraud and laches on the part of the subscriber. Va. Land Co. v. Haupt, 90 Va. 533, 19 S. E. Rep. 168, 44 Am. St. Rep. 939.

Same—When Stockholder Can Repudiate Contracts.—Whenever a stockholder has notice or the means at hand of becoming acquainted with the contracts made by the corporation in which he is a stockholder, a court of equity will not allow him to remain quiet an unreasonable length of time with a view of ascertaining whether the contract will result in profit to him, and repudiate it if it results in loss. Boyce v. Montauk Gas Coal Co., 37 W. Va. 73, 16 S. E. Rep. 501.

Same—When Suit against by Stockholders for Fraud, etc., Allowed.—While a minority of stockholders of a corporation may maintain a bill on behalf of themselves and others for fraud, conspiracy, or *ultra vires* acts against a corporation, when they have been injured by such act, they must act promptly and not wait an unreasonable time. It was held where they postponed their case for nine years, that they had forfeited their right to equitable relief. Boyce v. Montauk Gas Coal Co., 37 W. Va. 73, 16 S. E. Rep. 501.

To Set Aside Deed for Fraud Prompt Action Necessary on Discovery.—A plaintiff's bill alleged the procurement by false and fraudulent representations of a deed for property, which was sold by decree of court, and it was filed within a month of six years after the sale had been confirmed. When fraud is relied upon to secure the relief sought, prompt action must be taken, and any delay in doing so, or the continued use and occupation of the property received under the sale, will be deemed an election to affirm it. In this case after such unexplained delay a court of equity granted no relief. Bailey v. Calfee (W. Va.), 39 S. E. Rep. 642, and numerous cases there cited.

But where a purchaser of town lots did not learn that the representations that induced him to make the contract were false until three years thereafter, when he brought suit for rescission, and in the meantime the vendor had no opportunity to dispose of the lots, and none of its creditors were prejudiced by the rescission, there was no valid defence on the ground of laches. Grosh v. Ivanhoe Land, etc., Co., 95 Va. 116, 27 S. E. Rep. 841.

Same Rule in Case of Contracts.—A person who elects to set aside a contract for fraud, must bring suit for the purpose, without unreasonable delay after the discovery of the fraud, unless there be good reason to excuse it; otherwise his delay will deny him relief. A delay of six years was held unreasonable in Whittaker v. Southwest Va. Imp. Co., 34 W. Va. 217, 12 S. E. Rep. 507. See Bill v. Schilling, 39 W. Va. 108, 19 S. E. Rep. 514.

To Set Aside Transactions for Mistake Prompt Action Necessary on Discovery.—In an action to rescind a deed on the ground of mistake in the property conveyed, it appeared that the plaintiff was thoroughly acquainted with the location of lots in that neighborhood, and had once owned this same lot conveyed in this deed. After making a cash payment and receiving a deed he discovered the mistake, but made no offer to return the deed, and nearly a year later when one of the notes fell due objected to paying it for the *sole* reason that there was a variance between its terms and the recitals in the trust deed by which it was secured. Even if the plaintiff had been entitled to rescind the contract upon discovering the mistake, the situation was eminently one which called for prompt and decisive action on his part. He should have returned the deed at once and demanded the restitution of his money and the cancellation of his obligations. But he did not do this until the lots had greatly depreciated in value; consequently equity did not grant relief. Simmons v. Palmer, 93 Va. 389, 25 S. E. Rep. 6.

Thus, where a bill was brought to correct a mistake fourteen years after it was discovered, and six years after it was found that the other security for the payment of a bond was not sufficient, it was held a case of laches, and no relief was granted because of the inexcusable delay. Carter v. McArtor, 28 Gratt. 356, and *foot-note*.

Hence, if the vendor of land, where a mistake has been made in the quantity of land conveyed, does not bring his suit within the time that would bar an action of ejectment (after the sale and conveyance), he must make his election and demand, giving notice of his claim, or bring his suit within a reasonable time after the discovery of the mistake. Western Min., etc., Co. v. Peytona, etc., Co., 8 W. Va. 406.

Acquiescence in Decree.—A party may be concluded by his acquiescence in a decree affecting his rights made in the progress of the cause, when he takes under the decree a part of the fund affected by it, and makes no objection to it until after the final decree in the cause made twenty-two years after prior decree. Burton v. Brown, 22 Gratt. 1.

Counterfeit Note—Notice Should Be Prompt.—The plaintiffs obtained from the defendant a bank note which was returned in March, 1825, to them as counterfeit, but they did not return it to the defendant, nor give him notice of its being counterfeit, until May, 1825, although the plaintiffs' place of business and defendant's residence were only 110 miles apart, and mail passed between those places regularly once a week. This was such negligence on the part of the plaintiffs, as precluded them from recovering. Pindall v. Northwestern Bank, 7 Leigh 617.

Trust Deed Released by Fraud—Knowledge by Assignor of Notes Secured—Estoppel after Four Years.—In a suit to set aside a release of a deed of trust securing purchase money notes, on the ground that it was obtained by fraud, the plaintiff's assignor of the notes had knowledge of the alleged fraud, and permitted the defendant to sell the property under the deed of trust acquired subsequent to the release, and to purchase and hold the property four years. The plaintiff was estopped by reason of the laches of the assignor from impeaching the validity of the release. Nat. Mut., etc., Assoc. v. Blair, 98 Va. 490, 36 S. E. Rep. 513.

Creditor of Trust Deed Purchases at Void Sale—Knowledge by First Grantor for Seventeen Years Bar to Suit to Set Aside.—A creditor secured by a deed of trust purchased the land at a void sale under such deed, and received a deed from the trustee conveying the fee. The purchaser afterwards conveyed by deed the land in fee to another, who held actual possession for the period of the statute of limitations. The fact that the first grantor knew of such

sale for at least seventeen years, was sufficient to defeat a suit in equity brought to set aside the sale and conveyance, and redeem and recover the land, by reason of laches and staleness, even if the statute of limitations did not bar it. Swann v. Thayer, 36 W. Va. 46, 14 S. E. Rep. 423.

Rights of Assignee of Bonds Secured by Deed of Trust Lost by Laches.—Land purchased by a testator in 1840 was paid for by his executrix in 1850, and the conveyance was to herself "as executrix." A few years later in a conveyance of the same land to secure bonds, she recited that it was paid for with her own means and was hers. After her death the administrator of the assignee of the bonds instituted a suit in 1881 to enforce the trust deed. It was held that the rights of the assignee has been lost by his laches. Morgan v. Fisher, 82 Va. 417.

Trust Raised by Creditor of Administrator Dealing with Assets—Knowledge for Two Years Bars Relief.—Where the creditor of an administrator dealt with the assets of the estate, in such a manner as to raise a trust on the part of the creditor, there being no actual fraud, a court of equity refused to enforce such a trust after the lapse of twenty years from the time the transaction became known, or might have become known to the *cestuis que trust* by the exercise of proper diligence. Morris v. Duke, 2 P. & H. 462.

3. PREJUDICE TO OTHERS.

General Statement.—Parties who come into equity to enforce claims, must do so within a reasonable time. They must not delay by their negligence until there can no longer be a safe determination of the controversy, and adversaries will be exposed to the danger of injustice from loss of evidence and information, and means of recourse against others, occasioned by deaths, insolvencies and other untoward circumstances. Smith v. Thompson, 7 Gratt. 112, 54 Am. Dec. 126.

Same—Attacking Voluntary Deed.—Although a deed cannot be attacked as voluntary after the expiration of the statutory limitation, yet there is no limitation upon the right of a creditor to institute a suit to attack such deed as fraudulent in fact. But the right to institute such suit can be lost in equity by remissness and delay in its assertion, and a party may lose his right to complain of fraud where such conditions exist as will render the court unable to pass upon the questions involved without serious risk of doing injustice to others, resulting from his delay. Bumgardner v. Harris, 92 Va. 188, 23 S. E. Rep. 229.

Suit in Four Years—No Prejudice, No Laches.—Where a suit was commenced within less than four years from the time the alleged cause of action arose, there was clearly no such lapse of time or acquiescence as would bar the plaintiff's right to relief, no grounds being stated which showed that the rights of any of the parties had been prejudiced by the delay. Crumlish v. Shen., etc., R. Co., 28 W. Va. 623.

Rescission of Contract for Fraud—Rights of Other Party.—The rule is, where a party has a right to rescind a contract on the ground of fraud, that he must rescind at once on discovering the fraud, or as soon thereafter as circumstances will permit; for he is not bound to rescind, and any unreasonable delay, especially if it be injurious to the other party, will be regarded as a waiver of his right, and it is well settled that the plaintiff will then be precluded from relief by his laches. In this case the bond was executed in 1879, but the bill alleging fraudulent procurement was not instituted until 1885, and no explanation was given for the delay. Barnett v. Barnett, 83 Va. 504, 2 S. E. Rep. 733.

Same—Rights of Creditors or Third Parties.—Where a party seeks to rescind his contract on the ground of fraud he will be deemed to have waived his right to rescind if the rights of creditors have intervened, or an innocent third party has acquired an interest in the property, or if in consequence of his delay, the position even of the wrongdoer is affected. Grosh v. Ivanhoe Land, etc., Co., 95 Va. 161, 27 S. E. Rep. 841.

Estoppel of Judgment Creditor.—Where a judgment creditor stands by and sees his debtor's land sold without making any assertion of his claim, and failing to do so for a number of years afterwards, he will be denied the right to subject the land in the hands of the innocent purchaser. Henry v. Ould, Va. Law J. 1883, p. 54.

Innocent Purchaser Protected after Seventeen Years Delay.—A lien on land acquired by virtue of a contract, unrecorded in the county where the land is situated, as against one who acquired title to the land without actual or constructive notice thereof, was barred by laches, where the lien was asserted more than seventeen years after the purchaser acquired title and possession thereunder, and twenty-five years after the lien was created, no reason being given for the failure to assert it earlier. Nelson v. Triplett (Va.), 39 S. E. Rep. 150.

Administrator Liable When by Delay the Obligor Becomes Insolvent.—Where an administrator did not take any steps to enforce the collection of a bond in accordance with his duties, but held it while the obligor was solvent, suffering him to become insolvent and to convey all of his property to the exclusion of this debt, he must upon well-settled principles be held to have made himself liable by his laches for what he could have made out of the obligor. Sterling v. Wilkinson, 83 Va. 791, 3 S. E. Rep. 533.

Claim against State Barred Where Delay Prevents Reimbursement from General Government.—Unnecessary delay on the part of the claimant until after the year 1790, to make his claim against the state for vessels impressed in 1781, whereby the state was deprived of the opportunity of obtaining reimbursement from the general government, barred the owner both at law and in equity. Com. v. Banks, 4 Call 338.

After Seventeen Years Acquiescence Sale Will Not Be Disturbed When Purchaser Has Made Valuable Improvements.—The trustee in a deed authorized his executors by will to execute the trust, which they did in 1818, by selling the land for its full value. This was after the death of the grantor whose heirs were two daughters, one of whom was absent from the commonwealth at the time of the sale. The husband of the other assented to the sale and received his wife's share, and also that of the absent daughter, for whom he undertook to act. The latter returned in 1820, a widow, and resided with her sister where the land was situated. The purchaser made valuable improvements on the property and no claim was made by any of the parties until 1835. Under the circumstances the sale was not disturbed. Hughes v. Caldwell, 11 Leigh 342.

Indemnity Bond—Twenty-Three Years Delay—Original Debtor Insolvent.—The plaintiffs in an action to enforce an indemnity bond showed no equitable right when their suit was brought more than thirty-four years after the original bond was payable, and more than twenty-three years after the date of the

bond of indemnity, during which time, for a period of nearly thirteen years, there was an executor for the estate of one of the joint obligors of the original bond. Notwithstanding this, the claim for indemnity was allowed to sleep until the other joint obligor, the original debtor, became utterly insolvent a few years before the institution of this suit. After such great lapse of time and laches on the part of the plaintiff no relief was allowed in equity. Smith v. Thompson, 7 Gratt. 112, 54 Am. Dec. 126.

Failure of Attorney to Pay Over Purchase Money Collected—No Relief against Land after Eighteen Years Delay.—The plaintiff was assigned certain purchase money notes secured by a reservation of a vendor's lien on a tract of land. He employed an attorney to enforce the lien, and in April 1879, a decree directing sale was confirmed. A deed was directed to be made to the purchaser, and the attorney was appointed special commissioner to execute the deed. The plaintiff failed for eighteen years to take any legal steps to collect the money, which had been paid to the attorney, and in the meantime the land came into the hands of innocent purchasers. By reason of his laches the plaintiff was not entitled to a recovery. Shields v. Tarleton (W. Va.), 37 S. E. Rep. 589.

4. LOSS OF EVIDENCE—DEATH OF PARTIES AND WITNESSES.—See "5. Obscurity of Transactions," *infra*.

The Rationale of the Rule Is to Prevent Injustice.—A claim which was probably just originally, will be disallowed and rejected in consequence of its staleness, and of the probable impossibility, from loss of evidence and death of parties, of ascertaining the facts of the case and doing justice, and also because it may reasonably be presumed that the claim, if originally just, had been abandoned or satisfied. Robertson v. Read, 17 Gratt. 544, and *foot-note*, with collection of authorities.

Thus, where the appellants stood by without complaining until the death of the last person who could throw any light upon the case, and then came forward asserting a claim unsupported by proof, and after twenty-five years called upon the court to do what would be manifestly unjust and inequitable, it was impossible that any proper investigation could be had. Every presumption was against the claim of the plaintiffs; the persons who could speak no longer lived, the materials for investigation were lost, and the grave was closed over all save a stale claim, to enforce which the plaintiffs were clearly not entitled to the aid of a court of equity. Hill v. Umberger, 77 Va. 653.

Same—Proper Defence Prevented.—Laches in the assertion or prosecution of a claim is not always enough to defeat it. It must be such as to afford a reasonable presumption of the satisfaction or abandonment of the claim, or such as to prevent a proper defence by reason of death of parties, loss of evidence or otherwise. Tazewell v. Saunders, 13 Gratt. 354, and *foot-note*, collecting authorities.

On the other hand delay in prosecuting a suit for seven years and three months, where all the parties are still living and able to defend it, will not warrant its being dismissed on the ground of lack of due diligence in prosecuting it. It takes longer delay, and death of parties or loss of evidence, to call for such dismissal. Pethtel v. McCullough (W. Va.), 39 S. E. Rep. 199.

Same—Evidence Unsatisfactory.—An equitable claim of any kind, and especially one which depends alone upon parol testimony, will not be recognized after a great lapse of time, during which it has been ignored, where no satisfactory reason can be assigned for not making the claim sooner. And this is especially true where the nature of the claim requires explicit evidence to explain it, and such lapse of time renders the evidence unsatisfactory, which might otherwise have been regarded as sufficiently clear and explicit. Troll v. Carter, 15 W. Va. 557; Benjamin v. Clarke, 20 Gratt. 544; Phelps v. Seely, 22 Gratt. 589; Western Min., etc., Co. v. Peytona, etc., Co., 8 W. Va. 442.

In Old Transactions Lapse of Time of Weight for Defendant—Rights Presumed Exercised.—Lapse of time is justly allowed great weight in controversies about transactions long since passed. This weight is thrown in favor of the party who insists that the state of things existing during that lapse shall not be disturbed. This is especially so where the immediate parties to any given transaction are dead. It is presumed that persons having the right to property will exercise it, and if this is not done, the presumption is obvious that the right does not exist. Evans v. Spurgin, 11 Gratt. 615.

Rendering Accurate Settlement of Account Impossible.—A decree in a creditors' suit, disallowing a claim presented by an administrator of a deceased creditor of the defendant, was proper, where the demand was stale and was never asserted by the decedent in his lifetime, and where by reason of lapse of time, death of parties, loss of evidence, and loose business methods of the parties, an accurate and fair settlement of their accounts was impossible. Kavanaugh v. Kavanaugh, 98 Va. 649, 37 S. E. Rep. 275.

Deed Attacked for Fraud Sustained after Death of Vendor and Witness.—A chancery suit was brought to cancel a deed on the ground of fraud in its execution eight years after it was recorded, and after the death of the vendor and a witness. The defendant was a child of eight years, and it was erroneous to set aside the deed, as the laches of the plaintiff was sufficient to prevent relief. Lafferty v. Lafferty, 42 W. Va. 783, 26 S. E. Rep. 262.

When No Safe Conclusion from Death of Commissioner and Loss of Papers—Situation Will Not Be Disturbed.—Where a commissioner, whose transactions were the subject of the controversy, and against whom no claim was asserted in his lifetime, was dead, and who was affirmatively shown by the record to have been a gentleman of the highest integrity, and careful and accurate in his affairs; where the record and papers connected with the suit have been destroyed; and where books of the bank in which the money in question was directed to be deposited have been lost; there could no longer be a safe determination of the controversy because of the laches of the plaintiff, and the *status quo* was not disturbed. Perkins v. Lane, 82 Va. 59.

Loss of Important Evidence with No Explanation for Delay Bars Suit to Set Aside Conveyance.—Where a judgment was recovered in 1875, on a debt contracted in 1865, and where conveyances by the debtor charged to be fraudulent were made in 1870 and in 1875, but suit was not commenced until 1883, nearly three years after the death of the grantee, and more than two years after the death of the debtor, by reason of which most important evidence was lost, and no satisfactory explanation was given for the long delay of the appellant in asserting his rights, the bill was rightfully dismissed on the ground of laches. Terry v. Fontaine, 83 Va. 451, 2 S. E. Rep. 743.

Settlement between Guardian and Wards Undisturbed after Twelve Years Delay and His Death.—A father, as guardian for his children had possession of their property, and as executor of an estate to which they were heirs, made a contract with them by which for a consideration they released him from all liability as guardian and as executor. This contract was executed when the daughters were of age, had married and were residing apart from their father with their husbands, who united in the contract. It was held in this case that the daughters were estopped by their laches to set this contract aside on the ground of fraud twelve years after it was executed and after their father's death. Baylor v. Fulkerson, 96 Va. 265, 31 S. E. Rep. 63.

Suit to Set Aside Deed for Incapacity and Undue Influence—After Nine Years Delay and Death of Grantor and Grantee No Relief.—Where the object of a suit was to set aside a conveyance on the ground that the grantor was mentally incapacitated from disposing of his property when the deed was made, or was unduly influenced to make the conveyance, reasonable diligence has not been exercised where the suit was not instituted until nine years after the conveyance was made. The lapse of this length of time, and the failure to give any excuse whatever why the suit was not instituted earlier, and not until years after the death of the grantor and grantee, were sufficient to justify the dismissal of the bill. Orr v. Pennington, 93 Va. 268, 24 S. E. Rep. 928.

After Destruction of Papers and Death of Parties, Sale Confirmed for Twenty Years Valid.—A bill was filed in 1852, for the sale of land, and it was sold and confirmed in 1858. During the war the federal troops destroyed the commissioner's papers. In 1876 after the death of the executors of the original owners, his devisees brought an action of ejectment to recover land. It was enjoined on the ground of the laches of the parties bringing the action. Hatcher v. Hall, 77 Va. 573.

Lottery—Misapplication of Proceeds—No Accounting after Death of All Parties Who Could Explain—A lottery was authorized in 1802 for the relief of sufferers by fire in Lexington, but with the consent of the greater part of the sufferers, the commissioners applied the proceeds to the construction of roads, which were completed in 1809. The manager died in 1817. In 1827, the balance in the hands of the manager was vested in trustees, and the manager was required to settle with them. In 1830 the trustee brought a suit against the administrators of the manager for an account of the lottery fund. Equity would not entertain the bill for the account of such stale transactions, as all the parties who could explain them were dead. Caruthers v. Trustees of Lexington, 12 Leigh 610.

Death of All Actors and Loss of Valuable Papers Prevents Disturbance of Purchasers for Value.—The reservation at the foot of a final decree, that "any of the parties to this suit have leave reserved to them at the foot of this decree to ask any further order as may be necessary to enforce the same," cannot give the right nearly twenty-nine years after that decree to parties, who had been twenty-two, twenty and fourteen years repectively, *sui juris* and on the spot, to exhume from the debris of such an old suit such papers as had escaped the ravage of time and the public enemy; and the death of all the actors in the case, and the loss of many valuable and indispensable papers of the suit, prevented a court of equity from disturbing purchasers for value twenty-eight years after the end of the cause. Riely v. Kinzel, 85 Va. 480, 7 S. E. Rep. 907.

After Many Years Delay Deed Will Not Be Set Aside When All Persons with Knowledge of Case Are Dead.—Whatever may have been the original justice of a claim a court of equity will not interfere to set aside conveyances as void by reason of undue influence and fraud, where the delay was for fifty-one years after the delivery of the deeds, and twenty-four years after the death of the grantee, the parties who alone could tell anything about the transaction being dead. Griffin v. Birkhead, 84 Va. 612, 5 S. E. Rep. 685.

Judgment on Note—Suit after Twenty-Two Years Barred by Death of Defendants and Witnesses.—Where a judgment was obtained upon a negotiable note in 1857, and no execution was ever issued upon it, and it was never docketed until 1867, the lapse of twenty-two years before suit was brought constituted this a stale demand, after the death of all the defendants to the suit, and of all the numerous persons who could have had personal knowledge touching the transaction. Scott v. Isaacs, 85 Va. 712, 8 S. E. Rep. 678.

Settlement of Estate Barred When Plaintiff, Administrator Defendant and Beneficiary Dead—No Substantiation of Claims.—In a suit to settle an estate it appeared that the original plaintiff, the administrator defendant, and the chief *cestui que trust* were all dead; that the claims as to the first transactions arose thirty years ago; that another claim involved a settlement of accounts running through five years between parties who had since died; that another involved transaction covering a period of nine years, commencing more than thirty years ago, and that no book accounts or vouchers could be produced to substantiate them. It was held that the claim should be rejected as barred by limitation and laches. Garland v. Garland (Va.), 24 S. E. Rep. 505.

Contribution by Partner—Death of All with Knowledge of Facts.—A partner who failed to prosecute his claim for contribution from another partner until twenty-six years after the dissolution of the firm, and eight years after the payment of the debts, and after the death of all parties who had knowledge of the facts, including the partner against whom contribution was sought, was held guilty of laches. Compton v. Thorn, 90 Va. 653, 19 S. E. Rep. 451.

Where Fiduciary's Defence to Accounting Lost by Death of Parties, Witnesses, and Papers Destroyed, Bill to Inquire into Set Aside.—Where more than twenty-five years had passed, and the original parties in interest, the witnesses, and the commissioner who settled the accounts, were all dead, the written evidences of the papers in the cause lost, and the aged fiduciary himself, whose prompt and regular settlements attested his fidelity, had by the lapse of time and existence of the war, lost his property, and means of defence against the demands set up in a suit, equity refused to enforce a demand so long deferred. Castleman v. Dorsey, 78 Va. 342.

Legal Title Sustained When Holder of Equity Delayed until All Cognizant of It Were Dead.—If the legal title to land passes into the hands of purchasers for valuable consideration and without notice of an equity, and the possessor of the equity, instead of his promptly asserting the right to demand the legal title to the land, delays the assertion of such demand for nineteen years, and until after the death of the grantor and of all others present when the equity arose, a court of equity will not enforce the making of the legal title to the possessor of the

equity, because of his laches. Frame v. Frame, 32 W. Va. 463, 9 S. E. Rep. 901.

5. OBSCURITY OF TRANSACTIONS.—See "4. Loss of Evidence—Death of Parties and Witnesses," *supra.*

Rendering Conclusion of Court Conjectural.—While no fixed rule has been or can be laid down to govern or determine what lapse of time should be deemed sufficient to bar a recovery, as this must depend upon the particular circumstances of each case, it is well settled that when from the plaintiff's delay any conclusion that the court may arrive at must be conjectural, he will be precluded by his laches from relief. Nelson v. Triplett (Va.), 39 S. E. Rep. 150; Doyle v. Beasley (Va.), 39 S. E. Rep. 152; Kavanaugh v. Kavanaugh, 98 Va. 649, 37 S. E. Rep. 275.

So, in a case where the evidence plainly shows that any conclusion at which the court can arrive must be at best conjectural, and that the danger of doing injustice is almost if not absolutely certain, because of obscurity of the original transactions by time (evidence being probably lost), courts of equity refuse to interfere, regardless of the original justice of the claim. Dismal Swamp Land Co. v. Macauley, 85 Va. 16, 6 S. E. Rep. 697. See also, Turner v. Dillard, 82 Va. 536; Caruthers v. Trustees, 12 Leigh 610.

And, although a delay of fourteen years does not create a statutory bar, if from the delay it is manifest that any conclusion to which the court can arrive, must be at best conjectural because of the obscurity of the original transactions, the court will not relieve the plaintiff, if it is too late to ascertain the merits of the controversy. Harrison v. Gibson, 23 Gratt. 212, and *foot-note.*

Has No Application Where No Room for Conjecture.—Where there is no room for conjecture, and the pathway is open and plain to a full and fair ascertainment of the rights of the parties, with no obstruction to the attainment of complete justice, under such circumstances the doctrine of laches does not apply. Whitlock v. Johnson, 87 Va. 323, 12 S. E. Rep. 614.

Case Not Clear after Thirty-Five Years.—A court of equity refused to set aside a deed made by a daughter to her father immediately before her marriage, conveying her remainder in land, in which the father had a life estate, upon the ground of undue influence, after an interval of thirty-five years and after the death of the father. Though the claim of the daughter was not barred by the statute of limitations, the case was not a clear one, and there were no circumstances which sufficiently accounted for the delay. Pusey v. Gardner, 21 W. Va. 469.

Terms and Conditions of Agreement Uncertain.—Even where the rights of third parties do not intervene a court of equity will not grant relief by conveying the legal title to the donee of land. Thus, where a suit was not instituted for thirty-one years, if there was any trouble about the terms of the agreement or the conditions on which the deed was to be made by the donor to the donee, no relief was granted. Frame v. Frame, 32 W. Va. 463, 9 S. E. Rep. 901.

Where Justice to Parties Impossible.—Where a complainant delayed in asserting his claim until the original transaction out of which it arose had become obscure by time, parties had died, and evidence had probably been lost, so that it would be impossible with any degree of certainty to do justice between the parties, the bill must be dismissed. Tate v. Jones, 98 Va. 544, 36 S. E. Rep. 984.

So where the transactions involved had not become obscure by lapse of time, the sums sought to be recovered were not uncertain, and the evidence to enable the court to do justice between the parties had not been lost, no circumstances existed which sustained the defence of laches. Morrison v. Householder, 79 Va. 627.

And when the plaintiffs by their delay and gross laches made it not only inconvenient and difficult, but impossible for the defendants to state a just account, the court held that if it decreed such an account upon such imperfect and difficult material, it would incur the hazard of doing great injustice to the estate of one who had been dead for nearly a quarter of a century. Stamper v. Garnett, 31 Gratt. 550, and *foot-note.*

Impossible to Ascertain Truth of Case.—Upon a bill in equity to charge property, which had passed into the hands of third persons without notice of the complainant's claim, the court being called upon to investigate transactions which occurred thirty years before the institution of the suit, and, from lapse of time and the obscurity of the transactions, it was impossible to arrive at the truth of the case, the bill was dismissed. Page v. Booth, 1 Rob. 161.

V. CIRCUMSTANCES WHICH EXCUSE LACHES.

1. IN GENERAL.

Presumption Raised by Assent, etc., Must Be Rebutted.—When lapse of time is sufficient to raise the presumption of assent, acquiescence or waiver on the part of the plaintiff, or those under whom he claims, he cannot recover unless he rebuts such presumption by a reasonable and satisfactory excuse for the delay in the assertion of his rights not founded on his own laches or neglect. Bryant v. Groves, 42 W. Va. 10, 24 S. E. Rep. 605.

Hence, although an action on a note given for the purchase money of land was barred by limitation so as to defeat its collection out of other property of the debtor, the lien upon the particular land was not barred. But presumption of payment from lapse of time and laches, unless repelled and explained, will defeat the enforcement of such lien. Evans v. Johnson, 39 W. Va. 299, 19 S. E. Rep. 623.

Opportunity Must Be Given Plaintiff to Explain Delay Where It Is Not Too Long.—A plaintiff commenced his action in time to save the bar of the statute, but after doing so took no others steps for seven years. This appeared to have been great laches, but as he had not had an opportunity of explaining his delay, which was not so great but that it might have been satisfactorily explained, the court did not dismiss his proceedings on that ground. James River, etc., Co. v. Littlejohn, 18 Gratt. 53.

2. INSANITY.

Laches Not Imputable to One of Unsound Mind.—Laches, being an inexcusable delay in asserting a right, is an equitable defence, which implies knowledge or means of knowing one's rights, depending upon the particular facts of each case, and therefore cannot be imputed to one of unsound mind. Trowbridge v. Stone, 42 W. Va. 454, 26 S. E. Rep. 363. See also, Knight v. Watts, 26 W. Va. 175.

This principle was applied in a case where land was sold in 1815 by the sheriff to the deputy sheriff for the nonpayment of taxes, at which time the owner thereof was insane and so continued until his death in 1822. In 1833 his heir filed a bill for its recovery, and the delay in bringing the suit was held no bar to the recovery. Taylor v. Stringer, 1 Gratt. 158.

3. INFANCY.

Generally Excuses Laches.—Infants who are of

tender years when the transactions in controversy occur, are not chargeable with laches, when neither death of parties nor loss of evidence renders it difficult to do justice, and where all the vouchers have been preserved. Robinett v. Robinett (Va.), 19 S. E. Rep. 845.

It is true that delay in the assertion of a right, unless satisfactorily explained, operates in equity as evidence of assent; and laches and neglect are always discountenanced in equity; yet an infant or lunatic was not prejudiced because of the failure of a next friend to institute a suit, if such suit was brought promptly after there was some one upon whom the law imposed the obligation to guard the interest of the infant or lunatic. Knight v. Watts, 26 W. Va. 175. See Whitlock v. Johnson, 87 Va. 323, 12 S. E. Rep. 614.

Delay of Eight Years Explained by Infancy of Plaintiff.—The delay of legatees for eight years to institute a suit to surcharge and falsify the settled accounts of an executor, was held not sufficient ground for refusing relief, especially as one of the complainants was a female and under age when the settlement was in progress, though probably of full age when it was returned to the court of probate and recorded. Handly v. Snodgrass, 9 Leigh 484.

Rescission of Purchase Made by Agent—Delay of Six Years Excused.—A delay of six years in impeaching a purchase made by an agent was held not to be fatal to the right of the plaintiffs to the aid of equity in rescinding the sale, where no ratification of the purchase appeared and all of the principals were nonresidents, some of them being infants and the others being *femes covert*. Buckles v. Lafferty, 2 Rob. 292, 40 Am. Dec. 752.

Infants Not Barred When They Sue in Five Years after Majority.—A testator died in 1808, leaving his estate to his four children, one of whom died shortly afterwards, leaving a number of children. An administrator qualified and his account was settled in 1811. He further administered, but returned no account of the administration, and died in 1812. The youngest of the grandchildren became of age in 1830, and within five years after he arrived at age, together with his brothers and sisters, filed a bill to surcharge the account of the administrator, and to have a full settlement. This lapse of time did not bar their recovery of their father's shar in the ascertained balance. Toler v. Toler, 2 P. & H. 71.

4. COVERTURE.

Excuses Delay in Bringing Suit.—The fact of a legatee being under the disability of coverture during a great portion of the time which exists between the accrual of the cause of action and the time when the suit is finally brought, is a circumstance to account for and excuse the delay. Baker v. Morris, 10 Leigh 284.

So in Justis v. English, 30 Gratt. 565, coverture was held to be a sufficient excuse to overcome the defence of lapse of time, alleged acquiescence, or imputed laches on the part of the plaintiff. See Buckles v. Lafferty, 2 Rob. 292, 40 Am. Dec. 752.

Disaffirmance of Deed—Thirty-Two Years Delay.—Where an infant married woman made a deed, she was allowed to disaffirm within a reasonable time after she become discovert, although this was about thirty-two years after she became of age. Such a disability was sufficient to repel the defence of laches. Wilson v. Branch, 77 Va. 65.

Lapse of Time during Coverture Does Not Affect Rights.—A female ward made a deed of general release and acquittance to her guardian, without any settlement of accounts, and also made a deed of gift to the infant son of the guardian without having its contents and effect explained to her. She married the same day. Her husband lived for more than twenty years, and then died. The lapse of time during the coverture did not affect the right of the wife to impeach the two deeds in equity. Waller v. Armistead, 2 Leigh 11.

Case When Delay Accounted for by Coverture.—A bond was delivered by the executor to the daughter of the testator in 1807. In 1808, she married and her husband died in 1819. In 1820 she married again and died in 1833. No suit was ever brought by her administrator. The obligor was unable to show any exemption from liability to pay the bond. The circumstances of the case accounted for the long delay, and the plaintiff was entitled to relief. Baker v. Morris, 10 Leigh 284.

5. FULFILLMENT OF CONDITIONS.

Legacy Limited on Future Event—No Laches till Then.—Laches cannot be imputed to a legatee for failure to sue for a legacy, which is limited upon a future event, until such future event happens. Effinger v. Hall, 81 Va. 94.

Action against Surety—No Laches until Request to Sue Principal.—A surety on a bond can never charge his creditor with laches until he has prompted him in vain to pursue the principal. Coles v. Ballard, 78 Va. 139.

6. RELATIONSHIP OF PARTIES.

A Circumstance of Excuse.—Mere delay is not always to be considered laches, and it may be explained by the mere kinship of the parties and their friendly relations, and by the inability of the debtor to pay. Jameson v. Rixey, 94 Va. 342, 26 S. E. Rep. 861.

Defendant in Loco Parentis—Explains Delay.—A step-father conveyed to his step-son, when a minor living with him, a slave, purporting to be for value, and he retained possession of the slave and her increase for many years, and until the death of the step-son. After the death of the step-son, who left no children, his widow filed a bill against the step-father and his wife for distribution of the slaves. This suit was brought a little less than twenty years from the time the step-son ceased to live with the step-father. The latter having stood in the place of a parent and guardian to the son until the son ceased to live with him, the claim was not barred by lapse of time. Roberts v. King, 10 Gratt. 184.

7. LOSS OF PAPERS.

Suit against Trustee—Temporary Loss of Papers.—Delay in prosecuting a suit against a trustee to enforce a claim by reason of the temporary loss of papers, and the improper acts of other claimants, was no bar thereto in Griffin v. Macaulay, 7 Gratt. 476.

Vendor's Lien—Destruction of Records and Books of Creditor.—A delay of twenty-six years in enforcing a vendor's lien may be explained by the destruction of the court records of the county, the departure of the appellant's former attorney to the Pacific coast, and the destruction of the creditor's books. Ginter v. Breeden, 90 Va. 565, 19 S. E. Rep. 656. See Turner v. Dillard, 82 Va. 536.

8. PENDENCY OF SUIT.

Cause in United States Court—Remanded.—Where a cause was removed from the state court to the United States court, where it remained for seventeen years, during which time active litigation was carried on between the parties, and then the cause was remanded to the state court for want of juris-

diction, the defendant could not under the plea of laches take advantage of the delay thus occasioned. Parker v. Clarkson, 39 W. Va. 184, 19 S. E. Rep. 431.

Suit by Ward against Guardian's Estate—No Satisfaction—May Sue Sureties.—A ward soon after coming of age filed a bill against the administratrix of her guardian for an account. After the suit had lingered for twenty-four years a decree was entered in favor of the ward, but not being able to obtain satisfaction of the decree she filed a bill against the sureties of the guardian. The lapse of time during which the ward was prosecuting her claim against the administratrix of the guardian, furnished no ground for the exoneration of the surety. Roberts v. Colvin, 3 Gratt. 358.

Presumption of Payment Rebutted by Suit.—A pending suit against an executor for more than his testator's estate was worth, within twenty years before suit was brought against him by legatees or distributees for their share of the estate, was held to rebut any presumption of payment arising from lapse of time against their demand, for until the debts were paid they had no claim to the estate. Winston v. Street, 2 P. & H. 169.

Ineffectual Effort to Subject Land—Wrongful Release by Sheriff.—A judgment was obtained on a contract made prior to the Constitution. The deputy sheriff levied the execution on the property of the debtor, who claimed it was exempt under the homestead exemption, and it was released without any indemnifying bond. After an ineffectual effort to subject the land to satisfy his debt, six years after issuance of the execution the creditor instituted his action against the sheriff and his sureties to recover the value of the property lost by their wrongful conduct. This delay was not a waiver, as the liability of the sheriff could not be affected by any delay short of the statutory period. Sage v. Dickinson, 33 Gratt. 361.

When Pending Suit No Excuse.—The pendency of a suit by those entitled to an estate, against the administrator and his sureties, to which a creditor of the administrator, who by dealing with the assets of the estate had raised a trust on his part, was not a party, was no excuse for their laches in producing their claim against him. Morris v. Duke, 2 P. & H. 462.

Suit Instituted in Two Years Bars Laches.—The contention that a bill should have been dismissed on the ground of laches is not supported by the facts of a case, in which it appeared that within two years after the death of the life tenant of a tract of land in 1852, a suit was instituted, whose object among other things was to obtain a construction of the will of the testator, and the decision was not rendered until 1867. In the same year a suit was filed by one of the devisees for a partition of this same land. These circumstances disclosed no laches on the part of the plaintiff. Davis v. Tebbs, 81 Va. 600.

Suspension by Injunction—Proper Instructions.—It was proper for the court to instruct the jury, where a *scire facias* was brought to revive a judgment, which had been suspended by an injunction for forty-six years, that the pendency of the injunction cause repelled the legal presumption of payment which would have arisen from lapse of time, if said injunction had not been pending. Hutsonpiller v. Stover, 12 Gratt. 579.

9. SUSPENSION OF BUSINESS.

By Civil War and Stay Laws.—The obstruction of legal remedies occasioned by the existence of the civil war, and the subsequent stay laws, which partially suspended legal remedies for eight years, sufficiently accounted for a delay in the assertion of rights, in Rowe v. Bentley, 29 Gratt. 756.

Thus, a lapse of twenty-eight years between the maturity of a bond and the institution of a suit upon it was repelled and explained by the existence of the civil war, the pendency of the stay law, and an attempt on the part of the creditor during this time to enforce collection of the bond. Updike v. Lane, 78 Va. 132.

So a delay of nine years in bringing a bill to correct a decree was satisfactorily explained by the case requiring the intervention of legislative authority to give relief, and the interruption of judicial proceedings by the existence and continuance of the civil war. Byrne v. Edmonds, 23 Gratt. 200.

Same—Slave Entitled to Bequest.—A fiduciary can rely upon the staleness of a demand, or upon any presumption of payment, or satisfaction, arising from lapse of time, which will prevent a legatee from asserting his claim. But where a slave was kept in slavery and deprived of both his freedom and the bequest to which he was entitled until the year 1865, and the stay law was in existence until 1869, he was not prevented from filing his petition in 1878. Jones v. Jones, 92 Va. 590, 24 S. E. Rep. 255.

Same—Enforcing Vendor's Lien.—A vendor's lien was reserved on land conveyed in 1860, and suit was brought to enforce this in 1886. Eliminating the periods of the civil war and also the stay law period, and considering the circumstances of the case, the delay was held not sufficient to constitute laches. Tunstall v. Withers, 86 Va. 892, 11 S. E. Rep. 565.

Length of Stay Law—Receiver's Delay.—The operation of the stay law, which went into effect in April, 1861, and continued until January, 1869, excused a delay on the part of a receiver in collecting bonds. Reynolds v. Pettyjohn, 79 Va. 327.

10. ABSENCE FROM JURISDICTION.

Laches of Legatee Excused.—A delay of seventeen years by a specific legatee to sue for his legacy was excused where he left the state two years before he arrived at age, was not heard of for eleven years thereafter, and has ever since been a nonresident. Nelson v. Cornwell, 11 Gratt. 724. See also, Buckles v. Lafferty, 2 Rob. 292, 40 Am. Dec. 752, and Whitlock v. Johnson, 87 Va. 323, 12 S. E. Rep. 614.

11. IGNORANCE OF RIGHTS.

No Imputation of Laches to One Ignorant of His Rights.—Parties were not guilty of laches in asserting their rights where they were wholly unaware of the very existence of those rights, as laches cannot be imputed to one who is ignorant of his rights. Hannon v. Hounihan, 85 Va. 429, 12 S. E. Rep. 157.

Mistake—Bill to Correct within a Year.—Where a bill was filed to correct a mistake of fact within a year after the mistake was discovered, no neglect nor any degree of what can be termed laches appeared, as it could not be reasonably considered that it ought to have been filed before the mistake was discovered. Fore v. Foster, 86 Va. 104, 9 S. E. Rep. 497.

Infants—Absence from Jurisdiction—Vigorous Steps Taken on Discovery of Rights.—Where the plaintiffs were very young when the transactions complained of occurred, and by the untimely death of certain persons they were deprived of persons having an interest in protecting their rights, and who could have informed them what they were, and where they were removed during their minority beyond the limits of the state, and for a great part of their minority lived abroad, they were not guilty of laches.

They had no correspondence or connections in this state, and were utterly ignorant of their rights until a short time before they instituted this suit. As soon as they were informed of their rights they took active and vigorous measures to enforce them. Whitlock v. Johnson, 87 Va. 323, 12 S. E. Rep. 614.

12. ACT OF DEFENDANT.

Assignment of Bond—Defendant Assumes Control of Everything.—When by the very terms and conditions expressed in the assignment of a bond, which was written by the defendant himself, there was nothing left for the plaintiff to do, and the defendant, as his personal friend and counsel, assumed to do everything needful to collect the bond and to account to the plaintiff, reserving absolute control in the matter, and the right to exercise his own discretion for enforcing payment, it was clear that the equitable doctrine of laches had no application whatever to the case. Lightfoot v. Green, 91 Va. 509, 22 S. E. Rep. 242.

13. MISTAKE.

Plaintiff Should Act in Reasonable Time after Discovery.—Mere delay is not a bar to a suit to correct a mutual mistake in a contract or to rescind the contract for that reason if the plaintiff acts within a reasonable time after discovering the mistake. But as in other cases if the delay is unreasonable after discovery of the mistake, the complaining party's negligence will preclude relief. 18 Am. & Eng. Enc. Law 118; Fore v. Foster, 86 Va. 104; Weidebusch v. Hartenstein, 12 W. Va. 760.

To Relieve from Mistake Reasonable Diligence Required of Plaintiff.—On a settlement of mutual accounts, the defendant executed to the other party a bond for the balance due. During the two years that the other party lived thereafter, no objection was made to the correctness of the settlement. Equity will not reform or cancel a bond on the ground of mistake in the accounting, unless a full settlement can be made and the mistake clearly appears. It requires that those who ask relief on the ground of mutual mistake shall have exercised that degree of diligence which may be fairly expected from a reasonable person, and it is negligence where a party complaining has within his reach the means of ascertaining the true facts but does not avail himself of the opportunity for information. Persinger v. Chapman, 93 Va. 349, 25 S. E. Rep. 5.

14. OLD AGE OF PLAINTIFF.

Explains Delay in Bill for Accounting.—A creditor's suit was instituted against the estate of a decedent, who died in 1868, and was terminated in 1879. Shortly after this the sole distributee died, and left as his executrix, his aged wife, who died in 1885. In the same year the administrator *d. b. n. c. t. a.* filed his bill against the administrator of the decedent asking for an account of his administration. The alleged delay was sufficiently accounted for by the succession of the death of distributee, the administration of his widow—an aged lady—and her death, and the ultimate qualification of the complainant as administrator *d. b. n. c. t. a.*, to repel any presumption or charge of laches. The action was not barred by the act of limitation and there were no circumstances to call for the equitable bar. Hurt v. West, 87 Va. 78, 12 S. E. Rep. 141.

15. RECOGNITION OF RIGHTS OF PLAINTIFF.

Claims Acknowledged—Payments Made in Satisfaction.—No laches were imputed to the plaintiffs so as to defeat their right to recover under a deed, which claim had been acknowledged, and payments to and acquisition of property by them in satisfaction of their claim had been acquiesced in. Under these circumstances there was no necessity for, nor any propriety in the institution of proceedings to assert rights under the deed. Griffin v. Macaulay, 7 Gratt. 476.

Bond Assigned as Security—Regular Payment of Interest.—A delay of ten years in bringing suit on a bond was satisfactorily explained where it appeared that it was assigned as collateral security, and the interest on it was regularly paid up to within a short time before the suit was brought, although all the obligors were at that time dead. Beverly v. Rhodes, 86 Va. 415, 10 S. E. Rep. 572.

Bond Payable on Demand—Payments Regularly Made—When They Ceased Suit Instituted.—There was no laches in suing upon a bond where the creditor received payments from the debtor up to 1868, the bond being given in 1849 and payable on demand. When the payments ceased the creditor got judgment and had an execution issued and levied. He died in 1872. In 1874, the assignee of the bond instituted suit. There was no laches or abandonment of the claim in this course of proceedings. Alexander v. Byrd, 85 Va. 690, 8 S. E. Rep. 577.

Settlement of Accounts—Claim Repeatedly Reported Favorably in Creditor's Suit.—In 1859 an executor settled his accounts, which showed a balance due by him. He died in 1860 and an administrator *d. b. n. c. t. a.* was appointed. In 1875 in a creditors' suit against the estate of the executor, such claim was reported favorably as a just debt owed by his estate. Subsequently the same report was repeatedly made and confirmed by the court. It was held that there was no laches in asserting the claim. Green v. Griffin (Va.), 20 S. E. Rep. 775.

16. NEGLIGENCE.

Neglect to Make Defence at Law—No Relief in Equity.—It is a well-settled rule, that where a party has been grossly inattentive and negligent of his defence at law, and does not prove any excuse for not defending himself in that action, he shall have no relief in equity. Haden v. Garden, 7 Leigh 157; Turner v. Davis, 7 Leigh 227; Morgan v. Carson, 7 Leigh 238; Perkins v. Clements, 1 P. & H. 141; Hendricks v. Compton, 2 Rob. 192. The same doctrine is applicable where negligence is that of the attorney. Ayres v. Morehead, 77 Va. 586.

Same—Ignorance of Counsel.—Although it may be manifest that great injustice has been done a defendant by a verdict and judgment against him at law, yet if this was not produced by any fraud or surprise on the part of the plaintiff, but is the result either of the defendant's own negligence, or of his counsel's ignorance or bad management, a court of equity can give him no relief. Tapp v. Rankin, 9 Leigh 478.

Same—Mere Request of Attorney.—A defendant upon whom process had been served, who wholly neglected his defence, or contented himself with merely writing to a lawyer who practiced in the court to defend him, without giving him any information about his defence, or inquiring whether he was attending to the case, was not entitled to relief against a decree by default, on the ground of surprise, however grossly unjust it was. Hill v. Bowyer, 18 Gratt. 364, and *foot-note*. See also, Callaway v. Alexander, 8 Leigh 114, 31 Am. Dec. 640.

Gross Neglect by Counsel.—A defendant was sued on the note of a partnership. He employed counsel and stated that he was never a member of the partnership, nor in any way liable for the debt. He

lived in the county but gave no more attention to the case. The counsel examined the docket and although he saw a suit against the partnership, he did not think it was against his client, and did not examine the papers, and no plea being entered, office judgment was confirmed. Equity did not relieve the defendant. Wallace v. Richmond, 26 Gratt. 67, and *foot-note*.

Action Dismissed for Want of Declaration—Delay of Nineteen Months.—Where goods were distrained for rent, a third person brought replevin for the same, but this action was dismissed for want of a declaration, the plaintiff having neglected for nineteen months to prosecute his claim. Then the plaintiff in the distress warrant brought suit on the replevin bond and recovered judgment. The plaintiff in replevin had no right to come into equity, after his great laches in prosecuting his action. Donnally v. Ginatt, 5 Leigh 359.

Voluntary Departure after Filing Answer—Eighteen Years Delay.—In a suit to enforce a vendor's lien the assignee of the equitable title filed his answer, and shortly thereafter left without employing an attorney, and remained absent part of the time from the state and the United States. More than eighteen years after the sale of the land he filed a bill attacking the sale as fraudulent, claiming the discovery of fraud shortly before the institution of his suit. His voluntary absence did not excuse his negligence, and his laches prevented him from being heard in a court of equity. Bill v. Schilling, 39 W. Va. 108, 19 S. E. Rep. 514.

Acceptance of Insurance Policy without Complaining That Options Were Omitted.—Where an assured accepted and retained a life insurance policy for nearly two years after it was delivered, without examining it to see whether the secretary of the insurance company had signed a slip attached to the policy, setting forth the options which the assured was entitled to exercise, and without offering to rescind the policy, or complaining to the company or its agent for the omission to sign the slip, his delay was unreasonable, and the omission was no defence to an action on his premium note. Fennell v. Zimmerman, 96 Va. 197, 31 S. E. Rep. 22.

17. PRUDENTIAL REASONS.

Difficulty of Prosecution—Conflicting Claims of Creditors.—Where the suit was one of great difficulty in prosecuting, and the plaintiff had not only to encounter the strenuous resistance of the debtor, but the conflicting claims of judgment creditors, these were extenuating circumstances in explaining the seeming neglect in prosecuting the claim. Mayo v. Carrington, 19 Gratt. 74.

Claims of Officer of Revolution—Similar Claims Resisted by State.—An officer of the Virginia navy during the war of the Revolution, who became supernumerary and so continued until the end of the war, was entitled under the act of May 1778, to one-half pay for life, and the lapse of time from 1783 when the claim accrued till 1826, when it was asserted, did not afford any presumption of payment, or of abatement of the claim, because during this time all similar claims of other officers were resisted by the state. Com. v. Lilly, 1 Leigh 525.

VI. HOW APPLICATION OF DOCTRINE GOVERNED.

1. IN EQUITABLE QUESTIONS BY RULES OF EQUITY.

Jurisdiction Alone in Equity—Statute of Limitations Not Applicable.—Where equity alone has cognizance to enforce a claim the bar of the statute of limitations will not be applied. Heiskell v. Powell, 23 W. Va. 717.

And where a suit is founded on a right purely equitable in its nature and without any corresponding legal right, there exists no analogy by which the statute of limitations can be applied; but it is one of those causes purely and exclusively equitable, and it must be determined upon the principles and rules of courts of equity regardless of the statute of limitations. Cranmer v. McSwords, 24 W. Va. 594.

Concurrent Jurisdiction—Statute is Applied—Accorded Weight in Purely Equitable Demands.—The statute of limitations is considered as much a bar in equity as in a court of law where the jurisdiction of the two courts are concurrent. But as respects mere equitable demands, length of time cannot be set up as an absolute bar; for as regards them it operates as a bar not *ex jure*, but as a fact showing acquiescence and furnishing evidence that the claim has been adjusted. Since the establishment of its jurisdiction equity has always had its limitations, recognizing the statute of limitations in cases of a legal character, and according great weight to length of time where they are equitable. Fore v. Foster, 86 Va. 104, 9 S. E. Rep. 497.

Equity Evidences Waiver by Delay.—Delay in the assertion of a right, when it does not operate as a statutory bar, may operate in equity as an evidence of assent, acquiescence or waiver, unless satisfactorily explained. Laches and neglect are always discountenanced by courts of equity. Kelly v. McQuinn, 42 W. Va. 774, 26 S. E. Rep. 517.

2. IN LEGAL CLAIMS EQUITY FOLLOWS THE LAW.

Statement of Principle.—No principle is better established, or more uniformly acted on in courts of equity than that in respect to the statute of limitations—equity follows the law—that is to say, if a legal demand be asserted in equity, which at law is barred by statute, it is equally barred in a court of equity; and if not barred by statute at law, neither is it barred in equity. Coles v. Ballard, 78 Va. 139; Fore v. Foster, 86 Va. 104, 9 S. E. Rep. 497.

Thus, the general rule in equity is that it will apply the statute of limitations in barring legal claims; but even where there is no absolute bar from lapse of time equity will not take cognizance of an equitable claim after great lapse of time, and where from the death of witnesses and the loss of papers, there is danger of doing an injustice, and there can be no longer a safe determination of controversy. Bargamin v. Clarke, 20 Gratt. 544, and *foot-note*, collecting the cases on this point.

Rule of Analogy.—Equity follows the law, and applies the statute of limitations to all demands of a strictly legal nature, and in equitable demands by analogy it applies the same bar that the statute fixes for legal demands of the like character. Justis v. English, 30 Gratt. 565.

Thus, where a suit was brought in equity upon a claim, which was legal in its nature, by analogy the statute of limitations was applied, and when the cause of action arose twenty-five years before the suit was brought the bar of limitation was complete. Wilsons v. Harper, 25 W. Va. 179.

So, where an administrator invoked the aid of a court of equity to recover from a guardian of a distributee money alleged to have been paid by mistake to such guardian, and the evidence showed that it was paid more than five years before the suit was brought, and the guardian pleaded the statute

of limitations, the court, by analogy to proceedings at law, held such demand barred, unless the plaintiff could bring himself within some of the exceptions to that act. Shriver v. Garrison, 30 W. Va. 456, 4 S. E. Rep. 660.

Time Does Not Run against One in Possession of a Right—Vendee in Possession.—Equity follows the law in holding that time does not run against one who is in possession in the exercise or assertion of a right. Hence a vendee who entered upon land and held with the vendor's consent and acquiescence, was not barred by mere lapse of time, as he was not put in default by a notice to surrender the premises or pay the price. Abbott v. L'Hommedieu, 10 W. Va. 677.

VII. PLEADING.

1. DEMURRER.

Lies When Facts Appear in Bill.—The defence of laches and stale demands may be made by demurrer when the *facts* manifesting it appear in the bill. Thompson v. Whitaker Iron Co., 41 W. Va. 574, 23 S. E. Rep. 795; Whittaker v. Southwest Virginia Imp. Co., 34 W. Va. 217, 12 S. E. Rep. 507. See Jarvis v. Martin, 45 W. Va. 347, 31 S. E. Rep. 957.

Unless Presumption of Payment Rebutted by Bill It Is Demurrable.—Where the presumption of payment arises by reason of lapse of twenty years of time, a bill seeking enforcement of such stale demand must set up facts and circumstances sufficient to rebut such presumption or it will be demurrable. Jarvis v. Martin, 45 W. Va. 347, 31 S. E. Rep. 957; Jackson v. Hull, 21 W. Va. 601.

When Bill by Inactive against Active Commissioner Demurrable.—One of two commissioners, appointed to collect and disburse the money from a sale of land, permitted the other, who was the attorney for the claimants, to collect and disburse the money while he remained passive. Ten years after the death of the active commissioner, twenty-seven years after their appointment, and thirty-one years after the decree fixing the claims and liabilities, the inactive commissioner filed a bill to ascertain whether any of the purchase money remained unpaid, and if so to resell the land; but he failed to allege or show that any of the purchase money remained unpaid or that any of the claims were unsatisfied. Such bill was demurrable for laches. Woods v. Campbell, 45 W. Va. 203, 32 S. E. Rep. 208.

Bill Demurrable for Want of Specific Excuse for Delay.—The defendant, a creditor of the father of the plaintiff, purchased a farm of his debtor which was sold under a judgment, and as part payment was credited with two judgments against the father for less than $300, which the plaintiff, by her father, had assigned to the defendant. The plaintiff was allowed, together with her father, to occupy the land free from rent for ten years and until the latter's death, during which time the plaintiff realized over $600 from the sale of ties and shingles cut from the place. After her father's death the plaintiff sued the defendant for the amount of the judgments, claiming they had been fraudulently assigned without her consent. In the absence of allegations and proof of specific facts showing an adequate excuse for the plaintiff's delay in asserting her alleged rights the bill could not be maintained. Eubank v. Barnes, 93 Va. 153, 24 S. E. Rep. 908.

2. AMENDMENT.

Plaintiff Taken by Surprise and Bill Dismissed—Amendment Should Be Allowed.—Where a demurrer to a bill was sustained upon the ground of laches, which was suggested by the court without being urged by counsel, whereby the plaintiff was taken by surprise, and on a subsequent day of the same term he moved the court to set aside the decision upon the demurrer and to allow him to file an amended bill, it was the manifest duty of the court to grant said motion. The amended bill explained satisfactorily every thing savoring of laches and acquiescence. Cottrell v. Watkins, 89 Va. 801, 17 S. E. Rep. 328, 37 Am. St. Rep. 897, 19 L. R. A. 754.

No Amendment Allowed unless Excuse Offered for Delay.—Where the plaintiff is not entitled to the relief sought, by reason of laches in filing his bill, he will not be allowed to amend his original bill, unless he offers some legal excuse for the delay; and especially is this the case if the amendment is not asked until the case has been submitted to the court, and a decision adverse to him has been announced. Bill v. Schilling, 39 W. Va. 108, 19 S. E. Rep. 514.

Bill Demurrable for Laches Will Be Dismissed unless Amended.—The defences of the statute of limitations and laches and stale demands being proper grounds for demurrer, a bill setting up a stale demand without alleging any reasonable excuse for delay in the assertion thereof, should be dismissed for want of equity, unless properly amended. Jarvis v. Martin, 45 W. Va. 347, 31 S. E. Rep. 957.

VIII. IN PARTICULAR CASES.

1. ACCOUNTING.

a. GENERAL ACCOUNTINGS.

Principles Applicable.—A court of equity ought not to direct an account to be taken after a great lapse of time, and after acts of acquiescence by the party demanding it, in a construction of his rights, which if correct would render such account unnecessary, because the great lapse of time may have rendered the taking of the account impossible on any principle of certainty or justice from the death of witnesses, loss of documents, and other causes. Bolling v. Bolling, 5 Munf. 334. See also, Caruthers v. Trustees of Lexington, 12 Leigh 610, and Turner v. Dillard, 82 Va. 536.

Thus, a bill was dismissed on the ground of lapse of time and the laches of the plaintiff, where danger resulted of doing injustice by attempting to settle accounts between the parties. West v. Thornton, 7 Gratt. 177, 54 Am. Dec. 134.

Will Be Refused if Injustice Results.—Though a creditor's debt was evidenced by a deed, yet where there had been gross laches in its prosecution, and the account could not be settled without injustice to the estate of the debtor, a court of equity did not give the creditor relief. Tazewell v. Whittle, 13 Gratt. 329, and *foot-note*.

Uncertainty of Accounts Will Cause Dismissal of Bill.—Every plaintiff who asks for relief of a court of equity ought to exhibit his claim within a reasonable time, so that the court may not do injustice to the defendant, but a bill in equity asking relief will be dismissed when the amount remaining due is uncertain, and can only be ascertained by a settlement of accounts in reference to transactions more than twenty-seven years old at the commencement of a suit. Atkinson v. Robinson, 9 Leigh 393.

Effect of Rendition of Current Accounts—Objections in Reasonable Time.—It is a rule that current accounts rendered by one party to another, which are received and held without complaint shall be deemed settled accounts. Objections to such accounts must be made within a reasonable time, and

it lies upon the party contesting the accounts so rendered to prove that he made objections within a reasonable time. Townes v. Birchett, 12 Leigh 173.

So where dealings were had between a merchant and a planter for a number of years, and accounts were rendered from year to year, and balances struck, and the planter paid up the balance due from him, such accounts after an acquiescence for the unreasonable period of more than ten years, were a bar to any future settlement. Irvine v. Robertson, 3 Rand. 549.

Against Sheriff for Taxes Collected.—In 1803 and 1804 a sheriff collected taxes for the poor, and in November 1823 the overseers of the poor commenced proceedings against him by motions for the balance unaccounted for. After such a lapse of time the motions were not entertained. Overseers of the Poor v. Tucker, 2 Leigh 580.

Against Tenant for Use and Waste—Proof of Damage Vague.—Where the owner of land sued a prior occupant for an accounting for the use, occupation and waste, and his proof of damages was vague and uncertain, and he made no claim for damages for eighteen months after he paid the liens of the prior occupant, the suit was properly dismissed for laches. Dadisman v. Long (Va.), 22 S. E. Rep. 850.

Widow's Bill for Account Filed after Two Years Delay Dismissed.—The trustees in a deed of trust made by a husband sold the land after his death, and the purchaser conveyed it to others. After an unexcused delay of more than twenty years which appeared upon the face of the bill, the widow brought suit claiming her dower, and an account of profits. It was held that the plaintiff was entitled to no accounting, and the bill was properly dismissed. Macaulay v. Dismal, etc., Co., 2 Rob. 507.

Action of Debt—Account of Stale Transactions Not Allowed.—In a bill filed to review the verdict of a jury in an action of debt on a bond, which found for the plaintiff, an account of transactions which were old and stale, although partly subsequent to the date of the bond, ought not to be allowed for the purpose of obtaining a discount against it. Randolph v. Randolph, 1 H. & M. 181.

b. BY FIDUCIARIES.—See monographic *notes* on "Executors and Administrators," "Trusts and Trustees," and "Guardian and Ward" appended to Barnum v. Frost, 17 Gratt. 398.

Denied When It Would Be Mere Conjecture.—Where an action was brought to have a settlement of an executrix' account, when by lapse of time, loss of evidence and death of parties it was impossible to have any settlement based upon anything other than mere conjecture, it was held to be nothing less than wrong and oppression to disturb the settled rights of the executrix long since dead; one against whom the record disclosed nothing to her discredit, or against the fairness of her dealings, and in whose behalf presumptions arose. Nelson v. Kownslar, 79 Va. 468. See Caruthers v. Trustees of Lexington, 12 Leigh 610.

Thus, where a testator died in 1852, and his administrator in 1857, and a bill was filed in 1871 to require a settlement of his administration accounts, the relief sought was refused because of the death of all parties cognizant of the transaction, the destruction of the county records, and because it could not be settled without great danger of injustice to the deceased administrator. Stamper v. Garnett, 31 Gratt. 550.

In 1841 the son of a testator qualified as his executor, and thirty-seven years afterwards a suit was instituted for a settlement of his accounts, but the plaintiff and defendant were both old and died within a few months. The witnesses were dead, and the vouchers of the executor had been destroyed during the civil war by the public enemy, so that it was impossible to secure a correct account. The long delay being unexplained the court left the parties in the same situation in which they had rested so long in contentment. Turner v. Dillard, 82 Va. 536.

Lapse of Time and Death of Executor No Bar When Fair Settlement Practicable.—A bill was filed by legatees against the executor and sureties of the testator eleven years after the last one of the plaintiffs had attained full age, asking a settlement of accounts. Notwithstanding the lapse of time, the bill was sustained where it appeared that no obstacles prevented a fair settlement of the accounts, no loss of vouchers or testimony being averred and no difficulties suggested. Under such circumstances it was held that it would be going too far to hold that mere lapse of time should operate as a bar, notwithstanding the death of the executor and his sureties. Aylett v. King, 11 Leigh 486.

Lapse of Time with Circumstances Showing Fair Settlement Improbable Will Bar Relief.—A bill was filed for the purpose of settling an administration account. It appeared that no account of this administration had in fact ever been settled. But this bill was filed twenty-eight years after the death of the testator, and from twelve to twenty years after the youngest of the plaintiffs attained to full age, and the accounts called for involved very ancient and complicated transactions. The great lapse of time was a sufficient objection to the relief prayed for in the bill, especially when the circumstances showed that probably nothing was due, and that a fair settlement could not be obtained because of loss of papers and evidence. Carr v. Chapman, 5 Leigh 164.

Accounts Half a Century Old—Bond Accepted in Settlement.—The account of an executor which had been acquiesced in for a great many years was presumed correct, and was not disturbed for the benefit of the appellant who had slept upon his rights a long time, the transactions originating over one-half a century previous. Especially where it appeared that the executor, the testator of the plaintiff, gave a bond after the transaction took place, in settlement of his accounts, to the testator of the plaintiff. Randolph v. Randolph, 2 Call 537.

Legatee Denied Relief after Thirty-Eight Years.—Stale demands by legatees are discountenanced by courts of equity, and executors will be protected against them. And no relief was given to a legatee after a lapse of thirty-eight years from the time when he could have brought suit, and after a lapse of thirty-six years from the date of the decree affirming the validity of the bequest to another legatee. Elcan v. Lancasterian School, 2 P. & H. 53.

Thirty Years Make Demands Stale.—An account of administration, demanded after the lapse of more than thirty years, was held to be a stale demand, and therefore denied in Parks v. Rucker, 5 Leigh 149.

Sixteen Years a Bar.—An acquiescence of sixteen years in the settlement of a decedent's estate was held a bar in equity to an investigation of its propriety in Hudson v. Hudson, 3 Rand. 117.

When Twelve Years Delay Not Sufficient to Make Laches.—An executor settled his accounts of administration before commissioners of the hustings court

in 1810, and a distributee of a deceased legatee, whose legacy had never been paid, lived in the town at that time, and subsequently died in 1816. Then the executor died. The legatee's estate was not administered upon until 1822, when a bill was filed to surcharge and falsify the account settled in 1810. It was held that the lapse of time was not sufficient to constitute a good bar to such a bill. Burwell v. Anderson, 3 Leigh 348.

A Case When Twenty Years Lapse of Time Barred an Accounting.—A bill was brought against the defendant, who had married an executrix, for an account of the testator's estate which had come into his hands. The defendant about twenty years before had exhibited in the county court an account of the debts and disbursements, to which he made oath and which was received without any examination as to its verity. Children of the testator as they came of age petitioned for their shares in their father's estate. In each case in the accounting of the testator's estate, the settlement first exhibited by the defendant was allowed as a good discharge for so much. In the present case the court refused to reopen the account, because of the distance of time, although the suit had been pending ten years and the transaction was of little more than twenty years standing, notwithstanding the defendant had not one voucher to produce. Major v. Dudley, Jefferson 51.

Settlement of Administrators Will Not Be Surcharged after Seventeen Years.—A lapse of twenty-five years after the death of an administrator and seventeen years after his accounts were closed by subsequent administrators was held in Green v. Thompson, 84 Va. 376, 5 S. E. Rep. 507, to be a bar to a suit to surcharge and falsify settlements of which the heirs of the testator were cognizant.

Twenty-Three Years after Return of Executor's Report It Will Not Be Recommitted.—A bill was filed by a husband and wife against the executors of the testator and widow for a settlement of their accounts The account was ordered and reported, which was returned in 1824, and not excepted to. The case was continued from that time until 1847, when the executors and widow were dead. It was too late for the plaintiff to revive the suit, and ask to have the report recommitted and reformed. Crawford v. Patterson, 11 Gratt. 364.

Suit Brought in Four Years after Qualification—No Laches.—There was no delay or laches in calling upon the administrator for a settlement of his accounts, when the suit was brought within four years after his qualification. Tiernan v. Minghini, 28 W. Va. 314.

Delay of Twenty-One Years with Acts of Estoppel Sufficient to Constitute Laches.—In a suit brought in 1895, by an assignee of a residuary legatee against the administrator's estate for the settlement of his accounts, it appeared that plaintiff became the assignee in 1874, but never notified the administrator nor made any demand for its payment; that in 1875 the administrator paid the legatee a small sum and received his receipt in full; that in 1891 on a settlement of a judgment in favor of the administrator against the complainant, no mention was made of the claim. The complainant gave no explanation for his long delay, and his right of action was barred by laches. Tate v. Jones, 98 Va. 544, 36 S. E. Rep. 984.

Twenty Years Delay and Acquiescence by Legatee Bars Objections to Legacy.—It was uncertain in a will whether a slave bequeathed to a daughter was "Harriet" or "Helen," but the legatee accepted the former, and the latter was delivered to another legatee. About twenty years after the slaves were delivered, and more than five years from the time when the daughter attained to full age, a bill in equity was brought by her husband and herself to recover "Helen." The length of time, and the acquiescence of the daughter in the manner of executing the will, were sufficient grounds for dismissing the bill. Parsons v. McCracken, 9 Leigh 495.

Full Settlement of Administrator Undisturbed after His Death, and Distribution of His Estate.—Where an administrator made a full settlement with the heirs and distributees, which was duly recorded and supposed to be final, a bill by these same parties to surcharge and falsify these transactions was not entertained fifteen years after the settlements were made, and eleven years after the administrator's death, when his estate had been in the main distributed and mostly consumed. Gibboney v. Kent, 82 Va. 383, 4 S. E. Rep. 610.

A suit for an account of an administration, twenty-six years after the death of the intestate, twenty-one years after the death of the administrator, long after his administrator had settled up his estate, showing that there were no personal assets, and in the absence of the first administrator's books and papers, was brought against the heir of the administrator, who at his death was an infant two years old. The staleness of the claim was conclusive against it. Hillis v. Hamilton, 10 Gratt. 300.

Representative of Administrator by Answering Bill for Accounting Waives Defence of Laches in Appellate Court.—An administrator qualified in 1785, and terminated his administration in 1794, dying some years afterwards without having settled his administration account. A distributee, who was a child in 1785, filed his bill in 1819, against the representative of the administrator for an account. The latter professed ignorance as to the accounts, except what may be learned from the papers of the administrator, but submitted in the answer to the account. The objection of laches did not avail in the appellate court after an account had been taken, and a decree had been made upon it. Wills v. Dunn, 5 Gratt. 384.

2. SPECIFIC EXECUTION OF CONTRACTS.

Party Seeking Relief Must Not Be in Default.—A court of equity will refuse relief to a party seeking specific performance, where he is in default, and by delay has indicated his intention to perform the contract or abandon it as the property rises or falls in value. Gish v. Jamison, 96 Va. 312, 31 S. E. Rep. 521.

So where a vendor of land declined for over a year, without sufficient reasons, to carry out his contract, at the end of that time, after prices had fallen, he was not permitted to secure relief by specific performance. Rison v. Newberry, 90 Va. 513, 18 S. E. Rep. 916.

Same—But Relief Granted if Delay Due to Other Party.—Thus, if there has been gross laches on the part of the plaintiff; or if he has unreasonably delayed to perform his part of an agreement; or if he has broken it; or if he has been in default, and the defendant would sustain serious loss thereby in case of specific execution; or if he cannot perform it; or if a performance would not put the other party in a situation he would have been in had there been a strict performance, he can have no decree in his favor, unless his

failure or delay has proceeded from the fault or assent of the other party. Chilhowie Iron Co. v. Gardiner, 79 Va. 305.

Evidence Must Be Clear and Delay Not Long.—Equity will not decree specific performance of an alleged parol contract to convey land, where the evidence is unsatisfactory as to whether the alleged contract was ever entered into, and where twenty years have elapsed since the contract is said to have been made. Pennybacker v. Maupin, 96 Va. 461, 31 S. E. Rep. 607.

Strict Compliance with Terms Essential.—Although courts of equity do not encourage laches, yet, if there has not been a strict legal compliance with the terms of a contract, and the noncompliance does not go to the essence of the contract, relief will not be granted in a suit for specific performance. Abbott v. L'Hommedieu, 10 W. Va. 677.

Lapse of Six Years a Bar Where No Part Performance.—Where it was proven in a suit brought for the specific execution of a contract for the sale of a tract of land, that there had been no part performance of the contract, the lapse of six years barred the plaintiff in his suit. Richardson v. Baker, 5 Call 514.

Refusal to Perform on Ground of Mistake No Excuse Where Due to Negligence.—A will was offered for probate, but was rejected because unattested. Then the heirs agreed to divide the estate in accordance with the provisions of the will. Afterwards two of the heirs refused to perform the agreement, alleging that they had never read the will, and were mistaken as to its provisions. There was no evidence to show that they executed the agreement in ignorance or mistake, and if they did so it was due to their own gross negligence, hence specific execution of the agreement was decreed. Lucketts v. Lucketts, 10 Leigh 50.

Decree Will Not Be Enforced against Bona Fide Purchasers after Thirty Years.—A decree of a court of another state, for the conveyance of land in Virginia, was not enforced in equity against *bona fide* purchasers without notice, or even against the heirs of a party against whom a decree was rendered, after the lapse of thirty years from the date of the decree before the institution of the suit. Massie v. Greenhow, 2 P. & H. 255.

Case When Specific Performance Not Barred by Laches.—The owner of a tract of land by a title bond given in 1848, recited that he had sold the said tract and bound himself on the payment of the purchase money to make a good title to the purchaser. Shortly after, the latter took possession and cultivated and improved the same until his death in 1865. In 1852, part payment was made of the purchase money, by the receipt of two bonds, which was treated as a ratification of the title bond. In a suit brought in 1875 by the heirs of the purchaser to enforce specific performance of the contract, it was held on the circumstances of the case that the claim was not barred by the lapse of time. Norman v. Bennett, 32 W. Va. 614, 9 S. E. Rep. 914.

3. PARTITION.

Long Acquiescence Cures Irregularities.—A partition, which has long been acquiesced in, and acted upon by the parties generally, ought not to be disturbed on the ground of irregularity only, although if it is unjust or illegal it may be impeached by a party who never acquiesced. Carter v. Carter, 5 Munf. 108.

Thus, a partial division of slaves, under the will of a Maryland testator, was made in that state in 1768, before the time appointed by the will for the division, and during the infancy of one of the legatees, but the division was acquiesced in, and no new division was ever demanded. After a great lapse of time (thirty-one years) such division, however premature or incomplete, was not allowed to be impeached. Colvert v. Millstead, 5 Leigh 88.

Twenty Years Possession Bars Plaintiff.—It was held in Straughan v. Wright, 4 Rand. 493, that in questions purely equitable, twenty years adverse possession barred the remedy of the plaintiff; but, where the court was only called upon to grant partition under a *legal* title which was disputed, the proper course was to retain the cause until the title was decided at law.

Lines Made by Parties Conclusive after Long Acquiescence and Possession.—Where a deed of partition between coparceners recited that a boundary line between them had been "run, made and established" and the parties had continued in possession up to the line, for nearly twenty years, it was held that after such long acquiescence by one party, and quiet possession by the other, such possession ought not to be disturbed by an action seeking to establish a boundary line described in the deed, which was different from the line actually run by the parties. Coles v. Wooding, 2 P. & H. 189.

4. SETTLEMENT OF PARTNERSHIP.

No Arbitrary Rule—When Mere Delay Immaterial.—With respect to the time when creditors should prosecute their demands against a surviving partner, in order to retain their right of resorting to the estate of a deceased partner, no rule of convenience exists, which requires him to do it within any assigned or arbitrary limitation; yet in Sale v. Dishman, 3 Leigh 548, it was held that it was not going too far to say, that a mere delay of six years in instituting proceedings against the surviving partner, would not discharge the decedent's estate, unless the creditor had been called upon to institute proceedings for the safety of that estate, and had declined or failed to do so.

Reasonable Diligence Required.—While the creditor of a partnership may not be held to adopt a very rigorous course against the surviving partner, nor to exercise the utmost possible diligence, he may at least be required within a reasonable time to place the debt in the ordinary channels of collection, and to give it that attention which will render it probable that the money may be made, and the estate of the deceased partner saved harmless. Jackson v. King, 12 Gratt. 499.

Same—Relief Refused When Injustice Results to Deceased Partner's Estate.—Where the creditor of a partnership failed to use ordinary reasonable diligence to collect his debt and there had been gross and unaccountable delay in proceeding against the surviving partner, which had resulted in casting upon the deceased partner's estate a debt which might have been made from the surviving partner, such laches for bade a court of equity from lending its aid to subject the estate of the deceased partner. Jackson v. King, 12 Gratt. 499.

Suit Should Be Brought in Time to Have Just Settlement—On Failure to Do So Doubtful Questions Decided against Plaintiff.—Although a suit for a settlement of partnership accounts may not be barred by statute until five years after the collection of all good debts due to the firm, yet it is the duty of the plaintiff, if necessary, to bring his suit before the lapse of time, loss of evidence and death of parties render it impossible or difficult to have a just settle-

ment; and if he fail to do so he must abide the consequences of his laches and the loss resulting therefrom. In such case doubtful questions must be solved against him. Foster v. Rison, 17 Gratt. 321, and *foot-note.*

Laches of Thirty-Five Years Will Bar Contribution from Estate of Deceased Partner.—After his copartner left the state, the remaining partner took charge of the firm assets, which were sufficient to pay the firm's debts and undertook to control the business and close it up. He did not make any account for thirty-four years nor make any claim against the estate of his copartner for contribution of firm's debts paid by him. He then attempted to subject the deceased partner's lands for the payment of a share of the debts thirty-five years afterwards. He was estopped by his laches from maintaining his suit. Compton v. Thorn, 90 Va. 653, 19 S. E. Rep. 451.

Bond Accepted as Return of Capital—Value Depreciated after Long Delay—No Contribution by Other Partners—On the winding up of a partnership one of the partners received as a return for his capital the bond of a third person secured by a deed of trust. After a delay of five years before taking any steps to collect it, and suit not being brought for seventeen years, which delay resulted in a depreciation of the value of the bond, the negligence of the assignee prevented any recovery against the other partners. Wilson v. Barclay, 22 Gratt. 534.

5. EQUITABLE TITLES.

When Barred by Adverse Possession.—An equitable title to land is barred by the adverse possession of the holder of the legal title for more than twenty years, the claimant of the equity having full knowledge of the commencement of the possession and being under no disability. Cresap v. McLean, 5 Leigh 381.

The right of a vendor to resort to land for the payment of the purchase price is not affected by the lapse of any time short of that sufficient to raise a presumption of payment. Coles v. Withers, 33 Gratt. 186, and *foot-note.* See Va. Code, § 2935.

Vendor's Rights—No Time Bars Recovery Where He Has Legal Title.—No lapse of time bars the right of a vendor to recover the purchase money for land, if he has not parted with the legal title. Evans v. Johnson, 39 W. Va. 299, 19 S. E. Rep. 623.

Thus, the owner of a tract of land sold his rights thereto in 1796, but did not convey the title. The equitable rights thereunder passed through several hands. In 1832, a suit was brought in which this land was involved, and the owner filed a cross bill claiming a lien on the land for the balance of the purchase money. Under these circumstances the lapse of time was no bar to his recovery upon his lien. Hopkins v. Cockerell, 2 Gratt. 88.

Same—Vendor Cannot Defend against Vendee on Ground of Length of Time.—It is not admissible on the part of a vendor to set up as a defence the length of time of an equitable title against his vendee. The relation in which they stand to each other forbids it; the former is a trustee for the latter, and the trust can never be determined but by a conveyance of the title. The vendor can never be permitted to set up his own omission to make a deed against the right of the vendee to demand one. Neither can he invoke the aid of cases which forbid the assertion of the stale equity, by a party out of possession against an adverse claimant in possession. Williams v. Lewis, 5 Leigh 686.

Same—Vendees Alleging Fraud Estopped by Ten Years Acquiescence.—After ten years acquiescence in a sale and conveyance, the vendees will be estopped by their laches and continued enjoyment of the land to defend an action for the balance of the purchase money by the vendor, alleging fraud. Nothing but clean hands, continued good faith and reasonable diligence can call courts of equity into activity. Smith v. Henkel, 81 Va. 524, and cases cited.

Vendor's Lien—What Laches Will Bar.—Laches, and even gross laches, is not enough to raise a presumption of the payment or abandonment of a vendor's lien; it must be *gross laches unexplained,* together with evidence affording the presumption of the abandonment of the right. Ginter v. Breeden, 90 Va. 565, 19 S. E. Rep. 656.

Same—When Relief Refused.—The holder of a title bond for a tract of land assigned it in consideration of the assignment of a debt of $300 of a third person, $225 which was paid to the assignor of the title bond. The latter lived seventeen years after the assignment without asserting any claim for the balance. Her administrator then sued to enforce a vendor's lien for the balance. He did not produce any note or bond of the third party who was dead, but his widow swore that he was able and did pay the debt. Under these circumstances it was proper to refuse the relief prayed for. Duffield v. Butler, 34 W. Va. 624, 12 S. E. Rep. 776.

Tax Sale—Laches No Bar to Owner Where No Possession under Tax Title.—Laches will not bar a land owner from assailing a tax sale of his land, when there is no actual possession under the tax title. State v. Sponaugle, 45 W. Va. 415, 32 S. E. Rep. 283.

Resulting Trust—Where Plaintiffs Have No Sufficient Possession for Specific Performance No Relief Given to One Denying Trust and Relying on Laches.—Where a period of forty years was allowed to elapse since an alleged resulting trust was created, and the plaintiffs and those under whom they claim did not have that actual, notorious and exclusive possession, which would entitle them to specific performance, a court of equity refused relief as against one who denied such resulting trust, and relied on the bar of laches. Woods v. Stephenson, 43 W. Va. 149, 27 S. E. Rep. 309.

When Uninterrupted Possession by Vendee Cures Defects in Title.—Land was conveyed in 1828, and bond given with condition to perfect the title. In 1834, a bill was filed by the vendors to subject the land for the purchase money. The vendee objected that the title had not been perfected. The cause lingered until 1852, partly through the fault of the vendee. The lapse of time and uninterrupted possession of the vendee under the deed, without any disturbance, and assertion of adverse claim, quieted the vendee's title, and cured the defect therein. Peers v. Barnett, 12 Gratt. 410.

Purchase Price Secured by Deed of Trust—Possession by Grantor for Seventeen Years Does Not Operate as Bar to Enforcing.—The payment of the purchase price for a tract of land was secured by a deed of trust given upon it. In a suit in equity to enforce this deed, the fact that the grantor remained in possession seventeen years, after the right to sell the property to pay the debt accrued, did not operate as a bar to the suit. Pitzer v. Burns, 7 W. Va. 63.

After Twenty-Seven Years Delay Sale under Mortgage Conclusive and Claim That Other Property Liable Is Stale.—In 1793, the mortgagee of a tract of land brought suit against the devisee of the mortgagor, in which suit the devisee insisted that the mortgagee had a remedy against other lands which ought first to be sold in discharge of the mortgage

debt. A sale, however, was decreed of the mortgaged premises in 1797, and the devisees immediately sold the land and paid the debt. In 1824, the devisee filed a bill insisting that both the personal estate and other lands were liable for the debt, in ease of the mortgaged premises. After so great a lapse of time the claim was not admitted, but was rejected as stale. Hayes v. Goode, 7 Leigh 452.

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425 *Nixon v. Rose, Trustee.

April Term, 1855, Richmond.

Wills—Separate Estate—Case at Bar.*—Testatrix bequeaths slaves to A, B and C jointly, upon the following trust: To be held by them in trust only for the benefit of her daughter E (a married woman), or her heirs. And as it is my wish to guard in the most ample manner against the imprudent sale or other disposition of the aforesaid property, during the natural life of E, it is hereby wholly and solely confided to the discretion of the aforesaid trustees A, B and C, in what manner the said E shall receive and enjoy the profits arising from the hires or other disposition of the slaves aforesaid. And in the event of the death of E without heirs of her body, then all the slaves and their increase to R. HELD:

1. **Same—Same.**—E took an absolute interest in the slaves; and the bequest over is void.

2. **Same—Same.**—That it is a bequest to the separate use of E.

3. **Same—Same—Case at Bar.**—That E, separately, or jointly with her husband, had no power to alienate the slaves during her coverture.

4. **Same—Same—Right of Possession.**—That the trustees may permit E and her husband to take possession of the slaves, and thus enjoy the profits of them.

5. **Same—Same—Trustees—Case at Bar.**—Two of the trustees having died since the death of the testatrix, the legal title survived to the third; and he may maintain an action to recover one of the slaves which had been sold by the son in law of E, with her consent.

This was an action of detinue to recover a slave, brought in the Circuit court of Buckingham county in December 1848, in which Gustavus A. Rose, the survivor of three trustees, was plaintiff, and George W. Nixon was defendant. Upon the trial the jury found a special verdict, which showed the following facts:

That Mrs. Caroline M. Rose died in 1809, leaving a daughter Emily, then married to William R. Coupland. By her will she bequeathed to Gustavus A. Rose and two others, who had died before this action was commenced, jointly, six slaves by
426 name, upon the following *trust: "To be held by them in trust only for the use and benefit of my daughter Emily Coupland or her heirs. And as it is my wish and desire to guard in the most ample manner against the imprudent sale or other disposition of the aforesaid property, during the natural life of the said Emily Coupland, it is hereby wholly and solely confided to the discretion of the aforesaid trustees (naming them), in what manner the said Emily Coupland shall receive and enjoy the profits arising from the hire or other disposition of the slaves aforesaid. And in the event of the death of the said Emily Coupland without an heir or heirs of her body, then and in that case, I desire that all the slaves and their increase may be given up to my son Gustavus A. Rose, or his heirs forever."

That after the death of Mrs. Rose, the slaves passed, with the assent of the trustees, into the possession of William R. and Emily Coupland, and have so remained except as hereinafter stated: That Mrs. Coupland has an only daughter Nancy, married to Wiltshire M. Lewis; and Mr. and Mrs. Coupland, upon the marriage of Nancy, put her husband and herself in o possession of two of the trust slaves, being children of one of those named in the deed. That previous to 1848 Lewis had been thus in possession of the slave, for the recovery of which this action was instituted, for five years, under an agreement with Mrs. Coupland to pay her fifty dollars a year hire for him; when, he then living in the town of Lynchburg, and being pressed for money, Mr. and Mrs. Coupland, on the 9th of December 1847, executed a paper under their hands and seals, by which in consideration of their affection for said Lewis, and of one dollar, they conveyed to him this and the other slave which had been put into his possession as aforesaid.

That Lewis not having been able to raise money by pledging the slaves, he
427 about February 1848, received *letters from Mrs. Coupland authorizing him to sell this slave; and he thereupon took him to Richmond and sold him to the defendant for the price of about five hundred and sixty dollars.

***Wills—Wife's Separate Estate.**—In Miller v. Miller, 92 Va. 512, 23 S. E. Rep. 891, it is said: "Certain words or expressions, where a contrary intention is not disclosed by other parts of the instrument conferring the estate, have been held *per se* to manifest an intention to create an estate for the separate use of the wife. And among the words and phrases so construed are the following: 'For her sole use and benefit'; 'for her own and sole use'; 'for her own use and benefit, independent of any other person'; 'for her sole and only use'; and 'only for the use and benefit of the wife or her heirs.' *Nixon v. Rose, Trustee, supra* (*12 Gratt. 425*); 1 Minor's Institutes 317, 318; Schouler on Husband and Wife, sec. 192; Bishop on the Law of Married Women, sec. 828, and 1 Leading Cases in Equity Part II, pp. 733-34."

See, in accord, citing the principal case, Green v. Claiborne, 83 Va. 389, 5 S. E. Rep. 376; Bedinger v. Wharton, 27 Gratt. 865; Bank v. Chambers, 30 Gratt. 209; Justis v. English, 30 Gratt. 571, and *note*; Haymond v. Jones, 33 Gratt. 329, and *note*; Frank v. Lilienfeld, 33 Gratt. 395, and *note*; Radford v. Carwile, 13 W. Va. 577, 652; Berkeley Springs Bank v. Green, 45 W. Va. 176, 31 S. E. Rep. 261; Coatney v. Hopkins, 14 W. Va. 361. See the principal case cited in *foot-notes* to Ropp v. Minor, 33 Gratt. 98; May v. Joynes, 20 Gratt. 692; Buck v. Wroten, 24 Gratt. 250; Jones v. Jones, 4 Va. Law Reg. 821.

That Mr. and Mrs. Coupland had resided in the county of Cumberland since 1819. And none of the trustees have had any active agency in the management of the property for the last twenty years; but have left the same to the management of Coupland and wife; but Coupland and wife always held and claimed the slaves under the bequest aforesaid. If upon these facts the law was for the plaintiff, they found for him, and assessed the value of the slave at five hundred and sixty dollars, and the damages for his detention at two hundred dollars. And upon this verdict the court gave a judgment for the plaintiff. Whereupon Nixon applied to this court for a supersedeas, which was awarded.

The Attorney General, for the appellant.
Irving & Johnson, for the appellee.

MONCURE, J. I think that the bequest of slaves and other property made by Mrs. Rose to trustees for the use and benefit of her daughter Mrs. Coupland, or her heirs, was of an absolute interest in the property, and not of a life estate only; and that the limitation over to her son Gustavus A. Rose or his heirs forever, in the event of the death of her said daughter without an heir or heirs of her body, is void for remoteness. The cases on this subject are very numerous; and it is unnecessary to review or even cite them; as, in the view which I take of this case, it is immaterial whether the said bequest be of an absolute or of a life estate. I will consider it, for the purposes of this case, as a bequest of an absolute estate.

I am of opinion that it is a bequest
428 for the separate *use of Mrs. Coupland. Among the words which have been held, per se, and independently of any contrary intention to be collected from other parts of the will, to create a trust for the wife's separate use, are the following: "For her sole use and benefit;" "for her sole use;" "for her livelihood;" "for her own use and benefit, independent of any person;" "that she should receive and enjoy the issues and profits." 2 Roper on Legacies by White 1414; White's Leading Cases in Equity, 65 Law Libr. 366, 376. But no particular form of words is necessary; and whenever it appears, either from the nature of the transaction, or from the whole context of the instrument, that the wife was intended to have the property to her sole use, that intention will prevail. 2 Bright on Husband and Wife 211. Though it seems that the intention to give her such an interest, in opposition to the legal rights of her husband, must be clear and unequivocal. Id. 206.

In the case under consideration, whether we look to the particular words used or the whole context of the will, the intention of the testatrix to exclude the marital rights of the husband, and secure the property to the separate use of the wife, is plainly apparent. In the first place, the property is given to trustees; which is a circumstance in favor of the intention to give it to the wife's separate use, though not of itself a sufficient evidence of such intention. 2 Roper 1415. In the second place, it is "to be held by them in trust, only for the use and benefit" of the wife or her heirs. These words are at least as strong as some of those which, we have seen, have been held, per se, to create a trust for separate use. It is difficult to perceive any substantial difference between the words "only for the use and benefit of the wife," and the words, "for her sole use and benefit," or the words "for her own use and benefit, independent of any person." In the third
place, the testatrix expresses her "will
429 and desire to *guard in the most ample manner against the imprudent sale or other disposition of the property" during the life of the wife; and for that purpose, wholly and solely confides it to the discretion of the trustees, in what manner the wife "shall receive and enjoy the profits arising from the hire or other disposition of the slaves aforesaid."

Here an intention is plainly indicated that neither the wife nor the husband should have a right to sell or otherwise dispose of the property; which is inconsistent with the idea of its being given, subject to his marital rights; in which case the jus disponendi would have been a necessary incident. It is wholly and solely confided to the discretion of the trustees in what manner the wife (not the husband, nor even the husband and wife) "shall receive and enjoy the profits." These are the very words which were used in Tyrrell v. Hope, 2 Atk. R. 558; and which the master of the rolls observed could admit of no other construction than that the property should be for the wife's separate use. He asked to what end she should receive the profits if they were to be the husband's property the next moment; and added, that the word "enjoy" was very strong to imply a separate use to the wife. 2 Bright 211. The intention to create a trust for the wife's separate use is at least as plain in this case as is that of West v. West's ex'ors, 3 Rand. 373, in which this court unanimously held that a separate estate was given. See also Scott v. Gibbon, 5 Munf. 86; Smith v. Smith's adm'rs, 6 Id. 581; Markham v. Guerrant, 4 Leigh 279; Lewis v. Adams, 6 Id. 320; and Perkins' trustee v. Dickinson, 3 Gratt. 335.

I am further of opinion that Mrs. Coupland has no power to alien her separate estate or any part of it. The jus disponendi is an inseparable incident of property held by a person who is sui juris. But nothing
is now better settled than that it may
430 be severed from *the separate estate of a feme covert. 2 Bright, ch. vii, p. 274; Steedman v. Poole, 6 Hare's R. 193, 31 Eng. Ch. R. 193; and other cases cited by Bright. In respect of her separate estate she is considered in equity as a feme sole. "Her faculties as such and the nature and extent of them (says Lord Langdale), are to be collected from the terms in which the gift is made to her, and will be supported by equity for her protection."—"If

the gift be made to her sole and separate use without more, she has, during coverture, an alienable estate independent of her husband. If the gift be made for her sole and separate use, without power to alienate, she has during the coverture, the present enjoyment of an unalienable estate independent of her husband."—"The separate estate may, and often does, exist, without the restriction, but the restriction has no independent existence; when found, it is a modification of the separate estate, and inseparable from it." Tullett v. Armstrong, 1 Beav. R. 1, 17 Eng. Ch. R. 132. "When the court first established the separate estate (says Lord Cottenham) it violated the laws of property between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a feme sole, the laws of property attached to this new estate, and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property, supported the validity of the prohibition against alienation." Same Case, on appeal, 4 Mylne & Craig 377, 18 Eng. Ch. R. 405.

This is the doctrine in England. In the United States, the right to restrict the power of alienation of a separate estate is universally admitted. In many of the states it has even been held that the wife has no such power, unless it be given
431 her by the instrument *which creates the estate. It has been so held, it seems, in South Carolina, Pennsylvania, Tennessee and Mississippi. See the cases cited in the notes of Hare and Wallace to White's Equity Cases, 65 Law Libr. 370-378.

In the case of the Methodist Episcopal Church v. Jaques, 3 John. Ch. R. 77, Chancellor Kent was of opinion, that "instead of holding that the wife is a feme sole to all intents and purposes as to her separate property, she ought only to be deemed a feme sole, sub modo, or to the extent of the power clearly given by the settlement. Instead of maintaining that she has an absolute power of disposition unless specially restrained by the instrument, the converse of the proposition would be more correct, that she has no power but what is specially given and to be exercised only in the mode prescribed, if any such there be." —"Perhaps we may say, that if the instrument be silent as to the mode of exercising the power of appointment or disposition, it intended to leave it at large to the discretion or necessities of the wife; and this is the most that can be inferred." On appeal to the Court of errors this opinion was pronounced to be erroneous, and it was held that a feme covert may dispose of her separate estate as if she were a feme sole, unless specially restrained by the instrument under which she acquires it; and that the specification of any particular mode of exercising her disposing power, does not deprive her of the right to pursue any other mode not expressly, or by necessary construction, negatived in the settlement. 17 John. R. 548. In Virginia, the right to restrain or interdict the power, has been expressly recognized and affirmed in several cases. West v. West's ex'or, 3 Rand. 373; Vizonneau v. Pegram, 2 Leigh 183; Williamson v. Beckham, 8 Leigh 20; Lee v. The Bank of the U. S., 9 Leigh 200. The only question seems to have been whether the specification of one mode of disposition in the settlement is an implied
432 *exclusion of the right to pursue any other: and that question seems not yet to be finally settled. Judge Tucker mantained the affirmative side of the question in the two cases last cited: and the decision of the first of the two cases, so far at least as he was concerned, was founded on that view. Judge Cabell, on the other hand, was decidedly of opinion that even in regard to personal property the weight of authority is the other way; but in regard to real estate (which a feme covert may dispose of in the mode prescribed by the statute unless interdicted by the instrument which settles it upon her, and can dispose of only in that way unless authorized by such instrument to dispose of it in some other), he maintained that the grant of authority to dispose of it in some other way does not, of itself, exclude the power to dispose of it in the statutory mode. He could not perceive the force of the argument which infers diminution of power from its extension; nor how the express grant of a power which the wife without such grant had not, can be made to take from her a power which she had without the grant. He distinguished the case of Lee v. The Bank of the U. S. in which this opinion was given, from the case of Williamson v. Beckham, on the ground that in the latter an intention to exclude all other modes of alienation than that prescribed in the settlement was apparent upon its face. Judge Brockenbrough concurred in Judge Cabell's opinion, which prevailed, the court being composed of three judges. See Woodson, trustee, v. Perkins, 5 Gratt. 345.

The right to restrain or interdict the power of alienation of a separate estate being thus established, the question now arises, whether such right was exercised by the testatrix in this case? I think that it was. It is not necessary that the power should be excluded in express terms. It may be excluded by implication. Its exclusion is often, if not generally,
433 *necessary to effectuate the objects of the settlement, and to protect the wife as well from her own weakness, as from the power and influence of her husband. The law therefore favors the intention to exclude it, and will give effect to such intention whenever it can be ascertained by a fair construction of the settlement. There can be no doubt, I think, of the intention of the testatrix in this case to exclude the power of alienation. Such a power would be inconsistent with the express terms, and the whole frame and pur-

pose of the settlement. The testatrix expresses her wish and desire to guard in the most ample manner against the imprudent sale or other disposition of the property during the life of the wife, and wholly and solely confides to the discretion of the trustees in what manner the wife shall receive and enjoy the profits of the property; which property, in the event of the death of the wife without an heir or heirs of her body, is directed to be given up to Gustavus A. Rose, or his heirs forever. Could plainer language have been used to show the intention of the testatrix that the wife should receive and enjoy only the profits, and should have no power to dispose of the property itself? Would not the existence of such a power be in conflict with the declared intention of the testatrix, not only in regard to the wife, but also in regard to Gustavus A. Rose? Although the limitation to the latter may be void, it yet serves in part to show, if the fact be not otherwise sufficiently shown, that the power to dispose of the property was not intended to be given to the wife. It cannot be necessary to say any thing more on this branch of the subject.

If the power of disposition was not given by the will, it has not been acquired by any thing which has since happened in this case. It can arise from no act or laches of the trustee; who, no more than the wife or her husband, can defeat the provisions
434 of the settlement. *The possession of the husband and wife was consistent with the trust, and was a mode of enjoyment of the profits of the property which the trustees had a right to permit.

It results from what I have said, if it be well founded, that neither Coupland and wife nor Mrs. Coupland had any power to sell or convey the slave in controversy; and consequently that the plaintiff in error, who claims only under them, is not entitled to the slave. It now remains only to enquire whether the defendant in error is entitled.

The bequest was to three trustees jointly, of whom the defendant in error is the sole survivor. There can be no doubt but that the three trustees, if all alive, would be entitled to demand, recover and hold the slave in trust under the will. The interposition of trustees seems at one time to have been considered necessary to protect the wife's separate interest. It has been long settled, however, that if no trustees be interposed by the settlement, the husband will be held in equity to be a trustee for the wife. Still, it is generally, if not always, better to have disinterested trustees; who will be appointed by a court of equity if necessary. The legal title remains in the trustees during the continuance of the trust; whether, in its general character, it be an active or a passive trust: for it is liable at any time to be stimulated to activity by any attempt to divert the property from the purposes of the trust. In this case a large discretion was given to the trustees in the management of the property. Though they were authorized, in their discretion, to permit the husband and wife to hold it, yet they had a right to take possession at any time, and it was their duty to do so whenever the safety of the property required it. Whether, the trust being joint, the defendant can alone perform it or not, the legal title to the property is in
435 him by survivorship, and he *has therefore a right to recover it at law. A right of action accrued to him for the slave in controversy at the time of the sale to the plaintiff in error, who became responsible for hires also from that time as a legal incident of property wrongfully withheld from the legal owner. Whether the plaintiff in error is entitled to any, and if any, what relief in equity, is a question which it is unnecessary, and would be improper, to decide in this case.

I am for affirming the judgment.

The other judges concurred in the opinion of Moncure, J.

Judgment affirmed.

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436 *Addington v. Etheridge, Coroner.

April Term, 1855, Richmond.

(Absent ALLEN, P.)

Conveyances—Benefit of Creditors—Inconsistent Reservations—Fraud Per Se.*—H, a merchant, conveys to L all his stock of goods, and the store-house for the current year, in trust to pay certain debts described in the deed. And the deed provides, that H shall keep possession of and sell the stock of goods in the usual line of his trade, and occupy the store, until default in the payment of any of the debts secured, and until the trustee shall be requested by any of the said creditors to close the deed by a sale. The deed is fraudulent *per se*, and void as to the creditors of H.

This was an action of debt in the Circuit court of Norfolk county upon an indemnifying bond brought by William Etheridge, coroner, acting as sheriff, for the benefit of William M. Levy, against William H. Addington and two others, his sureties in the

*Assignments for the Benefit of Creditors—Inconsistent Reservation—Fraud Per Se.—On this subject, see the principal case cited in *foot-note* to Quarles v. Kerr, 14 Gratt. 48; *foot-note* to Marks v. Hill, 15 Gratt. 400; *foot-note* to Gordon v. Cannon, 18 Gratt. 387; *foot-note* to Perry v. Shenandoah Nat. Bank, 27 Gratt. 755; Wray v. Davenport, 79 Va. 24; Young v. Willis, 82 Va. 296; Hughes v. Epling, 93 Va. 426, 25 S. E. Rep. 105; Gardner v. Johnston, 9 W. Va. 407; Harden v. Wagner, 22 W. Va. 364; Claflin v. Foley, 22 W. Va. 441; Livesay v. Beard, 22 W. Va. 591; Shattuck v. Knight, 25 W. Va. 598; Landeman v. Wilson, 29 W. Va. 708, 2 S. E. Rep. 206; Baer, etc., Co. v. Williams, 43 W. Va. 327, 27 S. E. Rep. 346; Conaway v. Stealey, 44 W. Va. 168, 28 S. E. Rep. 795; Fink v. Patterson, 21 Fed. Rep. 606.

See the principal case distinguished in Marks v. Hill, 15 Gratt. 416. See further on the subject, monographic *note* on "Assignments for the Benefit of Creditors."

bond. On the trial the plaintiff introduced a deed bearing date the 19th of January 1852, and recorded the same day, by which Walter P. Harrison, a merchant of Portsmouth, conveyed to William M. Levy all his stock of goods and store furniture in the store occupied by said Harrison, and also the store for the balance of the year, in trust to pay certain debts described in the deed. These debts were divided into four classes, and were to be paid in the order of the classes. The two first embraced debts for which negotiable notes had been given and discounted for the benefit of Harrison, and which would fall due, one of them within three days of the date of the deed, and the others at from thirty to ninety days.

The deed provided that Harrison should keep possession of and sell the stock
437 of goods, in the usual *line of his trade, and occupy the store, until default in the payment of any of the debts secured, or until the trustee should be requested by any of the said creditors to close the deed by a sale. And then the trustee was authorized to sell and pay according to the order of priority stated in the deed.

It was also proved that Addington was a creditor of Harrison by judgment confessed after the deed was recorded; and that he had levied an execution on the goods to satisfy his judgment; and that all the proceedings under the said levy were regular.

After the evidence was closed, the defendants moved the court to instruct the jury as follows:

First. That if they believed that the said deed from Harrison to Levy was given with intent to delay, hinder or defraud creditors of what they were lawfully entitled to, that the said deed is void as to said creditors.

Second. That the fact that the goods mentioned in the said deed were, by the authority of the said deed itself, to remain in the possession of the said Harrison, as in the said deed mentioned; and that he was thereby empowered to make sales of them, as in the said deed mentioned, and to account to the said Levy the trustee, as required by the said deed, rendered the said deed fraudulent and void per se as against the defendant Addington. But the court refused to give the instructions; and the defendant excepted. There was a verdict and judgment for the plaintiff for one thousand five hundred dollars. And thereupon Addington applied to this court for a supersedeas, which was awarded.

Tazewell Taylor, for the appellant.
Patton, for the appellee.

DANIEL, J., delivered the judgment of the court:

It seems to the court, that as it ap-
438 pears from the *bill of exceptions that no evidence was offered to prove the intent with which the deed from Harrison to Levy, therein set forth, was executed, other than such as was afforded by the provisions of the deed itself, the question whether the said deed was fraudulent per se or not, was one to be decided by the court on an inspection of said deed, and not proper to be submitted to the jury; and as the first instruction proposed by the plaintiffs in error sought to refer that question to the jury, it was not an error in the Circuit court to refuse to give said instruction.

It seems further to the court, that the clause in said deed, by which it was stipulated that the grantor W. P. Harrison should keep possession of and sell the stock of goods thereby conveyed, in the usual line of his trade, and hold, occupy and enjoy the store until default in the payment of any of the debts thereby secured, or until the trustee William M. Levy should be requested by any of the creditors in said deed mentioned to close said deed by sale, is explained by the clause immediately succeeding, in which it is declared that the said trustee is thereby empowered, in the event of default in the payment of any of the said debts by the said Harrison, when at maturity, upon the request of any of the said creditors, to dispose of the property in said deed conveyed; and that it was the purpose of the grantor in said deed to retain to himself the power to keep possession of and sell the said stock of goods until default should be made in the payment of said debts, and until the trustee should be requested by any of the creditors to close the deed by sale.

And it seems further to the court, that this power is one incompatible with the avowed purpose of the grantor to furnish an indemnity to his creditors; is equivalent in its effects to a power of revocation; and fully adequate to the defeat of the provisions of the deed. And therefore, that
439 said deed is, according to *the principles adjudicated by this court in the cases of Lang v. Lee, 3 Rand. 410, Sheppard v. Turpin, 3 Gratt. 373, fraudulent per se, null and void.

And it seems therefore further to the court, that the Circuit court erred in refusing to give the second instruction asked for by the plaintiffs in error.

It is therefore considered by the court, that the judgment of the said Circuit court be reversed and annulled, with costs, &c., the verdict of the jury set aside, and the cause remanded for a new trial, with instructions to the said Circuit court, if upon said trial the same instructions shall be asked, to refuse to give the first, and to give the second.

Judgment reversed.

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440 *Clark v. Ward & als.

April Term, 1855. Richmond.

1. **Attachments — Nonresidents — Who Are—Case at Bar.***—W, living in Virginia, determines to remove

See the principal case cited in Harden v. Wagner, 22 W. Va. 371.

***Attachments—Nonresidents.**—For the proposition that, one is a nonresident of the state in the sense

to another state; and in pursuance of that purpose, leaves the place where he has resided, and proceeds directly to the place where he intends to reside. He is a nonresident of the state in the sense of the attachment law, directly he commences his removal, and before he gets beyond the limits of the state.†

2. **Conveyance of Personal Property—Failure to Record Deed—Possession by Trustee—Effect.**‡—A deed is made conveying personal property to trustees for the purpose of paying debts specified therein; and the trustees take possession of the property and proceed to sell it for the purposes of the trust. Though the deed was not duly recorded, yet the property having been delivered to the trustees, this was a valid transfer thereof, and protects the property against the demands of creditors who had not acquired liens upon it before said transfer was consummated.

3. **Attachments—Case at Bar.**—A creditor secured by a deed of trust with others, sues out a foreign attachment against his debtor, and seeks to subject the property conveyed in the deed, to the payment of his debt, in preference to the other creditors secured by the deed; but he fails. This does not preclude him from his right to claim under the deed his ratable proportion of the trust fund.

4. **Same—Failure to Describe Real Estate in Endorsement—Effect.**§—The endorsement on the process of attachment not mentioning or describing real estate, the attachment does not operate upon any such estate.‖

5. **Same—Case at Bar.**—The attachment is served upon trustees in a deed of trust for the payment of certain debts, and among them are the debts due to the plaintiff in the attachment. There could therefore be no surplus in the hands of the trustees until the plaintiff's debts were
441 *paid, and consequently there can be no surplus in their hands liable to his attachment.

6. **Same—Case at Bar.**—The creditor having stated in his bill and proved, that his debtor had assigned to him certain railroad stocks, and a bond secured by a deed of trust, as a security for one of his debts, and the deed conveying all the debtor's stock and debts to the trustees, though they disclaimed any right to or possession of the stocks and bond assigned to the plaintiff, they are interested for the creditors, to see that the fund assigned to the plaintiff is properly applied to the satisfaction of his debt: And therefore, though there is nothing in their hands on which the attachment can operate, the bill should not be dismissed; but the court should proceed to have the assigned property properly disposed of and applied; and to give the plaintiff relief according to his rights under the deed.

On the 28th of June 1853, between the hours of 10 and 11 o'clock A. M. William M. Clark sued out of the clerk's office of the Circuit court of Frederick county a subpœna in chancery against Henry P. Ward, George W. Ward and C. Lewis Brent, returnable to the next July rules. On this subpœna a memorandum was endorsed, by which the officer to whom it was directed was ordered to attach the debts due and to become due by the defendants George W. Ward and C. Lewis Brent to the defendant Henry P. Ward, and also any other estate of that defendant whether in his own hands or in the hands of the other defendants, so that the said defendants be restrained from paying or conveying away the debts by them owing to, or the estate or effects in their hands of, the said Henry P. Ward, until the further order of the court. The sheriff endorsed on this subpœna, that it was received at seven minutes past 11 o'clock A. M. It was returned "executed on George W. Ward and Brent. H. P. Ward is not an inhabitant."

On the same day on which the subpœna was sued out, Clark filed his bill, in which he stated that Henry P. Ward was indebted to him in three sums of money, which he paid as security for said Ward, amounting to about one thousand two hundred
442 dollars. That for *one of these debts Ward had assigned to him as security twenty-three shares of the stock of the Winchester and Potomac railroad company, and also a claim on Alexander Clark, due by note, for about two hundred and fifteen dollars; but that neither the scrip nor the note was delivered to him at the time or since, so that he had no means of collecting the note, and the scrip could only be transferred on the books of the company by the said Henry P. Ward in person, or by his attorney in fact, or by a decree of a competent court; and by no other means could be made available.

He further stated that the said Henry P. Ward was not a resident of the state of Virginia, and that George W. Ward and C. Lewis Brent had in their possession goods, effects and estate and property of various kinds belonging to the said Henry P. Ward, and were indebted to him for money received for him sufficient to pay plaintiff's

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of the attachment law, directly he commences his removal and before he gets beyond the limits of the state, the principal case is cited and followed in Dean v. Cannon, 37 W. Va. 129, 16 S. E. Rep. 446. The principal case is also cited in *foot-note* to Long v. Ryan, 30 Gratt. 718. See, in accord, Moore v. Holt, 10 Gratt. 284; monographic *note* on "Attachments" appended to Lancaster v. Wilson, 27 Gratt. 624.

†The act, Code, ch. 151, § 1, p. 600, and the act, Sessions Acts of 1852, ch. 95, p. 78, authorizes an attachment "against a person who is not a resident of this state." The act of 1819, 1 Rev. Code, ch. 123, § 1, p. 474, authorized an attachment in equity against defendants "who are out of this country."

‡**Conveyance of Personal Property—Failure to Record Deed—Possession by Trustee.**—In Hobbs v. Interchange, 1 W. Va. 67, it is said that, the registry act does not apply where the possession of the goods is taken by the vendee, citing *Clark v. Ward, 12 Gratt. 440.*

§**Attachments—Endorsement.**—In the fourth headnote of the principal case it is held, the endorsement on the process of attachment not mentioning or describing the real estate, the attachment does not operate upon any such estate. This is approved in McFadden v. Crawford, 36 W. Va. 679, 15 S. E. Rep. 411.

‖The act, Code, ch. 151, § 7, p. 602, says the attachment shall be sufficiently levied "as to real estate, by such estate being mentioned and described by endorsement on such attachment."

debt. And making the three parties defendants, he prayed that the goods, estate and property of Henry P. Ward in the hands of the other defendants, and the moneys due from them to Henry P. Ward, might be attached, and they be restrained from paying or conveying the same until the future order of the court; and that the said stock of the railroad company might be sold under the decree of the court for the benefit of the plaintiff; and for general relief.

The defendants George W. Ward and C. Lewis Brent answered the bill. They said that they knew nothing of the indebtedness alleged in the bill, of Henry P. Ward to the complainant, or of the alleged assignment of the railroad stock and the claim on Alexander Clark; that neither the stock nor the claim had come into their hands or under their control. That they were not aware, and therefore could not admit, that Henry P. Ward, at the time of filing the bill or the issue of the subpœna, was a non-
resident of the state of Virginia. And
443 they denied that they or *either of them then had or at the time of filing the bill had, in their possession any goods or effects, estate or property of any kind belonging to Henry P. Ward, or that they or either of them then owed or at the filing of the bill owed him for money received for him, to any amount. The bill was taken for confessed as to Henry P. Ward.

The evidence was clear that Henry P. Ward was indebted to the plaintiff as stated in the bill, and that he had assigned the railroad stock and the claim on Alexander Clark as a security for one of the debts. The proofs further show that in March 1853, Henry P. Ward was a merchant doing business in the town of Winchester; that he had become embarrassed to insolvency, and by a deed bearing date the 14th of that month, he conveyed to George W. Ward and C. Lewis Brent, the whole of his property, consisting of real estate, his interests in estates of deceased persons, all his stock of goods, debts due to him, household furniture, and any stock that might be held by him in any joint stock company, in trust, to pay a large amount of debts specified in the deed; and among these were the debts due to the plaintiff Clark. These with the large mass of debts were placed in the second class in the deed: And it was provided that the trustees should sell the real estate and goods at any and such times within six months from the date of the deed, at public or private sale, either for cash or upon such credit as they should think would best promote the interest of the creditors; and until the goods were disposed of the trustees might dispose of them at private sales, and employ an agent to conduct the store, looking only to the interest of the cestuis que trust.

This deed was admitted to record upon the following certificate, viz:

444 *Frederick County, viz:

On the 14th day of March 1853, Henry P. Ward personally appeared before me, a justice of the peace for the county aforesaid, and acknowledged the above and foregoing deed of trust bearing date the 14th of March 1853, to be his act and deed, for the purposes therein mentioned. Given under my hand.

J. P. Riely, J. P.

It appears that within a few days at farthest, the trustees took possession of the goods valued at about four thousand dollars, and they were sold in the months of March, April, May and up to June. That from the date of the deed up to the 28th of June, Henry P. Ward resided with N. Bent in Winchester, except for a short time, when he was absent, a part of the time in Philadelphia and a part in the county of Culpeper. That he left Winchester on the 28th of June, about 9 o'clock A. M. upon the Winchester and Potomac railroad for Philadelphia, with the purpose of residing there. That on reaching Harpers Ferry he remained there until between half past 2 and 3 o'clock P. M. when he took the cars for Baltimore, intending to go directly on to Philadelphia.

The cause came on to be heard in November 1853, when the court being of opinion that Henry P. Ward was not to be treated as a nonresident of this state at the time of the institution of the suit, decreed that the bill should be dismissed, with costs to the defendants George W. Ward and Brent. From this decree the plaintiff applied to this court for an appeal, which was allowed.

This case was elaborately argued in writing by Steger, for the appellant, and Conrad & Tucker, for the appellees.

445 *Steger, insisted, 1st. That in the sense of the statute, Code, ch. 151, § 1, p. 600, Henry P. Ward was not a resident of the state at the time the process was issued. That having left Winchester with the purpose to settle in Philadelphia, whether he had passed beyond the limits of the state or not at the time, he was not a resident here: That imported a permanent abiding, which was not the condition of a man who was in the act of removing with the purpose not to return, but to fix his residence elsewhere. He referred to Roosevelt v. Kellog, 20 John. R. 208; the case of Wrigley, 8 Wend. R. 134; and Drake on Attachments, § 82, 83, 84, 85, as sustaining his construction of the statute. Drake, § 85, says, "It follows from these views of what constitutes a resident or inhabitant, that change of abode sine animo revertendi makes one immediately a non-resident of the place from which he departs. He also referred to Farrow v. Barker, 3 B. Monr. R. 217; Davis v. Thomas, 5 Leigh 1; and Moore v. Holt, 10 Gratt. 284. And he referred to the change in the language of the act from that of the act of 1819, in which the words are, "out of this country." 1 Rev. Code, ch. 123, § 1, p. 474. In the Code the language is, "not a resident of this state."

2d. That if Henry P. Ward was not a non-resident of the state, it was error to dismiss the bill as to him. That as to him

the plaintiff was entitled to come into equity to have the railroad stock subjected to the satisfaction of his claim. That as to this branch of the cause the other defendants disclaimed all interest; and it was therefore simply a question between the plaintiff and Henry P. Ward. That clearly as to him and as to this subject the statute gives the court jurisdiction: It requires the suit against an absent defendant to be brought in the county where his estate is: And in this case it was so brought,
446 and the sheriff returned *that he was no inhabitant. See Code, ch. 169, § 1, p. 641.

3d. That the deed of March 14th, 1853, was not duly recorded; and was therefore void as to creditors. That the act, Code, ch. 118, § 5, p. 508, declares that every deed of trust shall be void as to creditors, "until and except from the time that it is duly admitted to record." And it further directs the various modes in which deeds shall be admitted to record. Code, ch. 121, § 2, 3, p. 512. In this case the certificate of the justice was fatally defective: First, in not stating that the county of Frederick, in which the person making the certificate was a justice, was in the state, as is required by the act; second, in not stating that Henry P. Ward's name was signed to the deed, which is also required by the statute; and third, in not stating that the acknowledgment was made in the county of Frederick. A justice of the peace cannot act out of his county, and therefore it is required that it shall be stated that the acknowledgment was taken in the county where the justice has authority to take it. And for the strictness required in such cases, he referred to Turner v. Stip, 1 Wash. 319; Harvey v. Alexander, 1 Rand. 219; Lockridge v. Carlisle, 2 Leigh 186; Currie v. Page, 2 Leigh 617; Harkins v. Forsyth, 11 Leigh 294; Hairston v. Randolph, 12 Leigh 445; Healy v. Rowan, 5 Gratt. 414; Carper v. McDowell, 5 Gratt. 212.

He insisted further, that if the sale was an absolute sale, it was fraudulent and void, because there was no consideration for it. If it was in trust, as it clearly was, then it was void unless it was duly recorded. Bird v. Wilkinson, 4 Leigh 266; Lane v. Mason, 5 Leigh 520. And if it was void, then the property embraced in it is subject to an attaching creditor precisely in the same manner and to the same extent
447 as if *the deed had not been made. Peay v. Morrison, 10 Gratt. 149; Gibson v. White, 3 Munf. 94.

Conrad & Tucker, insisted, 1st. That even if the deed was not duly recorded, yet as the trustees had taken possession of the property and sold it, and in fact had paid over the greater part of the proceeds of the sales to the cestuis que trust before the attachment was issued, that the debtor certainly had no claim or right to the money in the hands of the trustees, and the attaching creditor could not therefore be entitled to it. Schofield v. Cox, 8 Gratt. 533; Glassell v. Thomas, 3 Leigh 113. That the property attached being personal chattels, its delivery under a bona fide transfer of title, for a lawful purpose, consummated the title of the trustees as against both Ward and his creditors, even if no writing had been used to pass the title or declare the trusts. 1 Black. Com. book 2, ch. 25; Power v. Walker, 3 Maule & Selw. 7. And if possession be taken at any time before an adverse execution, though long after the date of the deed, it will be valid. Jones v. Dwyer, 15 East's R. 21; Glasscock v. Batton, 6 Rand. 78; Robinson v. McDonnell, 2 Barn. & Ald. 134; Mair v. Glennie, 4 Maule & Selw. 240; Eastwood v. Brown, 21 Eng. C. L. R. 447.

2d. That the deed was duly recorded. That though the statute gives a form of certificate, it only requires a substantial compliance with it. Horsley v. Garth, 2 Gratt. 471. That when a justice performs an official act and certifies it, the presumption of law is, that it was done where he had authority to do it. And it is equally a presumption of law that the party acknowledging the deed is the grantor in it, as the name is the same.

3d. That the attachment did not lie under the circumstances of this case. First,
448 because the debtor *had no property in the state or debts due to him; and second, because Henry P. Ward had not ceased to be a resident of Virginia when the process was issued. To effect a change of domicil, there must concur an actual removal with the intention to reside in the place to which the party has removed. 1 Bouvier's Inst. 99; Jennison v. Hapgood, 10 Pick. R. 77; Cooper v. Galbraith, 3 Wash. C. C. R. 546. A mere intention to remove, unless such intention is carried into effect, is not sufficient to operate the change. 1 Greenl. Evi. § 108; The State v. Hallett, 8 Alab. R. 159.

DANIEL, J., delivered the opinion of the court:

It seems to the court, that at the time of the issuing of the subpœna and attachment in this case, the appellee Henry P. Ward was in fact, and in the true sense and meaning of the statutes regulating the subject, not a resident of this state.

It however seems further to the court, that there was no levy of said attachment on any real estate of the said Ward, no such estate being mentioned or described by endorsement on said attachment.

And the court, without deciding whether the certificate of J. P. Riely of the 14th day of March 1843, of the acknowledgment before him, by the said Ward, of the deed of trust of the same date, was sufficient in law to authorize the recording of said deed, is of opinion, that as the deed aforesaid purports to grant, assign and deliver to the trustees, George W. Ward and C. Lewis Brent, all the estate, property and effects therein intended to be conveyed; and as it appears from the evidence, that the execution of said deed was accompanied or in

good faith soon followed by a delivery of the personal property in said deed mentioned, there was a complete and valid transfer of said property to the said George W. Ward and C. Lewis Brent; and that the recording of the deed was in no
449 *wise essential to the protection of said property against the demands of creditors who had not acquired liens on the same before said transfer was consummated; and that as by the terms of the deed aforesaid, the payment of all the debts claimed by the appellant against the appellee Henry P. Ward, is expressly provided for, and so there can be no surplus in the hands of the trustees, after satisfying the demands of the creditors therein provided for, in which the appellant could have any interest (as his own claims would be paid before such surplus could arise), there was no property of the said Henry P. Ward in the hands of the said trustees liable to the attachment of the appellant.

The court is, however, also further of opinion, that the effort of the appellant to invalidate said transfer on the ground that the deed was not duly recorded, and to subject the property therein mentioned to the payment of his demands in preference to the other creditors therein secured, did not preclude him from a right to demand and have of the trustees his ratable portion of the proceeds of the property in their hands, in accordance with the provisions of said deed.

And the court is further of opinion, that as it is alleged in the bill and proved by an exhibit filed therewith, that the said Henry P. Ward, on the 12th of October 1852, assigned to the appellant certain scrip for five hundred and seventy-four dollars of stock of the Winchester and Potomac railroad company, and also a claim on Alexander Clark, due by note, and secured by a deed of trust on his property, as a security to indemnify the appellant on account of his acceptance of a draft for five hundred dollars, which is one of the debts provided for in the deed of trust of the 14th of March 1853: And as by the said deed the said Henry P. Ward assigned to the said trustees all money due him by bonds, notes or otherwise, and all stock that may be held by the said Henry P. Ward in any
450 *joint stock company; and as the appellant admitted in his bill that the amount of his claims against the said Henry P. Ward was properly subject to the off-set of a store account, the amount of which was not known, the said trustees, though having in their hands nothing amenable to the attachment, were yet interested as representing the creditors, in seeing to a proper settlement of accounts between the appellant and the said Henry P. Ward, as also to a sale of the stock aforesaid and a collection of the claim on Alexander Clark, and a proper application of the proceeds to the payment of the draft aforesaid.

And the court is therefore also further of opinion, that whilst the Circuit court properly refused to subject the property in the hands of the trustees, to the satisfaction of the claims of the appellant, in preference to the debts of other creditors provided for in the deed of trust, it erred in dismissing the bill, except so much thereof as sought to subject the property of Henry P. Ward in the hands of the trustees, to the attachment. Therefore it is decreed and ordered, that the decree aforesaid, except in the particular just mentioned, be reversed and annulled, and that the appellee Henry P. Ward pay to the appellant his costs, &c. And it is ordered that the cause be remanded to the said Circuit court, in order that the balance due by the said Henry P. Ward to the appellant may be ascertained, and a personal decree rendered therefor; also a decree for the sale of the stock aforesaid in the Winchester and Potomac railroad company, and the application of the proceeds of sale towards the discharge of the appellant's demand, with liberty to the appellant to amend his bill and make new parties, if so advised, with a view to obtain a decree for the sale of the property mentioned in exhibit No. 3, as conveyed by deed of trust to secure the note therein also mentioned, and for a like application
451 of the proceeds *of such sale; and also a decree for the payment by the trustees of the share or portion of the trust fund which may be applicable under the provisions of the deed of trust of the said Henry P. Ward of the 14th day of March 1853, to the residue of the appellant's demand.

Decree reversed.

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452 *Lohrs v. Millers' Lessee.

July Term, 1855, Lewisburg.

Forfeiture of Land—Act of 1835—Application to Case at Bar.*—H is the owner of a tract of land in 1797. Two papers purporting to be deeds bearing date in that year, one from H to G and the other from G to M, conveying this land, are by order of the proper court directed to be admitted to record, and are recorded; though they are not duly authenticated. M enters the land as his on the books of the commissioner of the revenue; and in 1815 it is sold as the land of M as having been forfeited for nonpayment of taxes, and conveyed by the sheriff to B, who enters it on the books of the commissioner; and it has been ever since held by B and those claiming under him; and all the taxes charged on the land have been paid or released. In 1843 a patent is obtained for the land by L, who enters it with the commissioner and pays the taxes thereon regularly. HELD: That under the circumstances the title of the parties claiming under B is valid; and the land was not forfeited under the act of 1835, as the land of H, to the junior patentee L.

*The principal case was cited in Twiggs v. Chevallie, 4 W. Va. 487; Whitham v. Sayres, 9 W. Va. 678; Bradley v. Ewart, 18 W. Va. 608; Simpson v. Edmiston, 23 W. Va. 682; Sturm v. Fleming, 26 W. Va. 59; Hall v. Hall, 27 W. Va. 481; Townshend v. Shaffer, 30 W. Va. 178, 3 S. E. Rep. 587; Cecil v. Clark, 44 W. Va. 674, 30 S. E. Rep. 221.

This was an action of ejectment in the Circuit court of Barbour county, by the lessee of Martin Miller and others against Peter and Peter P. Lohr. The case is stated by Judge Samuels in his opinion. There was a verdict and judgment for the plaintiffs; whereupon the defendants obtained a supersedeas from this court.

Haymond, for the appellants.
Hoffman, for the appellees.

SAMUELS, J. This cause is brought here by writ of error to a judgment for the plaintiff below, in an action of ejectment, in which John Doe, on the joint and several demises of Martin Miller and others, was plaintiff, and Peter Lohr and Peter P. Lohr were defendants. The parties, by consent entered of record, waived the right to have a jury, and thereupon the whole matters of law and fact were heard
453 and determined, *and judgment given by the court. Code, ch. 162, § 9, p. 629.

The plaintiff, to prove his title, gave in evidence a patent from the commonwealth to Levi Miller, the ancestor of plaintiff's lessors, for four hundred acres of land, and bearing date September 30th, 1843. He proved that the land thus granted to Miller was entered on the commissioner's books in the name of the grantee Miller, for the years 1844 and 1845, and the taxes imposed by law regularly paid within the years respectively in which they were so charged. That Miller the grantee died in 1845, leaving the lessors of the plaintiff his children and heirs at law; and that the land in 1846, and each year since that time, was charged on the commissioner's books to the lessors of the plaintiff, and the taxes imposed for each year respectively regularly paid by the lessors of the plaintiff. The plaintiff also gave in evidence the plat and report of the survey made in the cause.

The defendants gave in evidence a patent from the commonwealth to James Arnold for one thousand one hundred and forty acres of land, and bearing date the eighteenth day of April 1789; also a deed of bargain and sale from James Arnold to Ignatius Hayden, bearing date December 25th, 1789, for five hundred and forty acres of land, parcel of the land included by the patent last above mentioned. They also offered in evidence certain paper writings, purporting to be copies of deeds recorded in the clerk's office of Randolph County court; (in which county the land in controversy laid until the county of Barbour was formed; after which it lay in the latter county). These alleged deeds were, one from Ignatius Hayden to Ignatius Gough, bearing date April 29th, 1797, for three hundred and forty acres of land, parcel of the five hundred and forty acres conveyed by Arnold to Hayden, as above stated; the other from Gough to Meshach
454 *Hyatt, bearing date May 12th, 1797, for the same land. These copies were rejected by the Circuit court as inadmissible evidence.

The defendants further gave in evidence a deed bearing date December 25th, 1815, from John Crouch, sheriff of Randolph county, to Luke Bryant, purporting to convey three hundred and forty acres of land theretofore belonging to Meshach Hyatt, which had been returned delinquent for nonpayment of taxes, and sold by said sheriff to Bryant, as the law prescribed.

The defendants further gave in evidence a deed from Luke Bryant to Ezra Hyatt, bearing date May 25th, 1819, conveying the same land which Crouch as sheriff had sold and conveyed to Bryant.

It appears in the record that Meshach Hyatt paid into the treasury of the commonwealth the taxes imposed by law on three hundred and forty acres of land in Randolph county, for the years 1801 to 1807, inclusive; that for the years 1808 to 1815, inclusive, it was entered on the commissioner's books of Randolph county, and charged with taxes in the name of Meshach Hyatt, and that it was delinquent for nonpayment of taxes for the years 1808 to 1814, inclusive; that it was sold and conveyed by Crouch the sheriff to Luke Bryant for such delinquency as is already said. That in the years 1816 and 1817, the quantity of three hundred and forty acres of land was charged with taxes to Luke Bryant on the commissioner's books; a tract of like quantity was so charged in 1818 to Israel and Jesse Hyatt; from 1819 to 1840, inclusive, the like quantity was so charged to Ezra Hyatt; that the taxes for 1815 to 1824, inclusive, and for 1827, were paid to the sheriff of Randolph county; that the taxes for 1825 and 1826 and for 1832 to 1837, inclusive, were paid into the treasury of the commonwealth. That the land tax for the years 1838 and 1839 being unpaid in 1840, the sheriff of Randolph sold the land
455 *as the property of Ezra Hyatt, for his said delinquency, and that Eli Butcher became the purchaser. No deed from the sheriff to Butcher is shown that the plaintiffs here are in possession, holding as tenants under Eli Butcher.

The defendants below further gave in evidence a deed from a number of parties, calling themselves devisees of Ezra Hyatt, and purporting to convey to Eli Butcher the three hundred and forty acres above mentioned. The record, however, shows no copy of Ezra Hyatt's will, nor any proof that these parties had the right which they profess to convey.

It further appears that the land conveyed by Arnold to Hayden has never been entered on the commissioner's books in Hayden's name; and that neither Arnold nor Hayden in person or by tenant had actual possession of any portion of said land; that Lohr, &c., the defendants below, were in possession as squatters from 1840 to 1844, and in possession as tenants of Eli Butcher from 1844 to the time of bringing this suit.

The parties, upon these facts, submit the question of title to the court. The plaintiff below relies upon the act of February 27, 1835, ch. 13, § 2, p. 12, to show that the

commonwealth by forfeiture acquired title to the five hundred and forty acres of land conveyed by Arnold to Hayden, for the omission to enter the land on the commissioner's books and have it charged with taxes, as that act requires.

The defendants below insist that enough is shown to withdraw the three hundred and forty acres claimed by them from the operations of the statute.

The case, in this aspect of it, depends wholly upon the question whether the commonwealth acquired title to the land in controversy under the act of 1835, above referred to; because if she so acquired title, the grant to Miller, under the provisions of subsequent acts of assembly, passed her title to him.

456 *It is apparent from the record that two separate paper writings were exhibited to the County court of Randolph county, at its July term 1797: the one purporting to be a deed from Ignatius Hayden to Ignatius Gough for three hundred and forty acres of land; the other purporting to be a deed from Ignatius Gough to Meshach Hyatt for the same quantity of land; and that these papers were ordered by the court to be recorded.

It is further apparent that these papers were in fact recorded, although, as is alleged, and as the Circuit court decided, improperly recorded, as being defectively authenticated. I deem it unnecessary for the purposes of this case to consider whether the deeds, or either of them, were properly copied into the deed books of the office; and whether office copies of them could be used as evidence in a controversy about the title. I am of opinion that as the deeds (especially that from Gough to Hyatt) were in fact copied into the deed books under the order of a court having authority over the subject, as and for a registry thereof, it became the duty of the clerk and of the commissioner of the revenue to cause the land to be entered on the commissioner's books, and charged with taxes. It was wholly beyond their official duty to review the action of the court; or to place themselves in the position of creditors, or purchasers for value without notice; and to say that inasmuch as persons of these classes might not be affected by this registry, so these officers would not notice it, nor were they bound to perform any duty in consequence thereof. Neither Hayden, nor any creditor or purchaser claiming through or under him, sets up any title of his; nor has the propriety of the registry been questioned from 1797 to 1843. The attempt is now made to convert the commonwealth herself into a party complaining thereof. Of what can she complain?

457 Her taxes from 1797 to 1800 *after this lapse of time we must presume to have been paid; or if not paid, they were certainly released by act of assembly. It is distinctly proved that the taxes for every year from 1801 to 1839, inclusive, have been either paid or released by law. As the commonwealth has received what is called in the law "her just demands," one of the grievances recited in the act of 1835, as the reason for that enactment, does not exist. It is impossible to perceive how the "delay" and "embarrassment" in the "settlement and improvement" of the country, recited as another reason for passing the act, is to be in any degree obviated by forfeiting lands in the situation of this land. It would seem that this desirable purpose could be better promoted by quieting titles as far as may be consistent with the letter and spirit of the laws upon that subject. If the land be entered on the land books and charged with taxes, the commonwealth must resort to the means provided by law for the collection of her dues. If the alleged conveyances be copied into the deed books, any one desiring to purchase the land may inform himself as to the ownership thereof; if such conveyance be duly authenticated, he may perceive that the title is in the alienee; if not duly authenticated, he will know that the title remains in the supposed alienor, unless it can be shown by extrinsic proof that the conveyance was in fact executed.

In the case before us it appears that better means for giving information to purchasers are furnished than the act of 1835 requires. That act does not require the registry of the deed, but only the entry of the land on the commissioner's books, and assessment of taxes. In this case the deed was registered, even if improperly; the land was in fact entered on the books, and assessed with taxes. The letter and spirit of the act of 1835 and of all other statutes on the subject, are fully complied with in the case before us. The "just

458 *demands" of the commonwealth on this land have been paid; the ownership thereof may be ascertained by any one wishing to buy and improve it.

The title of Meshach Hyatt was not necessarily bad, although his deed be held to be defectively authenticated. That title, whatever it was, passed to Luke Bryant by the sheriff's deed. This deed was duly recorded and the land duly entered on the commissioner's book as early as 1815; that is, twenty years before the act of 1835, and has been continually so entered ever since; up to 1835 no forfeiture had been created for the omission to enter. The attempt is now made, however, to forfeit the land in the hands of a derivative purchaser, for a delinquency on the part of a remote alienor; for omission of an alleged duty in regard to this land, nearly forty years after he has, in all probability, ceased to have any interest in it. The facts that the land since 1815 has been continually on the books charged with taxes, that it has been held under deeds duly recorded since that time, it is supposed, are of no avail. That the commonwealth has the right to draw in question the validity of each and every link in the chain of title; that the assessment and payment of taxes on a title defectively deduced will not save the forfeiture on account of those very taxes; but that after re-

ceipt of her dues the commonwealth may seize the land itself in satisfaction of other and further taxes on the same land due from another person; that is to say, she may receive taxes of the mistaken claimant, and may recover the same taxes of the apparently true owner; that is, she may recover double taxes upon the same land.

If in any case the construction of a statute be doubtful, it is well for the court, in applying the law to the facts, to enquire whether the legislature, having the same facts in its mind, would have placed them under the operation of the law. If
459 we do so in this *case, and shall decide that the land was forfeited, we must hold that the legislature meant to forfeit lands as for an omission to enter and consequent nonpayment of taxes, in a case in which the entry was in fact made and the taxes in fact paid.

It is said that if the defendants below had proved title in Meshach Hyatt, derived from Ignatius Hayden, that then the entry on the land books in his name had been valid and the forfeiture prevented. It is further said Meshach Hyatt was not such owner or proprietor within the meaning of the law as might make such entry. That the chain of title stops with Hayden, and that he alone could make a valid entry; and that having omitted to do so, a forfeiture is incurred. These positions of the plaintiff's lessors, when properly analyzed, are found to be, that the commonwealth has a concern in lands above and beyond the taxes charged thereon; that although she may and does receive "her just demands" against any specific parcel of land, yet she may by forfeiture acquire the land itself in addition to her taxes, and this although the tax payer regarding himself as owner, in good faith, has complied with the letter of the law; that she may set up a title in a party who long since attempted to divest himself of all title, who has never since set up any claim; and this for the purpose of forfeiting such title to the prejudice of subsequent claimants who have fully discharged all just demands against the subject; that in every case of devise, descent, lineal or collateral, or of conveyance, if a party not in law entitled to succeed to real property, shall yet in good faith claim title, cause it to be entered and charged with taxes which he duly pays, yet the title of the true owners is forfeited for omission to enter it on the commissioner's books.

In fine, it is insisted, in effect, that the commonwealth is a grand beneficiary
460 to take advantage of all *mistakes, misconstructions, or imperfections touching titles or the transmission of titles; and this without regard to the fact that her revenue derivable from the subjects of the titles has been fully paid; that the registry laws provided for the security of creditors and purchasers, shall be held to apply to the commonwealth's claim of forfeiture, with only this difference, that in the latter extrinsic proof may be heard to defeat the forfeiture.

I am clearly of opinion that a forfeiture in this case cannot be adjudged to have occurred, without a departure from the letter and spirit of the laws: such judgment could only be sustained by making the statute rigorous and unjust in the last degree. Thus, I am of opinion to reverse the judgment of the Circuit court, and to render judgment for the plaintiffs in error.

Having found enough in the record to sustain a final judgment, I have not deemed it necessary to enquire whether the deeds from Hayden to Gough and from Gough to Hyatt might have been properly admitted to record under the registry laws of 1814, 1819 and 1850, and whether under the decision of this court in Hassler's lessee v. King, 9 Gratt. 115, they may be regarded as already recorded, or in a condition to be hereafter recorded. Nor have I deemed it necessary to consider whether the obvious repugnancy of the facts on which the Circuit court rendered judgment should be held sufficient cause of reversal. It is stated as a fact that the boundaries of the land claimed by the plaintiff's lessors are shown by the red lines on the surveyor's plat; yet it is further stated that certain other lines on the plat indicated by certain letters include the land in controversy; and judgment is given for the land so included by the lettered lines. The judgment is thus given for land lying without Miller's grant. If either of the two causes last indicated should be sufficient to reverse the judgment, and no other error existed, the cause
461 *would have to be remanded for a new trial. Finding enough, however, to justify a final judgment without looking to these causes, they become immaterial in this case.

ALLEN and MONCURE, Js., concurred in the opinion of Samuels, J.

DANIEL and LEE, Js., dissented.

Judgment reversed.

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462 *Olinger v. Shepherd.

July Term, 1855, Lewisburg.

1. **Forcible Entry and Detainer†—Code of 1849.**—In a case of forcible entry and detainer pending when the Code of 1849 went into operation, the subsequent proceedings may conform to the provisions of the Code.
2. **Unlawful Detainer†—Embodying Complaint in Summons.***—It seems that under the Code of 1849 a separate complaint is not necessary in a proceeding for an unlawful detainer; that the only complaint necessary is that embodied in the summons.
3. **Ejectment — Unlawful Entry† — Distinction.‡**—The distinction between an action of ejectment and a proceeding for an unlawful entry and detainer.

*Unlawful Detainer—No Plea—Effect.—See the principal case followed in Frazier v. V. M. I., 81 Va. 59.

†Unlawful Detainer.—See monographic *note* on "Unlawful Detainer" appended to Dobson v. Culpepper, 23 Gratt. 352.

‡Ejectment — Unlawful Detainer — Distinction be-

4. **Unlawful Detainer**‖—**Right of Possession Unnecessary.**§—In a proceeding for an unlawful entry or detainer, if the defendant has entered unlawfully, the plaintiff is entitled to recover without any regard to the question of his right of possession: And this, though the land from which he is ousted is the land of the commonwealth or of the party who ousted him.

5. **Unlawful Entry**‖—**What Possession Necessary.**¶—The possession to which the proceeding for unlawful entry will apply, is not confined to actual occupancy or enclosure; but it is any possession which is sufficient to sustain an action of trespass. And thus actual possession of a part of a tract of land under a *bona fide* claim and color of title to the whole, is such a possession of the whole or so much thereof as is not in the adverse possession of others, as will sustain this proceeding.

6. **Evidence—Extent of Possession—Invalid Deed.**‖—A deed, though it may be invalid to pass the title it purports to convey, may be admissible evidence as a link in plaintiff's chain of title to show the bounds of the land claimed by him, and the extent of his possession.

On the 3d of June 1850, John C. Olinger, the plaintiff in error, exhibited his complaint before a justice of the peace of Lee county, that Alfred Shepherd, the defendant in error, had unlawfully turned him out of possession of a certain tenement, containing by estimation two hundred acres of land, with the appurtenances, lying and being in the county aforesaid: whereof he prayed restitution of the possession. A warrant was accordingly issued in the
463 form prescribed *by the act of February 12, 1814, 1 Rev. Code, ch. 115, p. 455–459, which was then in force. The warrant was duly executed and returned, an order of survey was made and executed, and the case was continued from time to time until the 18th of October 1852, when the defendant pleaded "not guilty," to which the plaintiff replied generally; and issue was joined thereon. A verdict was found for the plaintiff, and that he recover from the defendant the possession of the premises in the complaint and warrant mentioned; on which a judgment was rendered accordingly.

On the trial of the cause, the plaintiff offered to give in evidence a deed purporting to be a deed from Alexander W. Mills, as clerk of the County court of Lee county, to John C. Olinger for forty-eight thousand two hundred acres of land in said county; which deed was duly recorded, and recites that a tract of land lying in said county, containing forty-nine thousand two hundred acres, had been returned delinquent in the name of the heirs of Nathaniel Taylor, for the nonpayment of taxes due thereon for the year 1834, which taxes, with the damages thereon, chargeable by law upon the said tract of land, amounted to the sum of four dollars and ninety-two cents; and the said tract having been duly advertised according to law, was offered for sale at public auction for cash, at the October court held for said county, at the court-house, on the 21st of October 1834, or so much thereof as would be sufficient to discharge the said arrears of taxes and damages, when the said Olinger offered to pay the said sum of four dollars and ninety-two cents for forty-eight thousand and two hundred acres; and no person offering to pay the same for a less quantity of land, it was bid off to the said Olinger; and that the said Olinger had returned to the court a fair plat and certificate of his having the same surveyed and laid off in pursuance of an act of
464 the *general assembly; which was received by the court and ordered to be recorded. To the introduction of which deed the defendant objected, unless the plaintiff would first give in evidence a plat and certificate of survey made pursuant to the act of the 10th of March 1832, and all other proceedings of record required by the act in accordance with the provisions of which the deed purports to have been made; but the court overruled the objection. Whereupon the defendant further objected to the introduction of the deed: First, because the deed recites that the delinquency of the land thereby conveyed was in the name of Nathaniel Taylor's heirs; whereas the commissioner's books for the county of Lee for the year 1834, introduced by the defendant, show said land to be listed in the name of "Taylor's heirs;" and the delinquent list of the sheriff of said county for said year, and the list of sales of lands delinquent for said year, introduced as aforesaid, show that no delinquency or sale of land occurred, or was made in said year in the name of Nathaniel Taylor's heirs. Secondly, because the deed, in its metes and bounds, varied from the plat and certificate of survey. Thirdly, because it appeared of record that the return of the sheriff of delinquent land for the year 1834 was made at the October term of the county Court for said year, instead of the August or September term thereof, as the law required; and it appearing from the list of sales aforesaid that the sale of the land in the deed mentioned was also made at the October term of the court, it could not have been advertised according to law, as recited in the deed. Fourthly, because the affidavit

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tween.—The principal case was cited in Power v. Tazewells, 25 Gratt. 789, as to the distinction between the action of ejectment and the proceeding for unlawful detainer.

§**Unlawful Detainer—Right of Possession Unnecessary to Sustain Proceeding**—In accord with the proposition laid down in the fourth headnote, see the principal case cited in Davis v. Mayo, 82 Va. 99; Mears v. Dexter, 86 Va. 834, 11 S. E. Rep. 538; Moore v. Douglass, 14 W. Va. 734; Hays v. Altizer, 24 W. Va. 506; Duff v. Good, 24 W. Va. 685, 687; Hukill v. Guffey, 37 W. Va. 453, 16 S. E. Rep. 550; Voss v. King, 38 W. Va. 615, 18 S. E. Rep. 765.

‖**Unlawful Detainer.**—See monographic *note* on "Unlawful Detainer" appended to Dobson v. Culpeper, 23 Gratt. 352.

¶**Unlawful Entry—What Possession Necessary to Sustain the Proceeding.**—See the principal case cited in Norfolk City v. Cooke, 27 Gratt. 438; Moore v. Douglass, 14 W. Va. 732.

required by the 17th section of the act of 10th of March 1832 was not attached to the list of sales aforesaid. And fifthly, because the deed upon its face did not state all the particular circumstances of title, as required by the 20th section of the said act. But the court overruled these objections also,
465 and permitted the deed to *be given in evidence to the jury. To which opinions of the court the defendant excepted.

The plaintiff having given in evidence the deed aforesaid, offered no evidence tending to show that Alexander W. Mills was clerk of the said county at the time the deed was executed. A patent to Nathan Fields, Nathaniel Taylor and John Johnston, dated the 30th January 1796, for sixty-two thousand acres of land, was given in evidence by the defendant; and these were the only conveyances of title exhibited in the cause. The plaintiff introduced a witness, whose evidence tended to prove that the forty-eight thousand two hundred acres of land claimed by the plaintiff is a part of the sixty-two thousand acres embraced in the said patent. The defendant gave in evidence a certified printed list of the auditor, made out and deposited in the clerk's office of Lee county, pursuant to the act of 1831, of lands forfeited and vested in the president and directors of the Literary fund, at the sales of 1816, which list embraced a tract of sixty-two thousand acres in the name of Nathan Fields, Nathaniel Taylor and John Johnston. The plaintiff offered no evidence to show that the said tract was redeemed; but showed that forty-nine thousand two hundred acres of land were charged on the commissioner's books in 1834 in the name of Taylor's heirs; that the same was returned delinquent in that year and sold; that the plaintiff took possession of part of the land purchased by him at the time the deed from the clerk was executed, and has continued in possession thereof up to the present time; that the said land was charged to the plaintiff on the books of the commissioner in 1835, and has continued so charged, without delinquency, up to the present time, and that it covers the land in controversy, of which the defendant took possession in the spring of 1850.

The only evidence tending to prove
466 that the plaintiff *ever had actual possession of the land in controversy, was that he had actual possession of another portion of the land embraced in his deed, as above stated, and there was also evidence tending to prove that the plaintiff refused to allow Barron, who had paid him for ranging in the adjoining neighborhood the previous year, on land in the plaintiff's deed, to range cattle on the land in controversy for the sum offered by him to the plaintiff, and that Lewis also ranged at the same place Barron did, a different year, by leave of the plaintiff.

The defendant offered in evidence a copy of an entry for two hundred acres of land, and of a survey for one hundred and sixty-five acres of land, dated, the former February 25th, and the latter May 13th, 1850, made by and for him as assignee of William N. G. Barron, by virtue of a Virginia land office treasury warrant, No. 17,954, dated the 26th September 1849; also a receipt of the register of the land office, dated February 27, 1852, for the plat and certificate of the survey aforesaid. A witness testified that the survey made by the plaintiff in this cause embraced one improvement of from twenty-five to twenty-seven years' standing, and another made twenty or twenty-five years ago; one of which was abandoned and vacant when the plaintiff took possession under his deed, and before the sale.

Whereupon the defendant moved the court to give the jury the four following instructions:

1. If they believe from the evidence that the land claimed by the plaintiff is part of the same land patented to Nathan Fields, Nathaniel Taylor and John Johnston on the 30th day of January 1796 for sixty-two thousand acres, and that the title conferred by said patent was forfeited to the president and directors of the Literary fund in 1816, and that neither of said patentees nor any one claiming under them ever re-
467 deemed *said land, then the deed under which the plaintiff claims confers no title, and the jury must find for the defendant.

2. If they believe from the evidence that the land embraced in the deed under which the plaintiff claims was forfeited to the Literary fund in 1816, and has not been since redeemed, or that the proceedings upon which the said deed is founded are irregular, then it confers no color of title upon the plaintiff, and the jury must find for the defendant.

3. If they believe from the evidence that the title to the land embraced in the plaintiff's deed was forfeited to the Literary fund and not redeemed prior to the alleged delinquency thereof in 1834, and that the defendant entered and surveyed the land in controversy in 1850, and returned a plat and certificate thereof into the land office more than six months before the trial of this cause, then they must find for the defendant.

4. If they believe from the evidence that the survey upon which the plaintiff's deed is founded omits to state that it did not embrace improvements, and they believe from the evidence that it did include improvements, then it is insufficient to support the said deed, and they must find for the defendant.

But the court refused to give the said instructions; and instead thereof, instructed them, that if they shall believe from the evidence that the plaintiff purchased the land in controversy under a sale by the sheriff, and received a deed therefor, and took possession of said land under said deed, and held possession thereof more than seven years under said deed and before the defendant entered thereon, then the jury must find for the plaintiff, notwithstanding they might believe the same land was forfeited

to the president and directors of the Literary fund in 1816. To which opinion of the court refusing to give the four in-
468 structions moved *for by the defendant, and giving the instruction instead thereof as aforesaid, he also excepted.

The judgment of the County court was afterwards reversed by the Circuit court of Lee, on a writ of supersedeas; whereupon the plaintiff applied to this court for a supersedeas to the judgment of the Circuit court, which was awarded.

Baldwin, for the appellant.
B. R. Johnston, for the appellee.

MONCURE, J., after stating the case, proceeded:

The first objection taken to the judgment of the County court is, that the proceeding, having been commenced before the Code took effect, should have been concluded under the law which was then in force, and should not thereafter have conformed, as it did, to the provisions of the Code.

I think the case comes within the exception contained in the Code, ch. 126, § 2, p. 800, and that the proceedings had therein after the Code took effect properly conformed to its provisions. The only difference between the act of February 12, 1814, 1 Rev. Code 455, under which this case was commenced, and the Code, ch. 134, p. 556, under which it was concluded, seems to be in the mode and form of proceeding. Each provides a summary remedy for the same wrong, to wit, a forcible or unlawful entry, or an unlawful detainer. The same evidence which was necessary to sustain the remedy under the old law is necessary to sustain it under the new; except in this, that under the new law the complaint is general, of an unlawful withholding from the plaintiff the premises in question; and may be sustained by evidence of such unlawful withholding, whether the possession was acquired by the defendant forcibly, unlawfully, or lawfully and peaceably;
469 whereas, under the old law, *the complaint was several, of a forcible, or an unlawful entry, or an unlawful detainer; and the subsequent proceedings and the evidence, conformed to the nature of the particular complaint. In all cases, however, whether under the old law or the new, to sustain the complaint it is necessary for the jury in effect to find that at the date of the complaint the defendant unlawfully withheld the possession from the plaintiff, and that he did not so withhold it for three years before. Such was the effect of a special finding for the plaintiff in the form prescribed by the old law, and such is the effect of a general finding for the plaintiff under the new. The complaint under the new law is, "that the defendant is in possession," and as it is said, "unlawfully withholds from the plaintiff the premises in question." The defendant either pleads or makes default; and, in the former case, his plea is "not guilty." Whether he pleads or makes default, a jury is impaneled to try "whether he unlawfully withholds the premises in controversy." If it appear that the plaintiff was forcibly or unlawfully turned out of possession, or that it was unlawfully detained from him, unless it also appear that the defendant has held or detained the possession for three years before the date of the summons, the verdict shall be for the plaintiff, &c. But it is said that the complaint in this case was in the form prescribed by the old law, that the defendant unlawfully turned the plaintiff out of possession; and did not charge, as the complaint under the new law does, that the defendant, at the date or exhibition of the complaint, was in possession and unlawfully withheld from the plaintiff the premises in question; and it is therefore contended that the issue on the plea of not guilty did not involve these facts, and that they were not found by the jury in their verdict for the plaintiff. I think these facts were, in effect, involved in the issue and found
470 by the jury. The complaint *not only charged that the defendant unlawfully turned the plaintiff out of possession, but prayed restitution of the possession; which implied that the defendant still withheld the possession from the plaintiff. The jury was impaneled to try whether the defendant unlawfully withheld the premises in controversy, which was in effect the issue on the plea of not guilty. The verdict of the jury was for the plaintiff, and "that he recover from the defendant the possession of the premises in the complaint and warrant mentioned." The only effect which the form of the complaint could have had upon the case was to require proof that the possession of the defendant was acquired by an unlawful entry. This objection was not made by the defendant in the County court. On the contrary, if it was erroneous to conform the proceedings which occurred in the case after the Code took effect, to the provisions thereof, he committed the first error by pleading "not guilty."

Before I leave this branch of the subject, it may be proper to say, by way of explanation, that I do not consider a separate complaint to be now necessary, but the only complaint which the present law seems to contemplate, is embodied in the summons.

The other objections taken to the judgment of the County court are to the admission of the deed mentioned in the first bill of exceptions as evidence to the jury; and to the giving and refusing instructions, as mentioned in the second bill of exceptions.

This case seems to have been treated, both in the County and Circuit courts, as an action of ejectment, instead of an action of unlawful entry; and to that cause the supposed errors which have arisen in the case are justly attributable.

There is a material difference between an action of ejectment and an action of forcible or unlawful entry. The title or right
471 of possession is always involved *in the trial of an action of ejectment. The plaintiff cannot recover without showing that he is entitled to the possession; and the defendant, without having any

right to the possession himself, may generally prevent a recovery by the plaintiff, by showing an outstanding right of possession in another. The remedy for a forcible or unlawful entry was designed to protect the actual possession, whether rightful or wrongful, against unlawful invasion, and to afford summary redress and restitution. The entry of the owner is unlawful if forcible, and the entry of any other person is unlawful, whether forcible or not. If the defendant enters unlawfully, the plaintiff is entitled to recover, without any regard to the question of his right of possession. His actual possession, of itself, gives him a right of possession against any person not having a right of entry. That the land belongs to the commonwealth will make no difference. There can, it is true, be no adversary possession against the commonwealth. But a person may be in actual possession of the land of the commonwealth, and will be entitled to all the remedies which the law provides for the protection of the actual possession against tortfeasors. Any possession is a legal possession against a wrongdoer. Graham v. Peat, 1 East 244; Harker v. Berkbeck, 3 Bur. 1556. Proof of an actual and exclusive possession by the plaintiff, even if it be by wrong, is sufficient to support the action of trespass against a mere stranger or wrongdoer, who has neither title to the possession himself nor authority from the legal owner. 2 Greenl. Ev. § 618. In a case reported in 4 Leon. 184, and Godb. 133, it appears that Anderson, C. J., said, "If one intrude upon the possession of the king, and another man entereth upon him, he shall not have an action of trespass for that entry; for that he who is to have and maintain trespass ought to have a possession. But in such case he hath not a
472 *possession, for every intruder shall answer to the king for his whole time, and every intrusion supposeth the possession to be in the king." But it was decided in the subsequent case of Johnson v. Barret, Aleyn's R. 10, that an intruder upon the king's possession might have an action of trespass against a stranger. And the same principle is stated in 7 Com. Dig. Trespass, b. 2, p. 510, marg. 493, where the case reported by Aleyn is referred to, but not the previous case reported by Leon. and Godb. The weight of authority seems therefore to be in favor of the principle as laid down in Com. See also Cutts v. Spring, 15 Mass. R. 135; and Inhab. Barnstable v. Thacker, 3 Metc. R. 239.

If a person in possession of public land may maintain trespass against a stranger, a fortiori he may maintain forcible or unlawful entry against him. Forcible entry may be maintained where trespass cannot; as for instance, against the owner of the land; who may defend himself against an action of trespass by the plea of liberum tenementum. Hyatt v. Wood, 4 John. R. 950. The owner of the land, having a right of entry, will not commit a trespass by entering, though with force, unless he also commit a breach of the peace. The law will not give damages against him in an action of trespass quare clausum fregit, but will compel him to restore the possession in an action of forcible entry. That the defendant, in an action of forcible entry, cannot defend himself by showing that the land in controversy is a part of the public domain, has been decided in Alabama, Cunningham v. Green, 3 Alab. R. 127, and in Tennessee, Pettyjohn v. Akers, 6 Yerg. R. 448; and I am not aware that the contrary has been decided any where. I can see no reason for a different rule in regard to public and private lands. There is the same reason for the protection of the actual possession against unlawful invasion in both cases.

The plaintiff in the action is not suing
473 for *damages, but to have the possession restored to him; and when he shows that he has been turned out of possession forcibly, or by one having no right to do so, he has made out his right to restitution, which cannot be defeated by any evidence in regard to the title or right of possession. The judgment has only the effect of placing the parties in statu quo. It settles nothing, even between them, in regard to the title or right of possession: it being declared by law that "No such judgment shall bar any action of trespass or ejectment between the same parties, nor shall any such verdict be conclusive, in any such future action, of the facts therein found." Code, p. 557, § 4.

But what is the nature of the possession to which this summary remedy applies? It is certainly not confined to a possession by actual occupancy or enclosure. I think it applies to any possession which is sufficient to sustain an action of trespass. Title draws after it possession of property not in the adverse possession of another. Actual possession of part of a tract of land under a bona fide claim and color of title to the whole, is possession of the whole, or so much thereof as is not in the adverse possession of others. This is the general principle, and it applies to the remedy in question. It has been decided in Kentucky that actual residence on one part of a tract, claiming the whole, is a possession of the unenclosed part, within the meaning of the act against forcible entries. Vanhorne v. Tilley, 1 Monr. R. 50. If this be a sound principle of law, as I doubt not it is, it applies to the land of the commonwealth as against persons not lawfully claiming under her. See Cunningham v. Green, 3 Alab. 127. Of course her rights cannot be affected by any kind of possession of her land.

Applying these principles to this case, there can be no doubt of the plaintiff's right to recover, if the facts were according to the respective pretensions of the
474 *parties. The plaintiff being in the actual possession of a part of a large tract of land, claiming the whole under a deed conveying it to him by metes and bounds, and having continued in such possession for more than fifteen years, paying taxes on the whole tract, and which dur-

ing all that time was charged to him on the books of the commissioner, the defendant, within three years before the institution of the suit, entered and took possession of a part of the land not in the actual occupancy of the plaintiff, claiming it under an entry and survey made for the purpose of obtaining a patent, upon the ground not that it was waste and unappropriated land, but that it was part of a large tract of land which had become vested in the president and directors of the Literary fund, under the act of 1814, 2 Rev. Code, p. 550, § 30. We have seen that possession of part of a tract of land, under claim and color of title to the whole, is possession of the whole, and that this principle applies to the land of the commonwealth as against persons not lawfully claiming under her. The defendant claims under her, but not lawfully; the land not being waste and unappropriated, and therefore not liable to entry, survey and patent, even though the title be vested in the president and directors of the Literary fund. It is unnecessary to enquire what would have been the relative rights of the parties if the defendant had obtained a patent for the land in controversy before the institution of this suit. The land not being patentable, he was a mere trespasser in making the entry and survey, and is bound to restore the possession to the plaintiff from whom it was unlawfully taken.

The case, then, on its merits, seems clearly to be with the plaintiff, who is entitled to have the judgment of the County court in his favor affirmed, unless there be some error in the rulings of that court, which requires its reversal. The case, as
475 before observed, *was treated in that court, as well as the Circuit court, as an action of ejectment, and the questions raised and decided were appropriate to that rather than an action of unlawful entry. Still I think there are no errors in the judgment of the County court to the prejudice of the defendant.

Those questions arise on the two bills of exceptions taken in the case. That arising on the first is as to the admissibility of the deed. There can be no doubt about the admissibility of the deed as evidence, if the facts stated in the second bill of exceptions be referred to; as they clearly show that the deed was admissible as color of title, and for the purpose of showing the metes and bounds of the tract claimed by the plaintiff under the deed, and of part of which he took actual possession. The general rule certainly is, that facts stated in one bill of exceptions cannot be noticed by an appellate court in considering another. 1 Rob. Pr. 347. There may be exceptions to this rule where the reasons on which it rests do not apply. Perkins' adm'r v. Hawkins' adm'x, 9 Gratt. 649. The second bill of exceptions showing that the deed was clearly admissible, and that no additional evidence could have rendered it inadmissible, it would seem to be vain to reverse the judgment for the supposed error in admitting it before other evidence was offered which rendered it admissible. But without deciding whether this is an exception to the general rule before mentioned, and without looking to the facts stated in the second bill of exceptions, I think the deed was admissible evidence. It is a link, and it seems to me a necessary link, in the chain of the plaintiff's evidence. One of the questions necessarily involved in the case is, whether the plaintiff was in possession of the land when the wrong complained of by him was committed? A man can rarely be in the actual occupancy of every foot of his
476 land. His possession of part of *it is generally constructive, and results from his actual occupancy of another part, under claim and color of title to the whole. The deed under which he enters and claims is then a necessary part of his evidence to show the metes and bounds of his possession. It cannot therefore be said, when he offers the deed in evidence, that it is irrelevant and inadmissible. If no evidence be offered to support the deed, and prove that possession was taken under it of the land thereby conveyed, or some part thereof, the plaintiff's chain of evidence may be incomplete, and may be objected to on that ground, but not on the ground that the deed was not a proper link in the chain. The deed being a proper link in the chain of evidence, it will be presumed in favor of the judgment that the other necessary links were supplied before, at the time, or after the deed was offered. Flannagan v. Grimmet, 10 Gratt. 421. Specific objections were made to it, which, if well founded, affected its validity as a transfer of title; but whether well founded or not, left it still admissible evidence of the metes and bounds of the land in controversy, and of the extent of the plaintiff's possession. The motion was not to exclude the deed only as evidence of a valid transfer of title, but to exclude it altogether; and was therefore properly overruled, if the deed was admissible for any purpose.

The questions arising on the second bill of exceptions are, as to the instructions refused and given by the court. I think the four instructions moved for by the defendant were properly refused by the court. The first was properly refused, because even if the deed conferred no title, it did not follow that the jury should find for the defendant. The plaintiff, even if he had no title, had a right to recover if he was unlawfully dispossessed by the defendant within three years before the institution of the suit. The second was properly
477 *refused, because, notwithstanding the facts supposed in that instruction, the deed gave color of title to the plaintiff; and whether it did or not, he had a right to recover, if he was unlawfully dispossessed by the defendant as aforesaid. The third was properly refused, because the land in controversy not being waste and unappropriated, and therefore not liable to entry, survey and patent, the defendant's entry was unlawful, and the plaintiff was entitled to recover possession in this suit, notwith-

standing the defendant may have entered and surveyed the land in 1850, and returned a plat and certificate thereof into the land office more than six months before the trial of the suit. The fourth was properly refused, for the same reasons which made it proper to refuse the first and second. I do not admit, however, that it was necessary to state in the survey on which the plaintiff's deed was founded, whether or not any improvements were included on the land, nor that in the absence of such a statement, evidence dehors the proceedings would be admissible to show the existence of such improvements. On that subject I express no opinion, it being unnecessary to do so.

I am also of opinion, that there is no error in the instruction which was given by the court; at least none to the prejudice of the defendant. This instruction, like the rest, regarded the case as an action of ejectment, and is wholly inappropriate to an action of unlawful entry. Whether the proposition therein asserted would be correct or not in an action of ejectment, it does not seem to be untrue, though irrelevant and unnecessary, in an action of unlawful entry. If, as we have seen, the plaintiff would be entitled to recover in this action on the facts supposed in the instruction, without regard to the length of his possession, a fortiori he would be so entitled if he continued to hold possession more than seven years before the defendant's entry.

478 *In regard to all the questions arising upon the two bills of exceptions in this case, I refer to what is said by Judge Lee in Kincheloe v. Tracewells, 11 Gratt. 587, 608-9, which seems to be as applicable to this case as that. I also refer to the opinion of Judge Daniel in Tappscott v. Cobbs, 11 Gratt. 172, as having a material bearing upon some of the questions arising in this case, even in their application to an action of ejectment.

I am for reversing the judgment of the Circuit court and affirming that of the County court.

SAMUELS and LEE, Js., concurred in the opinion of Moncure, J.

ALLEN, P., and DANIEL, J., dissented.

Judgment of the Circuit court reversed; and that of the County court affirmed.

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479 *Hughes & Wife v. Johnston.

July Term, 1855, Lewisburg.

(Absent DANIEL and SAMUELS, Js.)

1. **Appellate Practice—Interlocutory Decree—Appeal Improvidently Awarded.**—If an appeal from an interlocutory order or decree is allowed, and the Court of appeals is of opinion that it should have been proceeded in further before the appeal was allowed, it will be dismissed as improvidently awarded.

2. **Same—Same—Same—Case at Bar.**—A bill is filed in 1836 by an executor and guardian, charging that the personal estate of his testator is not sufficient to pay his debts; and that it is for the interest of the infants to sell their land; and that he had made a contract for the sale of the land which he deemed highly beneficial to the infants. The bill is not sworn to; nor does it appear that the testimony was taken in the presence of the guardian *ad litem*, or upon interrogatories agreed to by him. In the same year a decree is made confirming the sale, and authorizing and directing the executor as commissioner to convey the land upon the payment or securing of the purchase money; and directing him to report to the court. The cause is continued regularly until 1845, when, on the motion of the plaintiff, an order is made for the settlement of the guardian's accounts: And then the cause is continued until January 1853, when the death of one of the infants and the marriage of the other is suggested: And the husband and wife obtain an appeal from the decree of 1836. HELD:

1. **Same—Same—Same—Same.**—The appeal was improvidently allowed, and should be dismissed.

2. **Same—Same—Same—Same.***—The cause should be sent back, and the plaintiff required to amend his bill and make the purchaser and those claiming under him, parties. He should be allowed to make the affidavit prescribed by § 16, of the act, 1 Rev. Code 405, concerning guardians, and to show, if he can, that the evidence was properly taken; and both parties should be allowed to introduce further evidence. And if upon taking the proper accounts, and the evidence introduced, it shall appear that the sale was necessary under the facts existing at the time, and was fairly made, and for a full price, the same is not to be set aside on account of the irregularities in the proceedings.

480 *In May 1833 John H. Fulton and Beverley R. Johnston, executors of Charles C. Johnston deceased, and guardians of his two infant children, filed their bill in the Circuit court of Washington county against the said infants, to have a sale of a tract of land descended to them from their father. In their bill they state that there was a considerable sum due for the purchase money of the land; that the personal estate of their testator was not sufficient to pay his debts, and that it was for the interest of the infants that the land should be sold. That so believing, they had made a contract for the sale of the land to Robert Beattie at the price of seven thousand dollars, which they considered highly advantageous to the infants; and they ask that the said sale may be confirmed. This bill was not sworn to by the plaintiffs.

At the same term of the court a guardian ad litem was appointed for the infants, to defend them in the suit; and he answered, submitting their rights to the protection of the court. Afterwards the bill was amended, making the heirs of the infants parties defendants.

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*See principal case cited and followed in Londons v. Echols, 17 Gratt. 19.

Judicial Sales—Validity of—Notice to Purchaser.—See principal case cited in Estill v. McClintic, 11 W. Va. 425; Heermans v. Montague (Va.), 20 S. E. Rep. 904, 2 Va. Dec. 6; *foot-note* to Londons v. Echols, 17 Gratt. 115.

Depositions were taken by the plaintiffs in relation to the condition of the land, and to show that it was for the interest of the infants that it should be sold: but it does not appear that these witnesses were examined in the presence of the guardian ad litem, or upon interrogatories agreed upon by the plaintiffs and the guardian.

In June 1836 the cause came on to be heard, when the court, upon the personal knowledge of the judge of the tract of land, as well as the matters contained in the record, being satisfied that the sale made to Beattie was judicious and highly beneficial to the infant defendants, decreed that said sale be confirmed: And Beverley R. Johnston, who was appointed a commissioner for the purpose, was directed, upon the
481 payment *of the purchase money, or upon its being secured by a lien upon the land, to convey the same to the said Beattie, with special warranty; and to report his proceedings to the court.

From this time the cause was regularly continued until October 1845, when, on the motion of the plaintiffs, a commissioner was directed to state their accounts as guardians of the infant defendants, and report the same to the court. And then the cause was continued until January 1853, when the death of one of the infant defendants, and the marriage of the other to Robert W. Hughes, was suggested, and the suit was revived in the name of Johnston, the surviving executor and guardian, against Hughes and wife; who thereupon applied to this court for an appeal from the decree of May 1836; which was allowed.

J. W. Sheffey and Patton, for the appellants.

Stuart and Baldwin, for the appellee.

ALLEN, P., delivered the opinion of the court:

The court is of opinion, that as by the Code, p. 684, ch. 182, § 10, it is provided, that "the petition shall be rejected, when it is for an appeal from an interlocutory decree or order in a case, which the court or judge to whom it is presented deems it most proper should be proceeded in farther in the court below before an appeal is allowed therein," it is equally competent for the appellate court after an appeal has been allowed, to dismiss the same as having been improvidently granted and remand the case, if it deems the case to be one in which justice to all interested, makes it proper that it should be proceeded in farther in the court below, before concluding the rights of the parties interested in the decree, by reversing or affirming the same.

And it appearing that the interloc-
482 utory decree complained *of in this case was rendered on the 1st of June 1836, whereby a contract of sale in the bill and proceedings set out, as having been theretofore made with Colonel Robert Beattie was confirmed, and a conveyance of the land sold was directed to be made by a commissioner to said Beattie, upon the purchase money being paid or secured; that since then no proceedings besides continuances have been taken in the cause, except an order directing a settlement of the guardian account, made at the October term 1845, and an entry made in the year 1853, suggesting the death of one of the heirs of Charles C. Johnston, the marriage of the other, and a revivor of the cause against the surviving executor and guardian; the court is of opinion that it could not act upon the appeal after such a lapse of time, and in the present condition of the record, without the hazard of injustice.

The purchaser is no party to the record; it does not appear whether he acquiesced in said interlocutory decree confirming his contract for the purchase of the land; and if he has acquiesced, whether he has paid the purchase money, or received a conveyance. If the purchase has been completed, he has an interest in the decree, which should not be disturbed until he has been made a party and had an opportunity of being heard in support thereof.

The court is further of opinion, that in the present condition of the record it would be unjust to the appellee to express any opinion upon the alleged errors in said interlocutory decree. The propriety of the sale must be determined by ascertaining the condition of the estate at the time when the sale was made. If the sale was necessary under the facts then existing, and was fairly made for a full price, it does not follow that mere irregularities in the proceedings, if any such occurred, would make it necessary to set the same aside upon a final hearing. But whether such sale
483 *was proper or not cannot be correctly determined until an account of the liabilities and assets of the estate is taken: And the executorial and guardian accounts should be settled, and an enquiry made as to the payment of the purchase money of said land and the application thereof, before any final decree is pronounced.

To bring all these matters properly before the court for adjudication, the appellee should be required to amend his bill and make the said Robert Beattie, the purchaser of said land, and those claiming under him, if any, parties defendants; proper accounts should be ordered and taken; leave should be given to the appellee to file the affidavit prescribed by the 16th section of the act of 1819, 1 Rev. Code, p. 405, concerning guardians; and to show if he can that the depositions of the witnesses filed had been taken in presence of the guardian ad litem, or upon interrogatories agreed upon by him; and leave should be given to both parties to take further testimony, so as to enable the court upon a final hearing, to decide the cause with all the parties in interest before it, and in view of all the circumstances entitled to consideration.

It is therefore adjudged, ordered and decreed, that the appeal be dismissed as improvidently granted, with costs to the appellee, and that the cause be remanded to be proceeded in farther in the mode above indicated, in order to a final decree.

Appeal dismissed.

484 *Unis & als. v. Charlton's Adm'r & als.

Four Cases.

July Term, 1855, Lewisburg.

1. **Depositions†—Taken without Authority—Effect.**—A deposition is taken by a plaintiff in another state, to be read as evidence in a cause depending here; and the justices certify that the defendants appeared by counsel and cross-examined the witness: And the deposition shows that counsel professing to represent the defendants, did appear and cross-examine the witness. It does not appear, however, that the deposition was taken under a commission, or that the court here had ever authorized a commission to issue; nor was any notice to the defendant produced or proved. The deposition is taken without authority; and the justices having no authority to take the deposition, their certificate is no proof of any fact it states.

2. **Same†—Same—Admissibility as Evidence.***—A deposition having been taken without authority or notice, is not admissible as evidence; and the objection to it may be taken when it is offered to be read as evidence to the jury.

3. **Slaves—Suit for Freedom—Evidence—Declarations of Ancestress.**—In a suit by persons held as slaves, for their freedom, on the ground that the ancestress had been brought into the state without the oath then required by the statute having been taken by her master, her declarations that she was free in the state from whence she was brought, and request to the witness to write to that state to get information on the subject, it not appearing that such declarations or request was made within twenty years after she was brought into the state, are not competent evidence to rebut the presumption arising from lapse of time, that the oath was taken by the master.

4. **Same—Same—Same—Character of Master.**—Nor in such case is it competent to prove the character of the master holding her in the state, to account for her failure to assert her freedom.

5. **Same—Same—Competency of Witnesses—Case at Bar.**—In four suits for freedom, the plaintiffs in all of which claim as the descendants of one woman, who they allege was free, and the defendants in all of which claim under C, who the plaintiffs insist purchased their ancestress from S, the man who brought her into the state, with a general warranty of title, and whose administrator is a defendant in one of the suits, the cases are tried together, and it is agreed by the counsel that the depositions taken in one case shall be read in all; the defendants offer in evidence the deposition of S, and with it they offer a release from the
485 administrator of C to *S, of all right of recovery upon the warranty of title. HELD: The release of the administrator is sufficient to restore the competency of S, and if it does not apply to all the plaintiffs in the other suits, still under the agreement of counsel, the deposition is admissible as evidence on the trial.

6. **Depositions†—Impeachment of Witness—Inconsistent Statements—Laying Foundation.‡**—The deposition of a witness having been introduced as evidence, it is not competent for the other party to impeach his credibility by the proof of statements made by him at another time, inconsistent with, or contradictory of, the statement in his deposition, before the foundation for the introduction of such impeaching testimony is first laid by an examination of the witness touching the fact of his having made such statements.

7. **Same†—Time of Taking—Case at Bar.**§—A deposition taken at so late a day that the other party cannot attend at the time and place of taking it, and then get to the court, where the cause in which it is taken is to be tried, by the commencement of the term, is not admissible in evidence.

These cases were before this court in 1847, and are reported in 4 Gratt. 58. They were four actions for freedom brought in 1826, in the Circuit court of Montgomery county. All the paupers were descendants of a woman named Flora, who, they alleged, was a freewoman in Connecticut, and abducted from thence with her two infant children; and that they had been brought into Virginia, without the oath being taken by the claimant of them which was then required by the statute. The defendant in one of the cases was the administrator of James Charlton; and the other defendants claimed under Charlton, from whom they derived those of the paupers who were in their possession.

There were many trials of the cases; and they were removed to the Circuit court of the county of Rockbridge, from whence the former appeals were taken. After the cases were sent back they were returned to the Circuit court of Montgomery county; and came on for trial there in June 1853: By consent they were all tried together. Upon

*Depositions—Taken without Authority—Admissibility as Evidence.—The principal case was distinguished in Steptoe v. Read, 19 Gratt. 7.

†Same.—See monographic *note* on "Depositions" appended to Field v. Brown, 24 Gratt. 74.

‡Impeachment of Witnesses—Inconsistent Statements—Laying Foundation.—It seems well settled in Virginia that where the object is to impeach the credibility of a witness by proof of statements previously made inconsistent with his testimony in the trial, the foundation for such impeaching testimony must first be laid by an examination of the witnesses with reference to such inconsistent statements. The principal case is cited as authority of this rule of evidence in Jackson v. Com., 23 Gratt. 934; Little v. Com., 25 Gratt. 928; Davis v. Franke, 33 Gratt. 413, 425, and *foot-note*; Morgan v. Franklin Ins. Co., 6 W. Va. 498; State v. Goodwin, 32 W. Va. 182, 9 S. E. Rep. 87. The rule equally applies, whether the declaration of the witness supposed to contradict his testimony be written or verbal. N. Y., P. & N. R. R. Co. v. Kellam, 83 Va. 860, 3 S. E. Rep. 703, citing the principal case; Charlton v. Unis, 4 Gratt. 58; Conrad v. Griffey, 16 How. 38. And in Virginia—as seen from the principal case—the rule holds good even where the witness to be discredited testifies by deposition.

In Mattox v. United States, 156 U. S. 237, 15 Sup. Ct. Rep. 342, the principal case was cited to the point that the fact that the witness is dead does not change the rule. MR. JUSTICE SHIRAS, in dissenting opinion to the same case, said that the principal case was merely a case illustrating the general rule, and did not bear on the problem for solution in the case at bar.

§Depositions—Time of Taking.—See the principal case cited with approval in Fant v. Miller, 17 Gratt. 226; Wise v. Postlewait, 3 W. Va. 459.

the trial the plaintiffs offered in evidence the deposition of Shubal Stiles, taken in June 1845, before two justices of the
486 peace for the *county of Hartford in the state of Connecticut. The deposition showed that W. Hartwell, professing to act as counsel for the defendants, appeared and cross-examined the witness; and the justices certify that the defendants appeared by their counsel at the time and place of taking said deposition.

To the introduction of the deposition as evidence, the defendants objected, upon the ground that no notice of the time and place of taking it had been given; and also upon the ground that no commission had been awarded to authorize the justices to take it. No notice or commission was produced, nor did the record show that a commission had been awarded; and the certificate of the justices did not state that it was taken by virtue of a commission: These objections were not endorsed on the deposition. The court sustained the objection, and excluded the evidence; and the plaintiffs excepted.

The plaintiffs also offered in evidence the deposition of Henry Carty. In answer to questions put to him by plaintiffs' counsel, he said that old Flora, the ancestress of the plaintiffs, had told him at different times that if she had her just rights she would be a freewoman; and she at the same time wanted him to write her a letter to send back where she came from, to obtain information from the people concerning her freedom. That Squire Howard, who is dead, told the witness that Flora had applied to him as a magistrate concerning her freedom. And that James Charlton was a man of severe temper and likely to keep his slaves in subjection.

The plaintiffs offered this testimony to rebut the presumption arising from lapse of time, that James Stephens, who, defendants alleged, brought Flora and her children into the state, had taken the oath prescribed by the act of 1778. But the defendants objected to so much of the deposition as
487 is above given, and the *court sustained the objection; and certified that it did not appear when the declarations of Flora were made; but that it did appear that her application to the justice Howard was not made within twenty years after she was brought to Virginia. And it further appeared, from the petition filed by the plaintiffs, that they did not rely upon this ground as entitling them to freedom, when they instituted their suits. To this opinion of the court the plaintiffs again excepted.

All the testimony offered on the trial of these causes was in the form of depositions; and after the plaintiffs had read the depositions of several witnesses, for the purpose of proving that Flora and her two children had been brought from New York to Virginia by a certain James Simpkins; and that they had been sold by Simpkins to James Charlton, with a general warranty of title; the defendants offered in evidence the deposition of Simpkins, which was objected to by the plaintiffs on the ground that the witness was interested in the result of the suits. To obviate this objection, the defendants produced certain releases, whereby John McC. Taylor, the administrator of James Charlton, released to Simpkins all right of recovery which might in any way accrue to him as administrator as aforesaid, against the said Simpkins, in case the plaintiffs in the action against himself or in any of the other actions should recover their freedom. There were also releases from a number of the heirs of James Charlton. These releases bore date prior to the taking of the deposition. The plaintiffs objected that these releases were insufficient to restore the competency of the witness, as they did not release as to all the defendants, and because the release executed by Taylor was an insufficient release. But the causes were all tried together, and it was agreed by the counsel on both sides that the evidence taken in one case should be read in all. The court therefore overruled the objection, and admitted the evidence; and the plaintiffs again excepted.

488 *After the deposition of Simpkins had been read, the plaintiffs offered evidence to prove that he had made statements inconsistent with his deposition. The defendants objected to this evidence, and the said statements not having been made on oath, and no foundation having been laid for their introduction, the court sustained the objection, and excluded the evidence: And the plaintiffs again excepted.

The plaintiffs further offered in evidence the deposition of Robert Gardner. This deposition was taken on Thursday, the 11th of April 1850, at his house in the town of Christiansburg, in the county of Montgomery. At that time these actions were pending in the Circuit court of Rockbridge county; and the term of that court commenced on the 12th of April. The distance from the residence of the defendants to Lexington, where the court was held, is about ninety miles, and Taylor, one of the defendants, attended the court at that term. The notice for taking the deposition was served on one of the defendants on the 8th, on another on the 9th, and on another on the 10th of April. The defendants objected to the evidence on the ground that the notice was not reasonable; and the court sustained the objection: And the plaintiffs again excepted.

There were verdicts and judgments in all the cases for the defendants: Whereupon the plaintiffs applied to this court for supersedeases, which were allowed.

Hoge, for the appellants, insisted:

1st. That the objection to Stiles' deposition should not have been sustained: That the objection was not taken before the jury were sworn, and could not be taken afterwards. And he insisted further, that the appearance of the counsel for the defendants and the cross-examination of the witness by him, dispensed with the necessity of

producing the commission and notice. He referred to Jones v. Lucas, 1 Rand. 268; 2 Dan. Ch. Pr. 1122.

489 *2d. That the evidence as to the statement and acts of Flora should have been admitted; that it was for the jury to decide whether these statements were made within twenty years from the time she was brought into Virginia. Abraham v. Mathews, 6 Munf. 159; Kheel v. Herbert, 1 Wash. 203; Ross v. Gill, Id. 87.

3d. That Simpkins was interested, and his testimony should have been excluded. Woodward v. Woodson, 6 Munf. 227; 1 Greenl. Evi. 501, 502. That the releases were not by all the parties interested; and moreover, though they were dated prior to the taking of the deposition, yet they were not proved until the trial, when they were produced by the defendants. He referred to 1 Philips' Evi. 160; Mandeville v. Perry, 6 Call 78; Rowt v. Kile, Gilm. 202; Temple v. Ellett, 2 Munf. 452; Wilcox v. Pierman, 9 Leigh 144; Turberville v. Self, 4 Call 580; Richie v. Moore, 5 Munf. 388. That a release from the administrator was not sufficient, 1 Rev. Code of 1819, p. 387, 432, the administrator not having any interest in the slaves except for the payment of debts. He referred to Rosser v. Depriest, 5 Gratt. 6; Fisher v. Bassett, 9 Leigh 119; 1 Story's Equ. Jur. 23, 24, 25; Knight v. Yarborough, 4 Rand. 566. That the agreement to admit the evidence in all the causes, did not authorize the admission of illegal evidence in one cause, because it was legal in another. Chitty on Contr. 74, 76; Story on Contr. § 634, 635, 636.

4th. That the evidence of the statements of Simpkins was admissible to impeach his credit. Charlton's adm'r v. Unis, 4 Gratt. 58.

Baldwin and Patton, for the appellees, insisted:

1st. That the want of a notice and commission was conclusive against the admission of Stiles' deposition: That the appearance of counsel for the defendants did not cure this defect. Blincoe v. Berkely, 1
490 Call 405. *But that there was no evidence of such an appearance, or even that the deposition was taken; for the justices had no authority without a commission, and their certificate thereof in the absence of a commission proved nothing. Gillespie v. Gillespie, 2 Bibb's R. 90; Taylor v. Whiting, 4 Monr. R. 364; Clarke v. Goode, 6 J. J. Marsh. R. 637. That the objection was taken at the proper time, and it was not such an objection as was required to be taken before the jury was sworn.

2d. That the statements of the woman Flora were not proper evidence for the purpose proposed. That after twenty years it will be presumed the oath was taken. Abraham v. Mathews, 6 Munf. 159; McMichen v. Amos, 4 Rand. 134; George v. Parker, Id. 659; Betty v. Horton, 5 Leigh 615. That the statement had no relation to the oath, but to her having been free in Connecticut. That moreover the claim spoken of by the statute is a judicial assertion of the claim; and such as it was, it was after she had been here twenty years.

3d. That the causes were all tried together, and the true construction of the agreement of the counsel is, that if the evidence was legal in one case, it should be admissible in all. But if this was not so, the release of the administrator of Charlton, who alone could sue upon the warranty of Simpkins, was sufficient to render him a competent witness. 1 Lomax on Ex'ors 286, § 4; 287, § 9; Hays v. Hays, 5 Munf. 418.

4th. On the fourth point made by the counsel for the appellants, they referred to 1 Greenl. Evi. § 462; 2 Philips' Evi. 432.

5th. As to the notice to take the deposition of Gardner, they referred to Stubbs v. Burwell, 2 Hen. & Munf. 536; Winsookie Turnpike Co. v. Ridley, 8 Verm. R. 404; Waters v. Harrison, 4 Bibb's R. 87; Rennick v. Willoughby, 2 A. K. Marsh. R. 20; 2 U. S. Dig. 219.

491 *DANIEL, J. Proceeding to consider the causes of error in the order in which they are assigned in the petition, it seems to me that there is no just exception to the action of the Circuit court in excluding the deposition of the witness Stiles. It appears from the bill of exceptions, that no commission for taking the deposition, no notice of the time and place of taking it, was produced; the record did not show that a commission had been awarded, and the justices in their certificate do not state that they took the deposition by virtue of a commission. There was thus an absence of all proof to show that the plaintiffs had complied with the conditions on the performance of which their right to read the deposition depended. The failure to object to the deposition on this score, before it was offered on the trial, was no waiver of the objection. It was for the plaintiffs to show either an observance of the requirements of the statute under which they claimed a right to read the deposition, or that the defendants had waived or dispensed with it. Whether an appearance of the defendants by counsel, at the time and place of taking the deposition, might have been taken as the evidence of such waiver, is a question which cannot be raised. The only evidence of such appearance is in the certificate of the justices: And as it does not appear that they acted under a commission, they had no warrant or authority to speak in the matter; and their certificate is without force or virtue as proof in the cause.

No ground is laid on which to raise the question which the plaintiffs seek to present by the second cause of error assigned. In the fourth section of the act of 1778, for preventing the importation of slaves, 9 Hen. St. at Large 471, an exception is made in favor of persons removing from any other of the United States into this; provided that within a certain period after their removal they take an oath to the effect that
492 *their removal into the state is not made with an intention to evade the

provisions of the act, and that they have not brought their slaves with an intention of selling them. And by repeated adjudications of this court (as in Abraham v. Mathews, 6 Munf. 159, George v. Parker, 4 Rand. 659), made in cases arising under acts containing like provisions, it has been settled that twenty years' possession, by the master, of slaves thus brought into the state, without any claim of freedom on the part of the slaves, justifies the presumption that the master had duly taken the oath required by law. How such a claim should be asserted in order to have the effect of repelling this presumption, has never been decided by this court, and does not arise for consideration now. It is obvious, however, that no matter what may be the essentials of such a claim, or how it must be asserted, it can be of no avail unless made within the twenty years before the presumption has matured. It appears from Carter's statement that Charlton had purchased Flora, the ancestress of the plaintiffs, at least forty-five years before the date of his deposition; and he no where fixes the date of the loose declarations of Flora, that "if she had her just rights, she would be a freewoman." These declarations, from aught that appears to the contrary, may have been made long after the presumption had attached; and were therefore plainly inadmissible as testimony for any purpose. The opinion of the witness in respect to the temper and character of Charlton as a master, was, I think, equally inadmissible. If such testimony could be resorted to as furnishing a reason or argument why the presumption should not be allowed, it would be equally proper to go into proofs of the character of the slaves, as whether remarkable for timidity or otherwise. Such proofs, it is manifest, would rather serve to dissipate the attention of the jury, and to invite them into the indulgence of loose surmise
493 and conjecture, than to *guide them to those results which it is the aim and tendency of legitimate testimony to establish. The exception to the testimony was, I think, properly sustained by the court.

I cannot perceive any force in the objection to the releases executed to the witness Simpkins, on the score that they were not executed by all of the defendants. No good reason is suggested why such a release should be made by any one but Taylor, the personal representative of Charlton. No suit could be maintained against Simpkins for a breach of the warranty, whether express or implied, of the title to the plaintiffs as slaves, by any one but Charlton's representative, and the release of all right of recovery by him divested the witness of all interest in the controversy, in respect to all of the plaintiffs embraced in the release.

The further objection made to the releases, that they do not extend to all the plaintiffs in each of the suits, is met by the statement of the judge in the bill of exceptions, that "it was agreed by the counsel on both sides that the evidence taken in one case should be read in all." The terms of this agreement, it is obvious, are fully satisfied when it is shown that the deposition would have been legal evidence in any one of the cases: And as it is conceded that the releases embrace all of the plaintiffs in one of the suits, I see no reason why the agreement should not be allowed to cure the omission in the releases. The convenience of both sides was no doubt promoted by the agreement. The plaintiffs in each of the suits were all descended from one common ancestress; the testimony in respect to the claim of one was equally applicable to the claim of each; and it is difficult to conceive of injury resulting to the rights of any of them from the court's enforcing the agreement according to its terms. The third ground of error is, therefore, I think, untenable.

The fourth assignment of error
494 raises a question *which, it is somewhat remarkable, has never before been distinctly presented to this court for its decision, to wit, whether a witness who has testified in a cause may be impeached by the proof of contradictory or inconsistent statements, alleged to have been made by him on other occasions, before the foundation for the introduction of such impeaching testimony is first laid, by an examination of the witness touching the fact of his having made such statements. In the Queen's Case, 2 Brod. & Bing. 292, 6 Eng. C. L. R. 121, the question, so far as it relates to examinations in courts, was very fully discussed, and was decided in the negative by the unanimous opinion of the judges. This case occurred in 1820. The rule there stated has been adhered to in numerous cases since decided, and may now be regarded as firmly established in England. In some of the United States the courts have refused to adopt the rule; but I am satisfied, as well from an examination of such of the reports as are to be found in our library, as from a statement of Mr. Greenleaf in a note to his Treatise on the Law of Evidence, p. 579, that the rule has obtained in a large majority of the states of our Union.

In the case of Downer v. Dana, 19 Verm. R. 338, a distinction is taken between the case of a witness examined in court and one who has given his testimony in the form of a deposition. In that case the court sanctions, and expresses a determination to adhere to, the rule, that testimony, as to the previous declarations of a witness produced upon the stand, offered for the purpose of impeaching him, is not to be received, unless an opportunity be first afforded him to explain or qualify the imputed declaration. But it still decides that the rule has no application to testimony in the shape of depositions, whether taken with or without notice, and whether the adverse party attended at the taking or not, and that the adverse party
495 *may in such case, without previous enquiry, prove any inconsistent declarations or conduct of the witness.

After a careful examination of the opinion in which this distinction is taken, I have been unable to perceive the force of the reasoning on which it is made to rest. The principal reason assigned by the learned judge who delivered the opinion of the court, for refusing to apply the rule to depositions, is, that such a practice would impose on a party, wishing the privilege of impeachment, the necessity of attending in person or by attorney at the taking of every deposition to be used against him, within or without the state, which, on any other account, he might not be disposed to do. This argument ab inconvenienti is not wholly without show of reason when urged in behalf of the exercise of the privilege of impeachment by a party who has had no notice of the taking, or who, though notified, did not attend at the taking of a deposition which he seeks to discredit, but seems to me devoid of weight when extended to the case of a party who was present at the taking of the deposition, and had thus the same opportunity of cross-examining the witness, and calling his attention to the imputed inconsistent statements, that he would or might have had, in case the witness had been examined in court.

I have seen no other case in which this distinction has been taken, whilst in a number of cases decided by the courts of New York, Tennessee, Alabama and Mississippi, the rule has been held applicable as well to depositions as to the oral examinations of witnesses on the stand. Kimball v. Davis, 19 Wend. R. 437; Same Case, affirmed in the Court of Errors, 25 Wend. R. 259; Story v. Saunders, 8 Hump. R. 663; Richmond v. Richmond, 10 Yerg. R. 343; Howell v. Reynolds, 12 Alab. R. 128; Sawyer v. Sawyer, Walk. Ch. R. 48. And in the case of Conrad v. Guffey, 16
496 How. *Sup. Ct. R. 38, recently decided by the Supreme court of the United States, the authorities are fully examined and reviewed in the arguments of counsel and in the opinion of the court delivered by Justice McLean.

The effort there was to discredit a witness, who had given a deposition under a commission, by proof of antecedent contradictory statements; and the court were unanimous in the opinion, that as the witness had not been interrogated as to those statements when he was examined, the proof was not admissible. And the court quotes with approbation the opinion of the Supreme court of New York in the case of Kimball v. Davis, just cited, holding that where the imputed contradictory statements are alleged to have been made since the taking of the deposition, the adverse party can avail himself of such statements only by taking out a second commission.

The rule, we are told in Greenleaf on Evidence 579, proceeds from a sense of justice to the witness; for as the direct tendency of the evidence is to impeach his veracity, common justice requires that by first calling his attention to the subject, he should have an opportunity to recollect the facts, and if necessary to correct the statement already given, as well as by a re-examination to explain the nature, circumstances, meaning and design of what he is proved elsewhere to have said. These reasons, it is obvious, apply just as forcibly to depositions as to oral examinations in court. And indeed there are considerations which urge the application of the rule to the case of an impeachment of a witness who has given his testimony in the form of a deposition, which may not arise in an effort to discredit a witness who has been examined in court. In the latter case the witness usually remains in or about the court till the trial is concluded; and if an assault is made upon him by proof of inconsistent
497 *statements, he might, even before the adoption of the rule requiring him to be first examined as to such statements, be recalled and re-examined by the party in whose favor he had testified; and he may thus have an opportunity of repelling or explaining away the force of the assault: Whereas the witnesss whose deposition has been taken is usually absent from the scene of the trial, and has no shield against attacks on his veracity other than that provided by the rule. And as was very justly said by Chief Justice Nelson in Kimball v. Davis, in the absence of such a rule, strong temptations would exist for tampering with witnesses, and for perverting or manufacturing conversations after the taking of the depositions, and when explanations would be impossible.

Upon the whole, the rule appears to me to be a safe, just and convenient one; and I can see no good reason for refusing to follow the current of authority, in adopting it as a general rule. Cases may be supposed in which the courts may be strongly called upon to dispense with, or to make exceptions to the rule; and I will not undertake to say that special exigencies may not occasionally arise, requiring the courts to depart from the rule, rather than to sacrifice justice by sternly adhering to it. The same remark may, however, be justly made in respect to most rules of a like character, and suggests no serious objection to the adoption and observance of the rule in question as a general one.

There are no peculiar considerations calling upon us to exempt this case from the operation of the rule: For it appears from the deposition, that the plaintiff's counsel was not only present at the taking, but exercised on the occasion his privilege of cross-examining the witness. And as it does not appear that any predicate was laid in the course of the examination, for the introduction of proof of the inconsist-
498 ent declarations *offered on the trial to impeach the witness, the court, I think, did right in refusing to allow such proof to go to the jury.

The fifth bill of exceptions to the course of the court furnishes, I think, no ground of error. The defendants had a right to be present at court, as well as at the taking of

the deposition. And it is manifest from the facts set out in the bill of exceptions, that they could not have attended the taking of the depositions and then have reached the court by the commencement of its session: And the exception to the reading of Gardner's deposition was, I think, properly sustained.

I have been unable to discover any error in the action of the court, and am for affirming the judgment.

The other judges concurred in the opinion of Daniel, J.

Judgment affirmed.

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499 *Jackson's Adm'r v. King's Adm'r & als.

July Term, 1855, Lewisburg.

1. **Claim against Estate of Deceased Partner—Laches—Effect as to Surviving Partner.***—The creditor of a partnership may lose his remedy against the estate of the deceased partner, by his laches in prosecuting his claim against the surviving partner.

2. **Same—Same—Depends upon Circumstances.**—In such case there is no definite and fixed rule by which to measure the delay and neglect which will deprive the creditor of his remedy against the estate of the deceased partner. Each case must stand on its own circumstances, and be judged by them.

3. **Same—Same—Same.**—In such case, whilst the creditor may not be held to adopt a very rigorous course, nor to exercise the utmost possible diligence, at least he may be required within a reasonable time to place the debt in the ordinary channels of collection, and to give it that attention during its progress, which may render it probable that in the natural course the money may be made, and the estate of the deceased partner thus saved harmless.

4. **Same—Same—Same.**—Where the creditor fails *bona fide* to use the ordinary or reasonable diligence to collect his debt, or where measures have been taken to compel payment from the surviving partner, and there has been gross and unaccountable delay in the proceedings adopted, and it is palpable that the consequence of such delay has been to cast upon the estate of the deceased partner a debt, which might certainly have been obtained from the surviving partner, and which it was his duty to pay, this is such laches as will forbid a court of equity to lend its aid to subject the estate of the deceased partner.

This case was before this court in 1837, and is reported in 8 Leigh 689. In addition to the facts stated in the report of the case in 8 Leigh, it is to be stated that Bolton lived in Baltimore in 1807, when the three notes were executed, on which the judgments were recovered against Connally Findlay as surviving partner of Findlay & Co.; and he continued to live there until his death, without so far, as the record shows, ever having been in Virginia.

The administrator of William King
500 and the former *representatives and heirs of Connally Findlay, relied on the statute of limitations and the laches of the plaintiff. They also insisted that the judgments should be credited by the amount of a note executed by Trigg, King & Co. of Natchez, and transferred by Connally Findlay & Co. to Jackson, which they allege he had not accounted for. But it appears that he was not expected to take any steps to enforce the payment of that note, and that in fact it was intended to be applied to the discharge of another debt due from Connally Findlay & Co. to him; and that the partners in the firm of Findlay & Co. were partners in the firm of Trigg, King & Co. The heirs of Connally Findlay also insisted that they were entitled to legacies under the will of Thomas King, of whom Connally Trigg was the personal representative, and that they were entitled to have satisfaction out of his estate for their legacies.

After the cause went back from this court, the death of the plaintiff was suggested, and the suit was revived in the name of his administrator, and a commissioner was directed to take an account of the administration of Alexander Findlay and A. B. Trigg upon the estate of Connally Findlay; of the assets which came to their hands and their application; and the dates at which the several debts of said estate were paid, and the dignity and character of each.

The commissioner made his report; from which it appeared that upon the administration account the administrators were in advance to the estate. That of the assets of Connally Findlay & Co. there was in their hands two hundred and fifty-four dollars and sixty-three cents, as of the 1st of January 1823. That the proceeds of the real estate of Connally Findlay in their hands, amounted to one thousand five hundred and seventy-two dollars and thirty-seven cents, which being applied to satisfy the legacies due to the children
501 *of Connally Findlay under the will of Thomas King, and to satisfy the administrators the amount due to them on the administration account, left but the sum of seventy-five dollars and ninety-five cents remaining: And that the administrators had paid on judgments against Connally Findlay in his lifetime, one thousand three hundred and sixty-four dollars and twenty-five cents, on bonds two hundred dollars, on promissory notes six hundred and ninety dollars, and on accounts six thousand three hundred and fifty-two dollars. And that other lands of Findlay had been sold and the proceeds of sale had been received by the heirs.

The cause came on again to be heard on the 17th of April 1846, when the court held that the administrators had a right to retain in their hands, so much of the proceeds of the sale of the land belonging to Findlay as was sufficient to pay the legacies

*See monographic *note* on "Laches" appended to Peers v. Barnett, 12 Gratt. 410.

due under the will of Thomas King, and the amount due to them on their administration account; and made a decree against them in favor of the plaintiff for the sum of two hundred and fifty-four dollars and sixty-three cents, with interest thereon from the 1st of January 1823 until paid; that being the amount of the assets of Connally Findlay & Co. in their hands. And the court being of opinion that the intestate of the plaintiff had by laches lost his right to recover against the representatives of William King any portion of his debt, the bill was dismissed as to them, with costs. The facts upon the question of the laches of the plaintiff are fully stated by Judge Lee in his opinion. From this decree Jackson's administrator applied to this court for an appeal, which was allowed.

Baldwin, for the appellant.

B. R. Johnston and Patton, for the appellees.

502 *LEE, J. The defense sought to be made by the appellees under the allegation of payment cannot be maintained. There is no evidence nor even a plausible pretense of such payment, unless the receipt by Jackson of the note of Trigg, King & Co. for seven thousand six hundred and fifty-three dollars and seventy-four cents can be so regarded. But it is not shown that this was received by Jackson on account of this debt. He had at that time a large individual debt against Connally Findlay & Co. besides that which is the subject of demand in the present case, for the benefit of Highland & Gait. He alleges that this note was taken on account of this individual debt, and the character of the receipt given by him would seem to refer to a debt of this character: nor is there any proof to connect this transaction with the claim of Highland & Galt. The amount received upon this note was credited upon the individual claim, and such appropriation upon the proofs cannot be said to have been improper.

But if this note had been received on account of the claim of Highland & Galt, it would not have amounted to payment or satisfaction. It was received as a deposit by way of collateral security merely, without any undertaking on the part of Jackson to take measures for its collection. This is distinctly admitted in the answer of Alexander Findlay: Nor can it be said that because Jackson held the note without collecting it, he had lost his right on that account to call upon the parties from whom the original debt was due for payment. He was not bound to collect the note: he held it to receive payment if voluntarily made, but subject to the directions of Connally Findlay & Co. By their direction he sent it to Natchez, where a part was paid, and after it was returned to him, continued to hold it in the same way; but no application was ever made to him afterwards for it. And even if this application of
503 *the amount received to the individual debt were a misappropriation of the same, it was so in form only, and could not prejudice the estate either of King or Connally Findlay. Both were liable for both debts and thus got the benefit of the credit: and as the estate of William King was also liable for the note of Trigg, King & Co. as was also that of James King and William Trigg, they cannot impute laches to Jackson in failing to coerce payment from themselves.

Nor will the doctrine of presumptions afford any aid to this defense. The notes bore date on the 23d of November 1807, and were payable in twelve, twenty-four and thirty months after their date, respectively. Suits were brought against Connally Findlay in 1810, and judgments recovered upon two in 1811, and upon the third in 1812; and the present suit was brought in January 1825. Between the maturity of the note first payable and the institution of this suit was a little upwards of sixteen years, and this time upon a question of payment is sufficiently accounted for, and any presumption of payment fully repelled.

Jackson was a nonresident of the state, and was seeking the recovery of his debt by suits against Findlay, the surviving partner. In 1811 a payment of one thousand dollars is made which is credited upon the note first payable. In 1813 the debt is recognized in a letter from Connally Findlay & Co. to Jackson, and payment promised in cotton. In 1817 Findlay pays five hundred dollars, and promises a further payment in a short time; and in the same letter makes his acknowledgments for the indulgence he had received. And in 1819, Findlay having recently died, steps are taken to revive the judgments by writs of scire facias. These circumstances would seem to be abundantly sufficient to meet any presumption of satisfaction. But in truth any question of this character must now be regarded as out of the case;
504 for *payment was pleaded in bar of the writs of scire facias and the cases were tried upon issues joined on that plea, and the jury found in each case against the plea, and judgment was rendered accordingly. And in 1828, under the orders of reference made in this cause, Commissioner Campbell reports this debt as unpaid, and ascertains the amount then due to be eight thousand five hundred and eighty-six dollars and eight cents. Exceptions were taken, it is true, to the allowance of interest and the mode of computing it, but none to the recognition of the debt as still subsisting and unpaid.

The plea of the statute of limitations cannot avail the appellees. As to the representatives of Findlay there can of course be no pretense for its application; and as it respects the representatives of King it may be questioned whether the case would be within its operation. The demand is in equity against the estate of a deceased partner, the creditor having been unable to obtain satisfaction from the surviving partner. But against the latter he had regularly commenced proceedings in due time, and

had prosecuted the same to judgment. Whether the court would apply the statute from the same period at which it would commence to run in the action against the surviving partner, or would hold the estate of the deceased partner bound by the proceedings against the latter, and regard the bar of the statute as saved by these, is a question that may not be altogether free from difficulty. But it is unnecessary to express any opinion upon it because it is a sufficient answer to the plea, that the notes were given in Maryland, and that Jackson then was and up to the bringing of the suit continued to be a nonresident of Virginia, and so was within the exception in favor of nonresidents in the act in force at the time the suit was brought. The bill alleged the nonresidence of Jackson and a
505 pure plea of the statute *would not avail. It should be accompanied in some form with a denial of the nonresidence, or an allegation that Jackson had been within the state after the cause of action accrued. Sto. Eq. Pl. § 753; Coop. Eq. Pl. 232; Bayley v. Adams, 6 Ves. R. 586; Chapin v. Coleman, 11 Pick. R. 331; James v. Sadgrove, 1 Sim. & Stu. 4. There is no such denial or allegation to be found here, and there is no proof that Jackson ever was in Virginia at any time.

That the estate of King was not discharged in equity by his death will be readily conceded, but the character of the liability and the time and manner in which it was to be enforced, might admit of serious discussion if they were still open for consideration. The modern English doctrine would seem to be that the liability of the estate of the deceased partner is direct and immediate, and does not depend on the state of the relations between the partners, or the result of measures taken to collect the debt from the surviving partner. But the cases in Virginia would seem to lead to a very different conclusion. Linney's adm'r v. Dare's adm'r, 2 Leigh 588; Sale v. Dishman's ex'ors, 3 Leigh 548; Galt v. Galland's ex'or, 7 Leigh 594; Jackson v. King's reps., 8 Leigh 689. These cases, and the opinions of the judges, tend strongly to show that the liability of the estate of a deceased partner in any case is not absolute and immediate, but contingent merely, depending upon the result of proper efforts to collect the debt from the surviving partner or his ascertained insolvency.

But what may be the true solution of the abstract question, it is not material to enquire; because for all the purposes of this case the question must be regarded as settled by the decree of this court of the 15th of August 1837. For this court was of opinion and so adjudged, that the representatives of King were properly made parties because they were ultimately chargeable in the event of Findlay's funds prov-
506 ing *inadequate, unless the equitable rights of the appellant against them were lost by his neglect or misconduct; and that it was premature to hear and dismiss the bill as to them before it was matured as to Findlay's representatives, their liability being dependent upon the issue of the proceedings and the result of the enquiries in relation to Findlay, the surviving partner. Thus it must be taken to be adjudicated between these parties, that the liability of King's estate is not absolute and immediate, but secondary and contingent only, depending on the result of the proceedings against Findlay and the absence of misconduct or neglect on the part of the appellant in commencing and prosecuting such proceedings. These have hitherto been ineffectual, and satisfaction has not yet been obtained from Findlay or his estate; and if any question whether they had been sufficiently tested at the time of the institution of this suit, is now concluded by the decree of 1837, there yet remains by the very terms of that decree, the important enquiry as to the manner in which the creditor has conducted himself in regard to Findlay and his estate, and whether in the course which he has pursued, there has been any such "misconduct or neglect," such laches, as should repel his claim to the equitable relief which he now seeks.

The claim to charge the estate of a deceased partner with a debt of the firm is one recognized in the court of equity only; and as Lord Eldon observed in Kendall, ex parte, 17 Ves. R. 514, 526, the right "standing only upon equitable grounds, if the dealing of the creditor with the surviving partner has been such as to make it inequitable that he should go against that fund (the separate estate of the deceased partner), he would not, upon general rules and principles, be entitled to the benefit of that demand." Indeed, the opinion of Lord Thurlow in Hoare v. Contencin,
507 1 Bro. *C. C. 27, implies strong doubts as to the existence of any principle upon which a debt extinguished at law by the death of one jointly bound, shall yet be set up in equity against the estate of the deceased party; and Lord Eldon expresses his surprise that a court of equity should have interposed to enlarge the effect of a legal contract in such a case, though he admits the modern doctrine to be that a court of equity will under certain modifications, enable the creditor to resort to the assets of a deceased party who was jointly bound with others who have survived him. Kendall, ex parte, 17 Ves. R. 524, 525.

But this right being thus confessedly the creature of the court of equity, will be administered only upon its own terms and according to its general rules and principles. And it may be waived by the creditor, or it may be lost by the course and conduct which he adopts; and thus the equity which he would otherwise have had, will be entirely repelled. This is distinctly stated by Lord Hardwicke in Bishop v. Church, 2 Ves. sen. 371; and is recognized as the law by Judge Carr in Linney's adm'r v. Dare's adm'r, 2 Leigh 588, 595, and by Judge Tucker in Sale v. Dishman's ex'ors, 3 Leigh 548, 557. As it is expressed by the

last named judge, "the equity may be rebutted if the party is guilty of fraud or collusion, or even of laches." The correctness of this doctrine is also very fairly to be deduced from the cases of Lane v. Williams, 2 Vern. R. 272; S. C. 292; Daniel v. Cross, 3 Ves. jr. R. 277; Devaynes v. Noble, Sleech's Case, 1 Meriv. R. 396, 528; although under the particular circumstances of those cases the right was held not to have been lost.

What shall be said to be such laches as will deprive the creditor of the right to resort to the separate estate of the deceased partner, is no where ascertained with any thing like precision. As said by
508 Judge *Tucker in Sale v. Dishman's ex'ors, there is no settled rule or analogy yet established upon the subject. The same learned judge informs us that to require the same diligence which is demanded in cases of bills of exchange was very readily considered out of the question. And he seems to think that to put the case on the footing of the implied contract for due diligence between assignor and assignee, would be pregnant with the evil referred to by the master of the rolls in Sleech's Case in Devaynes v. Noble, 1 Meriv. R. 529. He is of opinion there can be no fair analogy between the case of the deceased partner and that of the assignor of a bond. The latter, he says, has parted with his interest and stands merely as a guarantor: The former was one of the joint debtors, and at his death the obligation ought to devolve with his estate upon his representatives. He agrees however that the court of chancery will not charge his estate with the equity until the insolvency of the survivor is ascertained, but says he is not aware of any express decision which requires the creditor to proceed within any limited time. He appears rather to place the liability on the footing of a suretyship, for he says that what is meant by laches is the failure to sue when required so to do; and that without such requisition he is in no sort culpable, though he agrees that the estate of the deceased partner may also be absolved by collusion, by giving time to the surviving partner, or by new arrangements with him.

With great deference, I think this is unduly limiting the range of the duties devolving upon a creditor who would preserve his resort to the estate of his deceased joint debtor, and within which only he may be guilty of such laches as will absolve that estate. And I incline to think the analogy is stronger to the case of the assignor of a bond than to that of a surety. If we are to regard the estate of the deceased part-
509 ner *(as for the purposes of this case it must be regarded) as only secondarily and contingently liable upon the establishment of the insolvency of the deceased partner, it stands in effect like the assignor, as a mere guarantor: it is not liable at once and directly as a surety, nor has it the rights or remedies of a surety against the surviving partner if the debt should be discharged out of the assets. Nor can there be any special fitness in requiring demand upon the creditor from the representative of the deceased partner to sue the survivor. He has no control over the social effects nor the books of the firm: all pass together to the surviving partner. He may not know or have the means of knowing who are the firm creditors, as they are presumed to make no call upon him till they have pursued the surviving partner in vain. And as he may not therefore be able to make the demand upon the creditor to sue, from the very nature and character of the liability, a sufficient warning should be implied that the latter must adopt such a course as will afford a just and reasonable protection to the estate of the deceased partner, and not subject it to wanton or unnecessary peril. I have seen no case sanctioning the suggestion that laches consists only in the failure to sue after request; while in one case it was distinctly held by Lord Hardwicke that the mere failure to sue, after being applied to do so, will not of itself be sufficient to absolve the estate of the deceased party. Bishop v. Church, 2 Ves. sen. 371.

It is in vain to look to the cases for any rule by which to determine the character of this laches, or to measure its precise extent. Sleech's Case, in Devaynes v. Noble, 1 Meriv. R. 529, only maintains that the creditor shall not be held to a very rigorous course of proceeding, nor required to use the greatest possible diligence to compel immediate payment by the surviving partner; and one of the reasons assigned
510 is that *such a course might do injury to the estate of the deceased partner by so hurrying the survivor as to disable him from meeting the engagements of the firm, and thus bring a debt upon the estate, which, if less rigor had been exercised, it might have wholly escaped. Miss Sleech had suffered her money to remain in the hands of the survivor of a banking firm for some eight months after the death of the other partner, when the former became bankrupt; and it was held by the master of the rolls, Sir William Grant, that her failure to prosecute her demand during this interval was not such laches as would absolve the estate of the deceased partner; and that the fact of her having received a part of the balance due her from the surviving partner, and afterwards signing his certificate as a bankrupt, were not such dealing with him as amounted to a waiver of her claim against the former. But it is no where intimated that the creditor cannot lose his equity by what would amount to laches, but the contrary is fairly implied throughout the whole case; and certainly there is nothing in the case or in the opinion of the master of the rolls to warrant the broad and sweeping terms employed by the chancellor in Hamersley v. Lambert, and of which even Judge Tucker expresses disapprobation in Sale v. Dishman's ex'ors, 3 Leigh 548, 560.

In Lane v. Williams, 2 Vern. R. 277

(Raithby's edition), the note in question is stated in a note of the editor, to have been of about one year's standing only, though the master of the rolls in Sleech's Case supposed the laches to have been much greater than in the case then before him. Judge Tucker supposes that the case is incorrectly reported, and that it may have been decided upon some other principle. Sale v. Dishman's ex'ors, 3 Leigh 558 n. Certainly a delay of one year would hardly suffice to bar the creditor's equity except under very peculiar circumstances.

511 *In Daniel v. Cross, 3 Ves. jr. R. 277, the interval which occurred before the bankruptcy of the surviving partner, was about two years. The partnership was dissolved in March 1791. The death of the deceased partner had occurred in June 1791, and the bankruptcy of the new concern did not happen till March 1793. It was held that this lapse of time was not sufficient of itself to exclude the claim upon the estate of the deceased partner.

In Hamersley v. Lambert, 2 John. Ch. R. 508, the partnership was dissolved by the death of one of the partners in September 1803. The other partner was discharged under the insolvency law of the state of New York in October 1807. It was held that this delay of some four years would not bar the equity against the estate of the deceased partner.

Yet none of these cases, nor any other that I have seen, can be regarded as establishing any thing inconsistent with the doctrine recognized in the Virginia cases, that such an equity may be lost by the laches of the creditor. It is true in the case of Hamersley v. Lambert, the doctrine stated to be deducible from Devaynes v. Noble, 1 Meriv. ubi sup. 528, is laid down in very broad and general terms. But the case itself will not justify the deduction made from it, nor was the assertion of any such doctrine demanded by the exigencies of that case or of the case of Hamersley v. Lambert.

Assuming then that laches will bar the creditor's equity, but finding no precise and definite rule by which to measure the delay and neglect which shall be said to amount to it, each case must, I apprehend, stand on its own circumstances, and be judged of by them. The right to charge the estate of the deceased partner, we are told by the Lord Chancellor in Kendall, ex parte, ubi sup. 524, is an equity to be enforced only upon equitable principles;

512 and it should depend therefore, *for its preservation, upon the observance by the creditor of good faith, the exercise of a certain reasonable diligence, and the maintenance of a just and proper regard for the rights and interests of the deceased partner. If, as for the purposes of this case we must accept it, the doctrine be that the right to resort to the estate of the deceased partner is secondary and contingent only, depending upon the ascertained insolvency of the surviving partner, or the result of fruitless efforts to obtain payment out of his estate, if the surviving partner be not notoriously or absolutely insolvent at the time of the death of the deceased partner, or at the maturity of the debt, if that only occurred after his death, it cannot be unreasonable to require that the creditor should commence and prosecute with at least reasonable or ordinary diligence, the proper proceedings to compel payment from the surviving partner. While he may not be held to adopt a very rigorous course nor to exercise the utmost possible diligence, at least he may be required within a reasonable time to place the debt in the ordinary channels of collection, and to give it that attention during its progress which may render it probable that in the usual course the money may be made, and the estate of the deceased partner thus saved harmless. The surviving partner takes the whole social effects, and upon him devolves the duty of discharging the partnership debts. He has the appropriate fund out of which they should be paid, and there can be no legal presumption that that fund will prove inadequate. Like the assignor of a bond, the estate of the deceased partner is bound only to guarantee against the insolvency of the surviving partner, and is only to be made responsible when that is established. Why then should the creditor not be held to reasonable diligence as in the case of the assignor? It would be utterly vain and illusory to declare the estate of the

513 *deceased partner to be only liable when the insolvency of the surviving partner has rendered the efforts to compel payment from him ineffectual, if the creditor may rightfully forbear proceedings indefinitely, until the party who might have been previously perfectly good should become insolvent, or having commenced them, suspend collection at pleasure, or suffer them to slumber for a series of years, during which the survivor may waste both the social effects and his own private estate, and thus inevitably cast a debt, which he ought to pay and which might have been made, upon the estate of the deceased partner. The right to call upon his estate to make good the debt upon the failure of the efforts to compel payment from the surviving partner, carries with it, by just and necessary implication, the duty of making such efforts bona fide, and with at least ordinary or reasonable diligence. Where this has been wanting, where measures have been taken to compel payment from the surviving partner, but there has been gross, wanton and unaccountable delay in the proceedings adopted, and it is palpable that the consequence of such delay will have been to cast upon the estate of the deceased partner (if it be held liable) a partnership debt of which payment could undoubtedly have been obtained from the surviving partner, and which it was his duty to pay, I think this is such laches as will forbid a court of equity to lend its aid to subject the estate of the deceased partner.

In Sale v. Dishman's ex'ors, all the judges were agreed that the liability of the estate

of the deceased partner depends on the ascertained insolvency of the survivor, and from their opinions it is plainly to be inferred that the equity of the creditor may be lost by misconduct or laches. But they considered the question of laches as not sufficiently presented by the pleadings in that case, and therefore that it was not necessary to make any decision upon
514 it. Judge Cabell, *however, concurs with Judge Tucker in thinking the diligence required is not that which is necessary as between endorser and endorsee, assignor and assignee, though he differs from him in regard to the effect of a failure to sue after request. Judge Carr does not advert to this point, but he gives us a very distinct idea of what was his understanding as to the measure of diligence required in such a case. For he says, "But Sale (the creditor) with Berryman's bond (the surviving partner's bond) in his possession, waited upwards of four years before he took any step to recover the money; and if Dishman's executors (the executors of the deceased partner) had put this matter in issue, and shown us that but for this delay the money might have been made out of Berryman, I strongly incline to think that this also would have been such conduct as would have rendered it inequitable to permit his resort to the estate of Dishman." And he quotes the remark of Lord Hardwicke in Bishop v. Church, that "the plaintiff must come as from a pure fountain; must show himself not to be guilty of any laches, much less collusion, turning to the prejudice of the other side, which might be strong enough to rebut that equity set up beyond what the rule of law admits."

So in Linney's adm'r v. Dare's adm'r, 2 Leigh 588, we have another illustration of this learned judge's views upon this subject. The debts in question were created the one in 1799, and the other in 1801. Murray, the surviving partner, regularly paid up the interest on the first debt till the 1st of December 1816, and on the last till the 1st of January 1817, and he continued solvent till about November 1817, but afterwards became insolvent, and so died. It was shown that it was owing to Linney's (the creditor's) indulgence that the debt was not early obtained from him; but there was no other proof of laches on his
515 part excepting *the mere delay which he had permitted. The case went off upon the question of jurisdiction, the court being of opinion that there was a plain and adequate remedy at law against Ross, the surety for the debts, who was still living and solvent; but Judge Carr went into an examination of the circumstances, and upon the merits seems to have had no difficulty in declaring his opinion to be that Linney had no well founded claim in equity against Dare's representatives. His remarks on this branch of the case are omitted in the report, but the result at which he arrived must of course have been deduced from the long indulgence given by the creditor, and the failure to collect the debt when it was perfectly in his power to do so, as constituting such laches or such a manifestation of purpose on his part to look to the surviving partner alone, as would put an end to the equity against the estate of the deceased partner.

Let us now glance briefly at the main features of the case before us.

The notes constituting the debt claimed, bear date on the 23d of November 1807. William King died about the 13th of October 1808. On the 21st of November 1809 Jackson took from Connally Findlay & Co. the note of King, Trigg & Co. for seven thousand six hundred and fifty-three dollars and seventy-four cents, but, as he alleges, to be applied to his individual debt. On the 30th of April 1810 he brings suits upon the two notes first payable, and on the 17th of September 1810 he brings suit upon the third. On the 22d of May 1811 a payment of one thousand dollars is made, for which due credit appears to have been given. On the 31st of May 1811 he recovers judgments upon the two notes first named, and on the 29th of May 1812 he recovers a judgment upon the third, all these judgments being against Findlay and the securities for his appearance. Upon the last named judgment an execution was issued on the
516 14th of *January 1814, but the same was not placed in the hands of any officer for service, nor was it ever served or returned. Upon the two previous judgments no executions were ever issued. In 1813 Jackson offered to take cotton for the debt; and A. Findlay for Connally Findlay & Co. writes in reply, promising to furnish the cotton accordingly.

In 1817 Findlay acknowledges the receipt of a letter from Jackson "requiring a little cash;" and he sends a note for five hundred dollars, and promises another payment in a short time. And he requests Jackson to accept his thanks for his "silence and indulgence." And the judgments were suffered to stand without any effort to enforce them during the remainder of Findlay's life. He died in 1818, and on the 29th of October 1819 writs of scire facias are sued out to revive the judgments against his administrators. These writs are however suffered to slumber on the docket upon the simple issue of payment until June 1827, when executions were awarded. In the mean time, however, that is to say, in January 1825, nearly seventeen years after the death of William King, this bill is filed, alleging that the personal estate of Findlay had been exhausted in payment of other debts, and seeking to charge the real estate belonging to the firm of C. Findlay & Co.; also that of which Findlay died seized, and also the personal and real estate of William King, with the payment of this simple contract debt: and also claiming payment of another debt which was afterwards confessed to have been previously satisfied.

Now, if it may be said there was no delay of which there could be any just complaint

up to the rendition of the judgments in 1811 and 1812, what is there to account for or to excuse the great delay that was suffered to occur afterwards? Why were executions not issued upon all of the judgments, and placed in the hands of the marshal for service? If this had been done, there can be no doubt from this record the
517 *debts would all have been immediately made. Findlay had succeeded to the whole social effects of C. Findlay & Co. real and personal, and was also possessed of a considerable estate, real and personal, of his own. He died possessed of a personal estate amounting to upwards of ten thousand dollars, besides certain slaves not accounted for in the settlement of the administration account. Between 1809 and 1817 he appears to have made sundry advancements in slaves to his children. Under the will of William King he was entitled to a legacy of ten thousand dollars, which might have been reached by proper process, and was itself more than sufficient to discharge the whole debt. The real estate also, which might have been subjected, appears to have been considerable and valuable. Yet Jackson, with his judgments not against Findlay only but his appearance bail also in the different cases, who, for aught that appears, may have been perfectly able to make good their respective liabilities, stands by and suffers the whole of this large property to be wasted or appropriated by others, without the slightest effort on his part to have any portion of it applied, as properly it should have been, to his debt. And after Findlay's death he contents himself with issuing writs of scire facias, which are suffered to sleep on the docket for years and until nearly every vestige of the large and valuable estate which might readily have been subjected to the debts at any time, had entirely disappeared. What Findlay had not himself disposed of is suffered through the utter neglect of Jackson to be applied to debts of inferior dignity, some due by simple contract merely. And of the real estate belonging to the firm of C. Findlay & Co. nearly the whole is sold and the proceeds appropriated to the payment of a debt which would appear to have been of inferior dignity to those judgments, while that of which Findlay died possessed,
518 the heirs have been *permitted to sell and to appropriate the proceeds to their own use. And it is perfectly apparent that if this debt be cast upon the estate of King, it will be because of the neglect of Jackson for years to compel payment from Findlay when it was perfectly in his power to have done so at any time.

I think the whole course and conduct of Jackson amount to such a manifestation of purpose to look to Findlay alone for payment of his debt, or discloses such palpable laches in the pursuit of his plain remedies against him, as should rebut any claim to the aid of a court of equity to set up his demand against the estate of the deceased partner, and that the Circuit court did not err therefore in dismissing the bill as to the representatives of William King.

But although the bill was properly dismissed as to them, I do not perceive why a different and further measure of relief was not afforded against the estate of Findlay. It is apparent that a large portion of the personal assets of that estate was applied in payment of debts of inferior dignity to that of Jackson. The real estate of which Findlay died seized, and which appears to have been worth between three and four thousand dollars, was bound by these judgments, but appears to have been sold by the heirs (with the exception of two inconsiderable parcels), and the proceeds applied to their own use. Why and how all this could properly be to the prejudice of the appellant, I cannot see from the record before us. And I think the appellant should be allowed to amend the bill, and to make such further allegations and such additional parties as may entitle him to enquire into the apparent devastavit by the administrators of Findlay, and if such be established, to charge those who may be legally responsible for the same, and for this purpose to have the proper accounts directed: and also to investigate fur-
519 ther the subject of the real *estate of which Findlay died seized, and the propriety of the disposition made of it after his death, and to hold those who may be accountable for the same, or for the proceeds thereof, if any such there be, to their just responsibilities. And upon such investigation the right of the administrators to retain in their hands so much of the proceeds of the sale of lands as was sufficient to pay the amount due to them and the other devisees of Thomas King, and also the balance claimed to be due to them as such administrators, may be the subject of further consideration.

I am of opinion to affirm so much of the decree as dismisses the bill as to the representatives of William King; but in all other respects to reverse the same, and to remand the cause for further proceedings.

DANIEL and MONCURE, Js., concurred in the opinion of Lee, J.

SAMUELS, J., concurred in so much of the decree as dismisses the bill against King's representatives; and dissented from so much as directed further proceedings against Findlay's estate; being of opinion that it should have been dismissed as to these parties also.

ALLEN, P., concurred in reversing the decree as to Findlay's representatives. But he was of opinion that the estate of King was not discharged, and that the decree should be reversed as to his representatives.

Decree affirmed in part and reversed in part.

520 *Butcher v. Carlile.

July Term, 1855, Lewisburg.

(Absent ALLEN, P., and LEE, J.)

1. **Pleading and Practice—Bonds Payable in Money or Notes Due on Solvent Men—Action of Debt.***—By a bond dated the 27th of March 1840, the obligor bound himself to pay to the obligee or order, on or before the 25th of March 1842, a certain sum of money, with interest; "which sum may be discharged in notes or bonds due on good solvent men residing in the county of R." This is a bond for the payment of money, for which debt will lie: and it is not necessary to notice the provision as to the mode of payment in the declaration.

2. **Action of Debt.**†—See the opinion of JUDGE MONCURE for the distinctions in relation to such obligations.

This was an action of debt in the Circuit court of Randolph county, brought by John S. Carlile, for the use of Samuel Gibbons, against Eli Butcher. The case is stated by Judge Moncure in his opinion.

Fry, for the appellant.

There was no counsel for the appellee.

MONCURE, J. This is an action of debt brought on two obligations, by one of which, dated on the 27th day of March 1840, the obligor bound himself to pay to the obligee, or order, on or before the 25th day of March 1842, the sum of eight hundred and sixteen dollars and five cents, with interest from the 25th day of March 1841, "which sum may be discharged in notes or bonds due on good solvent men, residing in the county of Randolph, Virginia." The other is a single bill obligatory, in the ordinary form, upon which no question arises in this case. The declaration is in the usual form of a declaration on common money bonds; taking no notice of the
521 stipulation contained *in the first mentioned obligation, that it might be discharged in notes or bonds as aforesaid. The defendant craved oyer of the obligations, and demurred generally to the declaration, and each count thereof. The demurrer was overruled; and issue being thereupon joined on the plea of payment, verdict and judgment were rendered for the debt in the declaration mentioned, being the aggregate of the two sums of money in the obligations mentioned, with interest on each. To that judgment a supersedeas was awarded.

The error assigned in the judgment is that an action of debt would not lie on the obligation mentioned in the first count of the declaration, the same "not being for money, but for a specified amount of the notes or bonds of others of fluctuating and uncertain value:" And consequently, that the court erred in overruling the demurrer to that count.

The action of debt only lies for money. On an obligation to pay or deliver any other article, covenant is the proper remedy; and the recovery is, of a compensation in damages. Bonds, bank notes and other choses in action are not money, but stand in the same category with other articles in this respect.

When an obligation is in a simple and single form, to pay money, or to deliver any other article, there is no difficulty; and in the former case debt, and in the latter covenant, is the appropriate remedy.

But sometimes the form of the obligation is complex; to pay money in a fixed quantity of some other article; or to pay it in an article whose quantity is not fixed; or to pay money or some other article, in the alternative, on a certain day; or to pay money with a privilege to the obligor to discharge the debt in some other article on a certain day. And in these cases a difficulty often arises as to the meaning and effect of the obligation, and the proper remedy for a breach of it.

522 *When the obligation is to pay money in a fixed quantity of some

*Pleading—Bonds Payable in Money or Equivalent—Default in Payment—Action of Debt.—In Marlor v. Texas & P. R. Co., 21 Fed. Rep. 385, it is held: "It is elementary that when a promise is in the alternative, to pay in money or in some other medium of payment, the promisor has an election either to pay in money or in the equivalent, and after the day of payment has elapsed without payment the right of election on the part of the promisor is gone, and the promisee is entitled to payment in money. For various illustrations of the rule, see McNitt v. Clark, 7 Johns. 465; Gilbert v. Danforth, 6 N. Y. 585; Stephens v. Howe, 2 Johns. & Sp. 133; Stewart v. Donnelly, 4 Yerg. 177; Choice v. Moseley, 1 Bailey 136; *Butcher v. Carlile, 12 Gratt. 520;* Church v. Feterow, 2 Pen. & W. 301; Trowbridge v. Holcomb, 4 Ohio St. 38; Perry v. Smith, 22 Vt. 301; Mettler v. Moore, 1 Blackf. 342." See also, citing and approving the principal case as to when debt lies, the following cases: Turpin v. Sledd, 23 Gratt. 240; Dungan v. Henderlite, 21 Gratt. 151, 152; Dearing v. Rucker, 18 Gratt. 438, 439, 445, 472; Minnick v. Williams, 77 Va. 760; Jarrett v. Nickell, 9 W. Va. 355; Burr v. Brown, 5 W. Va. 244.

In Randall v. Jaques, 20 Fed. Cas. 234, it is said: "Thus, if a farmer gives his bond or note for the payment of $1,000, by a given day, in one thousand bushels of wheat, and there is a breach, the loss of the creditor is not necessarily $1,000, but more or less, according to the market price of the wheat on the day of the breach, and at the place of delivery. Here, debt will not lie, but assumpsit or covenant only, according to the nature of the contract, the former, if a parol, the latter if it be a sealed contract. These distinctions are very well established by the court of appeals of Virginia, in the cases of Beirne v. Dunlap, 8 Leigh 514, and *Butcher v. Carlile, 12 Gratt. 520.*" See also, Crawford v. Daigh, 2 Va. Cas. 521; 4 Min. Inst., part I (3d Ed.), p. 551; monographic *note* on "Action of Debt" appended to Davis v. Mead, 13 Gratt. 118.

†**Same—Same—Same—Same—Declaration.**—In Minnick v. Williams, 77 Va. 761, it is said: "When the obligation is to pay money with a mere privilege to the obligor to pay in some other article on or before a certain day, it is unnecessary to take any notice of such privilege in the declaration if the day passes without payment of the money, or the delivery of the other equivalent article. Lewis v. Long, 3 Mun. (136); *Butcher v. Carlile, supra.*"

other article; as in so many bushels of wheat; or in wheat at a certain price per bushel; or in bonds, bank notes or other choses in action of a certain nominal amount, the authorities all seem to agree that the meaning and effect of the obligation is the same as if it had been in the simple form of an obligation to deliver the article, and that covenant is the proper remedy. Beirne v. Dunlap, 8 Leigh 514.

But when the obligation is to pay a sum of money in some other article of which the quantity is not fixed, the authorities are somewhat conflicting as to the meaning and effect of the obligation and the proper remedy for its breach. In Kentucky, it has been held that the proper remedy in that case also, is covenant and not debt. Watson v. McNairy, 1 Bibb 356; Bruner v. Kelsoe, Id. 487; Mattox v. Craig, 2 Id. 584; Noe, &c. v. Preston, 5 J. J. Marsh. 57; also in Arkansas, Jeffrey v. Underwood, 1 Pike's R. 108; and perhaps in some other states. But the weight of authority, and I think the better opinion, is the other way. Such was certainly the opinion of this court in Beirne v. Dunlap, supra, in which the Kentucky cases to the contrary were disapproved. See also 2 Bac. Abr. title Debt A, citing And. 177; and Bollinger v. Thurston, 2 Rep. Const. Ct. S. C. 447; Bloomfield v. Hancock, 1 Yerg. R. 101; Young v. Hawkins, 4 Id. 171; Henry v. Gamble, Minor's R. 15; Bradford v. Stewart, Id. 44.

An obligation to pay a sum of money in bonds, bank notes or other choses in action would seem at first view to fall under the last of the two above mentioned classes; and to be for payment in an article of which the quantity is not fixed. But in fact it falls under the first; and is for payment in an article of which the quantity is ascertained. This arises from the peculiar nature of the article; "which is enumerated in dollars and cents as specie is."

523 Campbell v. *Weister, 1 Litt. R. 30. "To pay one hundred dollars in bonds or bank paper, (says Parker, J., in Beirne v. Dunlap,) means bonds or notes calling for that sum, which the obligors or banks are bound for."—"And if so, an action of debt will not lie, unless it would lie upon a promise to pay a fixed quantity of any commodity of fluctuating value. In this respect there is no difference between bank paper and any other commodity. Paper may rise or depreciate in value before the day of payment; and if the day passes when the contract is to be fulfilled, the measure of the obligee's rights and of the obligor's liabilities is the value of the notes on that day, to be ascertained by the verdict of a jury, and awarded in damages." It was therefore held in that case that covenant and not debt was the proper remedy where the money was to be paid "in notes of the United States Bank or either of the Virginia banks." The court construed the obligation to be, in effect, an obligation for the payment of bank notes and not of money. See also Jackson v. Waddill, 1 Stewart's R. 579; Young v. Scott, 5 Alab. R. 475; Deberry v. Darnell, 5 Yerg. R. 451; January v. Henry, 2 Monr. R. 58; S. C. 3 Id. 8; Sinclair v. Piercy, 5 J. J. Marsh. 63; Day v. Lafferty, 4 Pike's R. 450; Hudspeth & Sutton v. Gray, Durrive & Co., 5 Id. 157.

When the obligation is to pay a sum of money, or some other article, in the alternative, on or before a certain day; or to pay a sum of money, with a privilege to the obligor to pay it in some other article on or before a certain day, the obligor has his election to deliver the article on or before the day; but if he fail to do so, he is liable absolutely for the money, and of course to an action of debt for its recovery. Story on Cont. § 969; Choice v. Moseley, 1 Bailey S. C. R. 136; Henry v. Gamble, Minor's R. 15; Bradford v. Stewart, Id. 44; Crawford v. Daigh, 2 Va. Cas. 521.

Sometimes the obligation has ap-
524 parently been for *the payment of bank notes or other currency than money; and yet the obligor has been held liable in an action of debt. In Crawford v. Daigh, 2 Va. Cas. 521, the note was for the payment of sixty-four dollars in good state bank paper, payable one day after date. The court was of opinion that state bank paper was not here mentioned as contradistinguished from money, but from other paper in circulation then less valuable than money. Payment was to be made in a currency of equal value to money, and one day after the date of the note. In this respect the case differed from Beirne v. Dunlap; in which the obligation was for the payment in notes of the United States Bank or either of the Virginia banks more than a year after its date. These notes at the date of the obligation and when it became payable, were current at par. But that they were so current when it became payable, was an accident, which, in the opinion of this court, did not affect the form of the remedy. They might have greatly depreciated in value in the mean time; and if they had so depreciated, the obligor would still have had the right to discharge his obligation by paying it in their nominal amount. In McConnel v. Caldwell, cited in 1 Yerg. R. 101, the promise was to pay four hundred dollars in specie, or current bank notes. The action of debt was sustained on the ground that the parties had referred their contract to a specie standard; and that the case was distinguishable from the leading Tennessee case of Gamble v. Hutchison, Peck's R. 130, where the money was payable in current bank notes, and it was held that debt did not lie. In Spain v. Grove, 1 Minor's R. 177, the promise was to pay one hundred and fifty-three dollars in good current money of the state of Tennessee equal in value to the said sum of one hundred and fifty-three dollars. The chief justice, in delivering the opinion of the court, said, "If it were necessary to
525 impanel a jury to enquire *of the value of the Tennessee currency, the jury would be bound by the valuation fixed

on by the parties; the only inference we can draw from the expressions used in the note is that if paid in good Tennessee currency, the maker should make the payment equal in value to specie." The action of debt was accordingly maintained.

While, therefore, certain general rules have been adopted, as means of ascertaining the intention of parties; the end in view in every case is, to ascertain the intention from the contract; and when so ascertained, effect will be given to it, if lawful.

Let us now apply these principles to the case before us. The obligation was to pay, on or before a certain day, which was about two years after its date, a certain sum of money and interest, "which sum may be discharged in notes or bonds, due on good solvent men residing in the county of Randolph, Virginia." I think this is clearly an obligation for the payment of a sum of money, with a mere privilege to the obligor to discharge it in notes or bonds of the description mentioned, on or before the day on which it became payable; and having failed so to discharge it, he is liable to an action of debt therefor, according to the principles before stated. The promise to pay, in the first place, is absolute; and the form of expression which follows, to wit: "which sum may be discharged," &c. indicates mere permission or privilege. The obligee had only a right to demand the money. He had no right to demand notes or bonds. The obligor had a right to pay in money; or in notes or bonds, provided he paid them on or before the day fixed for payment. From the terms of the obligation the debt was obviously a money debt; but the obligor wished to have, and stipulated for, the privilege to pay it in notes or bonds of a certain description. It might or might not be convenient for him to pay in such notes
526 or bonds. *He might or might not have them, or be able to get them; or might prefer to pay the money and keep the notes or bonds, if he had them. The obligee might have been as willing to receive notes or bonds as money, if they had been tendered to him in due time. And to compel him now to receive the value of such notes or bonds according to the uncertain assessment of a jury, would be gross injustice to him, as well as a palpable departure from the true intent and meaning of the contract. If the privilege had been to pay in bank notes, instead of the notes or bonds of individuals, there might have been some room for contending that notwithstanding the form of the obligation, it was in effect payable in bank notes. Bank notes are currency, though sometimes of depreciated value. And if they are of such value, it is certainly the interest of the obligor to discharge his obligation by paying them, and is generally more convenient for him to pay them than to pay money. But the notes or bonds of individuals are not currency; and whether it will be for the interest or convenience of an obligor to pay his debt in them or in money, is dependent on the peculiar circumstances of each case. This fact would be entitled to much consideration in determining the meaning of the obligation if its terms were not otherwise sufficiently plain, as I think they are.

The obligor having failed to pay the money in notes or bonds on or before the day fixed for its payment, and thus become liable absolutely for the payment of the money, an action of debt was maintainable against him for it; and it was unnecessary for the declaration to charge the nonpayment of the debt in notes or bonds. The obligation then became in effect a simple and single bill obligatory. In Crawford v. Daigh, supra, the note was for the payment of money in good state bank paper; and yet the court held that after the day fixed for such payment was passed, it was
527 *a note for the payment of money only, and being set out as such in the declaration, was set out according to its legal effect. See also Henry v. Gamble, supra. A fortiori, when the obligation is to pay money, with a mere privilege to the obligor to pay in some other article on or before a certain day, it is unnecessary to take any notice of such privilege in the declaration. See Bradford v. Stewart, supra. The privilege is in the nature of a defeasance, which need never be stated in a declaration, but is matter of defense, and ought to be shown in pleading by the opposite party. 1 Chit. Pl. 255.

I am for affirming the judgment.

DANIEL and SAMUELS, Js., concurred in the opinion of Moncure, J.

Judgment affirmed.

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528 *Ratcliff v. Polly & als.

July Term, 1855, Lewisburg.

1. **Suits for Freedom—Jurisdiction.**—Suit for freedom must be brought in one of the courts of the county or corporation in which the party suing is detained by the person having him in custody.
2. **Same—Same—Case at Bar.**—Where a person having persons of color in his custody, claiming them as slaves, resides in one county and holds them in that county, and brings them into another county in obedience to a writ of *habeas corpus* sued out by them, this is not such a detention of them in this last county, as will give the courts thereof jurisdiction of a suit instituted by them there, for their freedom: And this especially if the resort to the writ of *habeas corpus* was a contrivance to give jurisdiction of the case to the courts of the county to which they are so brought.
3. **Same—Same—How Question May Be Raised.**—In such a case the court should dismiss the suit, upon the motion of the defendant. And a rule upon the plaintiffs to show cause why the suit should not be dismissed, is a proper mode by which to raise the question of jurisdiction.
4. **Same—Same—When Objections May Be Made—Case at Bar.***—Though the petition of the paupers and the warrant of the justice are returned into court

*See quotation from principal case in Hunter v. Humphreys, 14 Gratt. 287, 293. See principal case also cited in *foot-note* to this case.

at one term, when one of the claimants enters himself a party, and the cause is then continued; and though depositions are taken by consent to be read on the trial, before the next term, yet no summons having been served on the person in whose custody the paupers were, he having entered himself a party at the next term, may then have the suit dismissed for want of jurisdiction: And it will be dismissed as to both defendants.†

By a petition bearing date the 10th day of March 1851, Harrison Polly, and three others, his brother and two sisters, applied to John W. Hite, a justice of the peace for Cabell county, stating that they were free persons of color, and were then in the possession of William Ratcliff, who held them as slaves: And they prayed that a summons might issue authorizing the
529 *sheriff of Cabell to take them into his possession for safe keeping, until the first day of the next term of the Circuit court of Cabell county, with leave for the petitioners to sue for their freedom. This petition was sworn to on the 12th of March by L. D. Walton; and on the same day the justice issued his warrant to the sheriff of Cabell county, directing him to take possession of the petitioners, and have them before the Circuit court of Cabell on the first day of its next term; and he was required to give to William Ratcliff notice of the detention, and the cause thereof. On the same day the sheriff took possession of the petitioners, but surrendered them to William Ratcliff, upon his executing a bond with sureties as prescribed by the statute, to have them forthcoming on the first day of the next term of the said Circuit court.

On the 17th of May 1851 the papers were returned into the Circuit court, and it was ordered that the suit be docketed; and on motion of Jarrett C. Ratcliff, he was admitted a defendant in conjunction with William Ratcliff; and the cause was continued until the next term.

On the 18th of October 1851 an order was made requiring the plaintiffs to show cause on the next Monday, why the suit should not be dismissed as having been improperly brought in the county of Cabell instead of the county of Wayne. On that day, in order to sustain the motion to dismiss the suit, the defendants filed the affidavit of William Ratcliff, in which he stated that he claimed the plaintiffs as slaves: That at the time of the commencement of this suit he was and still is a resident and citizen of Wayne county, and not of the county of Cabell. That he held and detained the plaintiffs in his custody in the county of Wayne alone, until he was commanded by a writ of habeas corpus to bring them to the county of Cabell.

That in obedience to said writ he
530 brought them to the *county of Cabell; that said writ was returnable on the 12th of March 1851. That the petition of the plaintiffs is dated on the 10th of March, two days before the return day of said writ; and the warrant of the justice and affiant's bond for the forthcoming of the plaintiffs, are both dated on the 12th of March, the return day of the writ. And that but for the issuing of said writ of habeas corpus, he would not have had the plaintiffs in the county of Cabell in custody or otherwise. The facts stated in this affidavit the plaintiffs admitted to be true.

The defendants also introduced the petition of the plaintiffs to the judge of the Circuit court for a writ of habeas corpus, and also the writ directed to William Ratcliff, requiring him to have the plaintiffs before the judge of the Circuit court of Cabell county, at chambers in the town of Guyandotte, on the 12th day of the then present month. This writ was dated the 8th of March 1851. On the return day of the writ Ratcliff produced the plaintiffs before the judge as directed, and made a return that he claimed them as his slaves. They also introduced the petition to the justice, the warrant and bond. The plaintiffs introduced another affidavit of William Ratcliff, which was made before the judge on the return day of the writ of habeas corpus, in which he states from whom he purchased the plaintiffs, and what he had understood of their previous history: And they also introduced a number of depositions taken by consent on the same day and subsequently, to be read as evidence for them in the Circuit court: But it is unnecessary to state their contents. The court discharged the rule and the defendants excepted.

The cause came on for trial in September 1854, when the defendants filed four other bills of exceptions to rulings of the court, in which the questions alluded to in the
531 opinion of Judge Moncure are *raised: but none of the questions reserved in these exceptions were considered by this court; and it is therefore unnecessary to state them. There was a verdict and judgment for the plaintiffs establishing their freedom; and from this judgment the defendants applied to this court for a supersedeas, which was allowed.

The case was elaborately and ably argued on all the points involved in the cause, by Fisher and McComas, for the appellants, and Fry for the appellees; but the only question considered by this court is that arising on the motion to dismiss the suit.

DANIEL, J. The first question presented for our consideration is, whether the proceedings in this case were properly commenced in the county of Cabell; and I experience no difficulty in answering it in the negative.

The first section of ch. 106 of the Code, p. 464, provides, that where any person conceives himself unlawfully detained as a slave, he may petition the Circuit court or court of the county or corporation in which he may be detained, for leave to sue for his freedom, or he may complain thereof to a justice. The second section provides that if the complaint be made to a justice, he shall, by precept in writing, give the com-

†The substance of the statute is stated by JUDGE DANIEL in his opinion.

plainant in charge to the proper officer, to be produced before the Circuit court or court of the county or corporation, (as the complainant may elect,) at the next term thereof; and in the mean time to be safely kept at the expense of the person claiming to be the owner; and shall cause such person to be notified thereof. And the third section provides that if the person claiming to be the owner, or some one for him, will enter into bond, approved by the officer having the complainant in charge, in a penalty equal to double the value of the
532 *complainant, supposing him to be a slave, conditioned to have him forthcoming before the said court at the next term thereof, such officer shall deliver to him the complainant.

The section of the Code of 1819, p. 481, corresponding with the first section just cited, requires the complaint to be made "to a magistrate out of court, or to the Circuit court for the county, or to the court of the county or corporation where the complainant shall reside, and not elsewhere."

We have no report of any decision in our court ascertaining the sense in which the term "residence" is used in the act of 1819. But I apprehend that it could never have been in the contemplation of the legislature, that, in controversies about jurisdiction in such cases, the will or choice of the complainant could be referred to as having any influence in solving questions as to his residence.

It is not necessary to enquire whether the Code of 1819, in fixing the jurisdiction by the residence of the complainant, had reference to his temporary or to his permanent residence. It could hardly have been the meaning of the law that such residence could be acquired against the consent of the owner or person claiming to stand in the relation of master. The very nature of the subject excludes the idea that it could have been competent for a person detained as a slave and having a residence in one county, appointed and fixed by his master or claimant, by running away into another county, to acquire a residence in the latter, so as to give to its courts jurisdiction of a suit brought by the runaway, for his freedom. And the aspect of the question would not be materially changed by supposing a temporary change of the residence of the complainant, effected by means of process issuing in a proceeding set on foot by himself, constraining the master to carry him away from the place of residence
533 *he had selected for him in one county into another county, to appear before a legal tribunal held in the latter.

The same course of reasoning, it seems to me, holds good in determining the place in which the complainant, under the first section of the present Code, is to be regarded as detained in slavery. As the relation of master and slave is, from its very nature, incapable of suspension, it may, in some sense, be said that a person held in slavery is detained as a slave in every place in which he may be, for any period of time, however short, during the existence of the relation. But as under the former laws it was not intended that the complainant should have any voice or mind in the selection of his residence, so under the present law it is equally clear, I think, that he cannot be allowed, by any act of his, done without the consent of his owner, or by any act of the officers of the law, done at his instance, so to change the place in which he is detained as to transfer, from the courts of one county to those of another, jurisdiction of a petition for leave to sue for his freedom. There is show of reason in the argument that the legislature, in ascertaining the jurisdiction of such suits by the place of the detention, instead of the place of the residence of the complainant, designed to get rid of serious questions which might otherwise arise as to the nature of the residence, as whether casual or permanent, which should determine the jurisdiction, and to disembarrass the remedy of those impediments which the owner or claimant seeking to evade a suit, by running off the complainant, might place in the way, by objecting to a suit brought in any county through which he might be passing, that it was not brought in the county in which the complainant resided. Be this as it may, it is, I think, obvious that the place of the jurisdiction is that in which the owner chooses to exercise
534 his *rights as master; that in which he willingly detains the complainant, and not that in which the presence of both the owner and complainant is brought about by the acts of the latter against the will and consent of the former.

With these views of the law, it is only necessary to refer to the affidavit made by the plaintiff in error, William Ratcliff, as the foundation for the rule to show cause why the suit should not be dismissed, (the facts stated wherein were admitted by the complainants to be true,) to show that the courts of Cabell county had no right to take jurisdiction of the case. The affiant states in his affidavit, that he claimed the complainants as his slaves; that at the time of the commencement of the suit, he was and still is a resident and citizen of the county of Wayne, and not of the county of Cabell; that he held and detained the complainants in his custody at his residence in the county of Wayne alone, until he was commanded by writ of habeas corpus to bring them to the county of Cabell; that in obedience to the commands of said writ, he did bring them to the said county of Cabell; that said writ was returnable on the 12th day of March 1851, and that their petition for leave to sue in forma pauperis is dated the 10th of March 1851, two days before the return day of said writ; that the warrant of the justice authorizing them to do so, is dated on the 12th day of March, the return day of the writ, and the bond of the affiant for their forthcoming and delivery to answer the judgments of the court, dated the same day: And that but for the issuing of said writ of habeas corpus he

would not have had the plaintiffs in the county of Cabell in custody or otherwise.

It is thus seen that the detention of the complainants by Ratcliff in the county of Cabell, was involuntary, and constrained and effected by legal proceedings set on foot by the complainants themselves;

535 *and that the case is brought fully within the influence of the views which I have presented in respect to the jurisdiction.

If, however, I could doubt as to the correctness of these views as furnishing a rule of universal application, and could be induced to believe that an exception might be made in a case where it appeared that a petition for a habeas corpus had been resorted to by the complainant in good faith as a means of trying his right to freedom, and not as a means of effecting a change of jurisdiction, and had been afterwards in like good faith, upon further advice and reflection, substituted by the proceedings pointed out in the statute, taken in the county to which the complainants and the owner might be brought by virtue of the habeas corpus, I should still hold that in this case there is not only nothing to justify such an exception, but that, on the contrary, the case is one calling for the most rigid application of the rule. The petition for the habeas corpus is dated and allowed by the judge on the 8th of March, and as has been before stated, was returnable on the 12th. Yet we find that the petition for leave to sue in forma pauperis, is dated on the 10th, before any return was made or could have been made to the writ of habeas corpus. When the petition was presented to the justice does not appear, but his warrant is issued on the 12th.

On the rule to show cause why the suit should not be dismissed, the complainants, whilst admitting the truth of Ratcliff's statement that he had brought them into the county of Cabell in obedience to the writ of habeas corpus alone, offer no explanation, by affidavit or otherwise, of their conduct in first procuring the habeas corpus, and then substituting the proceedings upon it by a regular suit so soon as they had thus effected a change in the place of their detention. Thus leaving their proceedings exposed, without explanation, to all

536 *the inferences of having originated in an unfair effort to change the jurisdiction to which they are, on their face, so plainly obnoxious.

The facts of the case unexplained do, I think, furnish ample warrant for the conclusion, that in presenting the petition for a habeas corpus the complainants did not, bona fide, seek to resort to it as a proper method of trying the right to freedom, (an office which, in such a case, it could not properly perform,) but that they took this course as a device by which they might be enabled to shift the scene of the trial of the regular suit they designed bringing, from the county of Wayne to the county of Cabell.

To sustain the jurisdiction of the Circuit court of Cabell under the circumstances of this case, would be to countenance a course which might operate in some instances most unjustly and oppressively on such as may happen to hold in their possession persons of color claiming a right to freedom. Under such a practice the defendant may not only be subjected to the alternative of finding security in a county remote from the residence of himself and his friends, or to surrendering his property to the sheriff, but compelled to try his right in a place where it may be jeopardied by the difficulty of procuring the full attendance of his witnesses; and where he must necessarily encounter greater trouble and expense in making his defense than he would be exposed to if the trial were had within the jurisdiction contemplated by the law.

It remains to be considered whether the objection to the jurisdiction was taken in a proper mode, and also whether there is any thing in the record to show that the plaintiffs in error have waived or lost their right to make the objection.

By a reference to the 4th, 5th and 6th sections of chapter 106 of the Code, already cited, it will be seen that the proceedings at rules, the declaration and

537 *pleadings that were provided under the former law, are dispensed with. The court to whom the petition is presented is required, in the sections just mentioned, to assign the petitioner counsel, whose duty it is made to file with the clerk a statement in writing of the material facts of the case, with his opinion thereon; and unless it appear manifest therefrom that the suit ought not to be prosecuted, the court is further required to cause the person claiming to be the owner, to be summoned to answer the petitioner; and is to proceed at the next term to the trial of the case, without regard to its place on the docket, having first impaneled a jury, which, without the formality of pleading, is to try whether the petitioner is free or not.

It is hardly to be supposed that the legislature, in thus dispensing with the rules, at which pleas to the jurisdiction in other cases, are usually entered, and also with all formality of pleading in court, designed that questions of jurisdiction should be litigated before the jury without notice to the petitioner; and it is equally hard to suppose that they designed to debar the defendants to such action, of the right to insist, in some mode, on the want of jurisdiction in the court before which they are cited to appear. In this state of the legislation on the subject, a rule upon the petitioner to show cause why the suit should not be dismissed for want of jurisdiction, founded on an affidavit of the facts on which the defendants mean to rely, seems to me to furnish as fair and convenient a mode of bringing said questions to the notice of the court as any that can be devised. I can see then no objection to the mode in which the defendants sought to rely on the want of jurisdiction in the court. Nor can I perceive any thing in the record to show that the

rule was not asked for in good time. The petition and warrant were returned into the Circuit court at its May term 1851, which was the first after the issuing
538 of the warrant; *whereupon, in the language of the record, "it is ordered that this suit be docketed, and on motion of Jarrett C. Ratcliff, he is admitted a defendant in this cause with the said William Ratcliff; and for reasons appearing to the court, this cause is continued till the next term." No statement of the case, no opinion of counsel, was filed at this or at any other term of the court. No summons was issued citing the defendants to the suit or either of them, to answer the petition; and no counsel appears to have been assigned to the petitioners. I do not deem it necessary to enquire what effect these departures from important requirements of the statute might have had on the judgment and verdict, if it was shown that the plaintiff in error had gone to trial without objecting to the jurisdiction of the court. But in the absence of a compliance on the part of the petitioners with these provisions, it can hardly be said that William Ratcliff was in any default when at the next succeeding term, the October court, he obtained the rule to show cause why the suit should not be dismissed. No summons had been executed upon him, and the first entry on the record which notices his appearance is that which records his motion for the rule.

I cannot perceive the force of the argument founded on the fact that it appears by the record that depositions had been taken, by the consent of the parties, before the May term, and between that and the October term, to be read on the trial of the cause. I know of no rule which would give to such consent the effect of controlling either of the parties in presenting the pleadings which they would otherwise be allowed to file, whether in the prosecution or the defense of their rights.

It seems to me that the objection to the jurisdiction was taken in a proper mode, and so far as William Ratcliff is concerned, in good time; and as the motion
539 *to dismiss the suit was founded on defects of jurisdiction not personal to him, but showing that the defendants in error had no right to institute their proceedings in the county of Cabell, that the court on the hearing of the rule ought not to have discharged it, but ought to have made it absolute, and to have dismissed the suit. And I am therefore of opinion, without expressing any opinion on the other causes of error assigned in the petition, to reverse the judgment, to set aside the verdict, and to dismiss the case.

MONCURE, J. I concur in the opinion of Judge Daniel, except that, instead of dismissing the suit, I am for remanding it for removal to the Circuit court of Wayne to be tried therein, under § 3 of ch. 174 of the Code, p. 657.

The motion to dismiss the suit for want of jurisdiction was not made until after many depositions had been taken, by both parties, some of them expressly by consent of parties, to be read as evidence on the trial of the suit in the Circuit court of Cabell; and after it had been docketed, and continued at the preceding term, apparently without objection. Under these circumstances, I think it would have been wrong to have dismissed the suit, and thus deprived the parties of the benefit of their depositions; but that it would have been proper to have ordered it to be removed to the Circuit court of Wayne.

Whether I would have reversed the judgment merely for the failure to order such removal, no specific motion for that purpose having been made, it is unnecessary to determine. I would have reversed it for other errors apparent in the record. I think the Circuit court erred in instructing the jury that inability to contract from voluntary drunkenness did not stand on the same ground as insanity or incapacity produced by the visitation of God; and that
540 unless the intoxication *was produced by the grantee in the bill of sale, or brought about by his machination, drunkenness of itself would not avoid the contract. I consider it to be now well settled that incapacity from drunkenness, however produced, will avoid a contract, in a suit brought to enforce it. I also think the court erred in instructing the jury that the grantee in the bill of sale, so far as he alleged or deposed to his own turpitude, was not a competent witness, and that he ought not to be heard to prove his own intoxication and incapacity therefrom at the time of making said bill of sale. I consider it to be now well settled, in this state as in England, that the objection referred to in this instruction goes to the credibility and not the competency of a witness. See Taylor v. Beck, 3 Rand. 316.

The other judges concurred in the opinion of Daniel, J.

Judgment reversed, the rule made absolute, and suit dismissed.

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541 *Ruffners v. Putney and Others.

July Term, 1855, Lewisburg.

Purchase of Equity of Redemption—Covenant to Pay Debts Secured upon—Case at Bar.—R takes a conveyance from his son in law P of the equity of redemption in certain land, and salt manufactories and implements thereon, which P had derived from R, and which he had previously conveyed in trust to secure certain debts, for some of which R was his surety, and among them two debts which were due to two of the sons of R; and R covenants with P to pay the debts secured upon it. R then enters into a covenant with his two sons, by which the property conveyed by P to R, is put into their possession; and they covenant to manage the same, and apply the proceeds to the payment of the debts secured thereon, until said debts are paid out of the proceeds, or until the land should be sold under the deed of trust or otherwise, so as

to discharge all of said debts out of the proceeds. And R covenanted that he would not convey or encumber said property, or any other property, of R, to, or for the benefit of, P, until said debts are paid; and that no bequest or devise by R to P or to P and his wife, should take effect or accrue to his or their benefit, nor should any right of theirs as heirs at law of R take effect for their benefit, until said debts should be fully discharged. R afterwards by his will gave certain real estate to P, and he probably died intestate as to a part of his estate. The sons went on to manage the property, expended a large amount in repairing it; and one of them advanced a large sum to pay the two preferred debts upon the property. And it was doubtful if the property was a full security for the debts upon it. P being about to sell a part of the real estate devised to him by R, the sons enjoined the sale on the ground that under their covenant with R, they had an equitable lien upon the property devised to him by R. HELD:

1. **Same—Same—Equitable Mortgages—Case at Bar.**—That the property in possession of the sons was first liable to the payment of the debts; and if that was not sufficient, they had an equitable mortgage on the property devised by R to P or inherited by P or his wife, which should be applied to pay the balance of said debts.

2 **Same—Same—Same—Same.***—That in taking an account, the sons were to be allowed for any proper expenditures for repairs of the property put into their possession; for the amount advanced by them or either of them to pay the two preferred debts; for all the other debts secured upon the property, and for the expenses attending the conduct and management thereof; and were to be charged with the gross profits of the property.

542 *3. **Same—Same—Same—Quære.**—If the sons are entitled to compensation for their labor and trouble in the management of the property? And it seems they are not.

This was a bill by Henry and Lewis Ruffner to enjoin and restrain Richard E. Putney from conveying away or disposing of certain property devised to Putney or Putney and wife, by David Ruffner deceased; and to subject the same in the hands of said Putney, or in the hands of purchasers from him, upon the grounds of an equitable mortgage which the plaintiffs claimed under an agreement with David Ruffner. The injunction was granted; and Putney, and Shrewsbury a purchaser from him, filed their answers; whereupon upon their motion the injunction was dissolved. The plaintiffs then applied to this court for an appeal, which was allowed. The facts are stated by Judge Samuels in his opinion.

Patton, for the appellants.
B. H. Smith and Fry, for the appellees.

SAMUELS, J. The appeal in this case is taken from an order of the Circuit court of Kanawha county, dissolving an injunction on motion of the defendants below, the appellees here. In ascertaining the facts of the case, on such motion, the allegations of the bill are to be taken as true, unless denied by the answers or disproved by evidence in the record: Any affirmative allegations in the answers, if not sustained by proof, will be disregarded by the court. Looking to the facts to be ascertained by the rules above stated, the record shows this case:

David Ruffner by deed, on the 19th of October 1825 conveyed to his son in law Richard E. Putney, a parcel of land lying in Kanawha county, on which are situated a salt well, salt furnace and other necessary structures and fixtures for the manu-
543 facture of *salt. On the 14th of May 1835, said Ruffner executed an olograph will, in which he subjected portions of his real estate to the payment of his debts; he made specific provision in real and personal estate for his wife Ann; he devised portions of his real estate severally to his sons Lewis Ruffner and Henry Ruffner, and his sons in law Richard E. Putney and Moses M. Fuqua. He also gave to his wife any residuum of money which might be due to him, and of the proceeds of certain real estate devised to be sold, after payment of debts. There is no general residuary disposition of testator's estate; nor does it appear what estate, if any, was left to pass under the statutes of descent and distribution, to the heirs at law and next of kin.

On the 20th of May 1840, Putney executed a deed of trust on the real estate conveyed to him by Ruffner on the 19th of October 1825, as above stated, to secure a debt of ten thousand two hundred and eight dollars and eighty-six cents, with interest from the 20th of May 1840, due to Dickinson and Shrewsbury.

On the 25th of August 1841, Putney executed another deed of trust on certain slaves hereafter to be mentioned, to indemnify William Tompkins and Andrew Donally as his securities in a debt of two thousand five hundred dollars.

After executing the two deeds of trust above mentioned, Putney, on the 12th of March 1842, executed a deed conveying to David Ruffner his equity of redemption in the land and slaves included in those deeds, also the absolute title to a quantity of other personal property. The deed from Putney to Ruffner recites that Putney owed certain debts therein specified, for some of which Ruffner was bound as security; among the debts specified was one to Henry Ruffner, the son of David Ruffner; and another to Lewis Ruffner, another son; and sev-
544 eral to Lewis Ruffner, and *various other and different persons, his partners in different firms; that suits had been brought on some of the debts. The aggregate principal of the debts recited as being due is between nine and ten thousand dollars; the principal of the debts due to Henry Ruffner, to Lewis Ruffner, and to

*Equitable Mortgages.—On this subject, see the principal case cited in Fidelity Ins., etc., Co. v. Shenandoah Val. Co., 33 W. Va. 771, 11 S. E. Rep. 61; Atkinson v. Miller, 34 W. Va. 121, 11 S. E. Rep. 1008; Dulaney v. Willis, 95 Va. 608, 29 S. E. Rep. 324.

Lewis Ruffner and others, amounted to near five thousand dollars. David Ruffner signed and sealed the deed from Putney to himself, and thereby covenanted, in consideration of Putney's conveyance to him and of one dollar, to pay the debts therein specified; thus in effect to indemnify Putney against them.

Very soon after the 12th March 1842, that is, on the 16th day of the same month, mutual covenants between David Ruffner of the one part, and his sons Henry Ruffner and Lewis Ruffner of the other part, were entered into, reciting the fact of the conveyance by Putney to David Ruffner, and of David Ruffner's covenant in consideration of that conveyance; and that said David Ruffner wished to free himself from the personal cares and responsibilities incurred by the terms of the said deed of conveyance; and it was agreed between the parties, that David Ruffner should forthwith deliver the lot of land conveyed, together with the salt furnace and all the appurtenances, into the possession, use, management and control of the said Lewis and Henry Ruffner, to the exclusion of all other persons, to be by them used and enjoyed at their discretion, for the purpose of paying, out of the net proceeds thereof, the debts and liabilities which said David assumed to pay in consideration of the deed of conveyance from said Putney as aforesaid, until said debts and liabilities should be fully paid and discharged out of the said proceeds, or until the land thus committed to their charge should be legally sold under deed of trust, or sold otherwise, so as to discharge all the said debts and lia-
545 bilities from *the proceeds of the sale.

And reciting that whereas the said Putney, with his wife, daughter of said David, would in case of said David's decease become as heir at law or by testament, entitled to a share in the estate, real and personal, of the said David, unless otherwise provided for by said David himself; and thus injustice be done to said Henry and said Lewis, by leaving them responsible for debts and liabilities contracted by said Putney on his own account; therefore, said David did thereby agree and bind himself not to make over, lease or convey in any manner to said Putney, or transfer to any person for his the said Putney's benefit, or that of his heirs or assigns, any part whatever of the lands, salt furnace and appurtenances aforesaid, nor any portion of said David's lands or other estate, real or personal, nor any way encumber or pledge the same for the benefit of said Putney, or for the payment of his debts, other than those which said David had already assumed to pay, or was otherwise liable to pay at the then present time, until all the said debts and liabilities should be fully paid and discharged; providing, however, that the terms of the agreement should not preclude the said David from conveying to the said Putney for a valuable consideration a building lot above George's creek, to be improved at his own expense. And the said David agreed that Lewis and Henry Ruffner should have the free use of coal on his land for the supply of the furnace, committed as above mentioned to their management for the payment of the debts aforesaid. And it was agreed and understood by the parties to the agreement, that no bequest or devise which said David might have made or might thereafter make in his last will and testament to said Putney and his wife, or to their heirs and assigns, should in any wise take effect or accrue to the benefit of said Putney, his wife, or their heirs or assigns; nor
546 should any right or title *which they should acquire as heirs at law, be valid or take effect for their benefit until said debts and liabilities should be fully discharged and paid off. The said Lewis and Henry agreed and covenanted on their part, to use due care and diligence in the management of the said furnace and its appurtenances, and to apply the net proceeds thereof to the payment and liquidation of the debts and liabilities aforesaid; and to render annually to said David as accurate an account as the nature of the case would admit, of both the gross proceeds of the said furnace, and the net proceeds remaining after all necessary charges should be deducted, and also an account of the application of such proceeds to the payment of the debts aforesaid; and should the property thus committed to their charge have at any time been freed from incumbrance by the discharge of the said debts and liabilities, then the said Henry and Lewis were to deliver up the possession and management of the same to the said David, or his legal representatives.

In pursuance of the agreement with David Ruffner, the other parties, Lewis Ruffner and Henry Ruffner, took possession of the property, and actively prosecuted the business of manufacturing salt. They expended not less than three thousand dollars in repairing the property, but the necessity or utility of such expenditure is denied by Putney. Lewis Ruffner, out of his own resources, paid to Dickinson and Shrewsbury nine thousand three hundred and thirty-one dollars, on account of their deed of trust on the property; he also paid the debt of two thousand five hundred dollars, in which Tompkins and Donally were securities, and charged by deed of trust on the slaves; the debt being about the value of the slaves. These payments were made to prevent sales under the deeds of trust. There are other debts in which David Ruffner was security for Putney, some of which have been paid out of Ruffner's estate,
547 and others of them remain *unpaid.

The bill alleges that the property embraced by the deed from Putney to Ruffner, affords but a hazardous and uncertain security for the debts charged thereon, and that the complainants would not have entered into the agreement without the additional security afforded by the agreement of March 16th, 1842.

The answer of Putney does not deny ex-

pressly that the property conveyed by him to Ruffner is insufficient as a security; he asserts, however, that he could have sold it to others at the time he sold to Ruffner, for money enough to have paid the debts then charged thereon and those assumed by Ruffner.

David Ruffner died, leaving the will herein before mentioned; which was admitted to probat in the County court of Kanawha county at the March term 1843. On the 1st of November 1844, Putney executed a deed of trust on the real estate devised to him by Ruffner, to secure a debt of two thousand six hundred dollars due to Andrew Donally; and he also sold a portion of the estate to William D. Shrewsbury. These persons are made parties, and are charged with having acquired their interests with notice of the equitable rights conferred by the agreement of March 16, 1842; which charge they do not repel. The bill prayed an injunction, which was awarded, to restrain Putney from selling or conveying away the property devised to him as aforesaid; and that the interests acquired by Donally and William D. Shrewsbury respectively, may be postponed to the equitable charges imposed by David Ruffner on the property; and for general relief. Putney and Shrewsbury answered and moved to dissolve the injunction; on which motion the material facts appear as herein set forth. The motion was sustained; an order entered dissolving the injunction; from which order this appeal is taken.

The whole case turns on the ques-
548 tion whether the *property formerly belonging to David Ruffner, to which Putney, or Putney and wife in her right, succeed under the will, or by descent or distribution, is charged either primarily or secondarily with the liabilities assumed by Ruffner for Putney, or with other of Putney's debts for which David Ruffner was bound as security. If the property be so charged, whether immediately or contingently, the complainants have the right to prevent the alienation thereof, unless it be subject to the charge, as the property might thereby pass into the hands of purchasers for value without notice, and thus the charge be rendered of no avail.

The purposes of David Ruffner, disclosed in his will, and of David Ruffner, Lewis Ruffner and Henry Ruffner, disclosed in the agreement of March 16th, 1842, and their cotemporaneous exposition thereof, are perfectly manifest. Putney had become deeply embarrassed by his debts. Ruffner, his father in law, was willing to relieve him from a portion of those debts; that portion seems to have been selected with reference to the benefit of Ruffner's two sons, and for his own relief as security; the debts are all, or nearly all, such as the father or one of the sons was concerned in either as security or creditor. David Ruffner intended to subject the property acquired by the deed of March 12th, 1842, to the burden of paying his liabilities assumed by the agreement of that date; and further to charge those liabilities, and any other of Putney's debts for which he was bound as security, or that portion of his estate which he had intended to give to Putney, or Putney and wife. This, in effect, was merely to vary the form of the benefit intended for Putney; he will get all that was intended for him either by payment of his debts or in the property itself, or so much thereof as remains after discharging the liabilities imposed thereon.

Thus, whilst Putney receives all that was intended for him, the other objects of
549 David Ruffner's care and *bounty, his wife and his other children, are secured to some extent, if not entirely, against having to give up a portion of the estate intended for them, to pay Putney's debts. The inherent justice of this arrangement commends it strongly to the favorable consideration of a court of equity; and there is no reason found in it for the earnest and impassioned invective by the appellees' counsel against the attempt to disinherit Putney and wife. The counsel seemed to have overlooked the obvious fact, that by permitting Putney to enjoy the whole subject devised to him or his wife without specific charge thereon, all David Ruffner's liabilities to or for Putney must be discharged out of the estate generally; and thus Putney's debts, in whole or in part, in effect, be paid by the other parties interested, especially by Ann Ruffner, the wife of the testator. I am clearly of opinion that the defense of the appellees, so far as it rests upon the supposed hardship of the arrangement, is without a shadow of foundation.

It only remains to enquire whether there is any other defect in the contract, which will prevent the court from giving it the effect intended. The principal if not the only objection in this aspect of the case, is the want of valuable consideration moving from Lewis Ruffner and Henry Ruffner. In reply it may be said that David Ruffner was under the obligation of his covenant to Putney to pay to the appellants a sum of money, with interest and costs, of about five thousand dollars. It was therefore perfectly competent for David Ruffner to make any arrangement with these creditors of Putney for the discharge of the debts; and it cannot be said that David Ruffner's contract was merely voluntary. The appellants, instead of exacting payment directly of Putney, or indirectly of Ruffner through Putney, agreed to await the slow process of procuring payment by means of equitable charges on portions of Ruffner's estate.

Thus David Ruffner had a double con-
550 sideration from the appellants; *one a large sum of money; the other the forbearance to collect it. Nor is this all. In consideration of the charges imposed by David Ruffner on portions of his property, the appellants bound themselves for an indefinite time, to give their labor and care to the personal and pecuniary relief of David Ruffner, in the management of the property committed to their hands. And

this is a work of great magnitude. Whether the appellants could make any charge for their personal labor, care and diligence, is a question not free from doubt. See 1 Lomax Dig. 332; Bonithon v. Horhmore, 1 Vern. R. 316; French v. Baron, 2 Atk. R. 120; Godfrey v. Watson, 3 Atk. R. 517; Langstaffe v. Fenwick, 10 Ves. R. 405; 1 Powell on Mort. 295 b, Rand & Coventry's edition.

It is probable, that whilst the English rule of withholding any compensation for personal service under all circumstances, might not be adopted in all its rigor, yet in our courts it would be departed from only in cases in which circumstances might make it equitable to do so. The money expended by a mortgagee in possession for needful repairs of the mortgaged property, is chargeable thereon. 1 Lomax Dig. 333.

In the case before us the money was in fact expended; the utility of the expenditure is a subject for further enquiry. The money, nearly twelve thousand dollars of principal in amount, paid by Lewis Ruffner to relieve the property from the paramount liens thereon, clearly went to the relief of David Ruffner, and should be charged on the mortgaged subject.

Thus, we have before us a case in which a purpose is distinctly manifested, by the owner of property, to charge certain liabilities for which he is bound, upon specific portions of his estate, real and personal; this purpose is declared by covenant under seal, for a consideration of great pecuniary value.

The form of the deed and the nature of a portion of the property, are such that
551 a charge is not imposed of *which the common law courts would take cognizance. The more comprehensive and beneficent jurisdiction of courts of equity, however, embraces the case, and may give full relief. Those courts have long recognized a species of security known as an equitable mortgage, and will give it the effect of a legal mortgage. Wherever it appears by writing, signed by a debtor, that he intends to charge his debt upon certain property of his own, courts of equity, at the instance of the creditor, will effectuate the intention. Nor is it material in what form of instrument the intention is expressed: mere promises, powers of attorney, deeds imperfectly executed, and other written papers, have been held to create equitable mortgages in the contemplation of courts of equity. Those courts, on the general principles of their jurisdiction, have always specifically executed such contracts. The law courts giving either no relief, or inadequate relief, for this reason the courts of equity have taken jurisdiction and given to the intentions of parties their full effect. See Miller on Equitable Mortgages, p. 1, 2, 3, 4, 5, 47 Law Libr.; 3 Powell on Mortgages, (Coventry & Rand's edition,) p. 1049 a, 6; 1050, &c.

Looking to the written evidence in the record, there is no doubt in my mind that David Ruffner intended to charge the debts mentioned in the deed of March 12, 1842, and other debts for which he was bound as security for Putney, upon the property conveyed by that deed, and also upon that portion of his estate to which Putney or Putney and wife might succeed under his will, by descent or distribution. That the property conveyed by the deed should be held as a primary security for the debts mentioned in the agreement of March 16, 1842, and the other property as a secondary security. Thus I am of opinion to reverse the order of the Circuit court dissolving the injunction and to reinstate that injunction.

In order to a full and final adjust-
552 ment of the charges *on the property, it will be necessary to amend the bill making the personal representative of David Ruffner's estate, Ann Ruffner, the wife of Richard E. Putney, Moses M. Fuqua and wife, and the creditors whose debts are charged on the property, or any part of it, parties defendants.

DANIEL and MONCURE, Js., concurred in the opinion of Samuels, J.

ALLEN, P., and LEE, J., dissented.

The decree was as follows:

The court is of opinion, upon the facts as they now appear in the record, that the property, real and personal, conveyed by the appellee Putney to David Ruffner, by the deed bearing date March 12, 1842, and also the estate, real and personal, formerly belonging to David Ruffner, and to which Putney, or Putney and wife in her right, succeed by devise, bequest, descent or distribution, are chargeable with the debts recited as due from Putney, and assumed by David Ruffner by the deed aforesaid, and any other debts due from Putney for which David Ruffner was security on the 16th of March 1842.

The court is further of opinion, that both parcels of property are also chargeable with any money expended by Lewis Ruffner and Henry Ruffner, or either of them, in relieving the property, or any part thereof, from paramount liens thereon, and for any money expended in needful repairs, and for all proper expenses incurred in prosecuting the work contracted for by the agreement of March 16, 1842.

The court is further of opinion, that Lewis Ruffner and Henry Ruffner, or either of them, will not have the right to make any charge for personal service, care and diligence, under their contract of March 16, 1842, unless in the further progress of the case it shall appear equitable to allow such charge.

553 *The court is further of opinion, that the charges herein before declared to be proper shall be credited by the gross proceeds resulting from the prosecution of the work contracted for by the agreement of March 16, 1842, and the balance, if found against the appellee Putney, shall be charged primarily upon the property conveyed by the

deed of March 12, 1842, and secondarily on the property to which Putney, or Putney and wife in her right, succeeded after the death of David Ruffner.

The court, regarding the rights of the parties as having been such as hereinafter declared at the time the injunction was dissolved, and being of opinion that the injunction was necessary to preserve those rights, is therefore of opinion, that the order dissolving the injunction is erroneous.

It is therefore adjudged, ordered and decreed, that said order be reversed and annulled; and that the appellants recover of the appellees their costs in this court expended.

And the court, proceeding to make such order as the Circuit court should have made, it is further ordered, that the motion to dissolve the injunction be overruled; and further, that complainants shall amend their bill making parties the personal representatives of David Ruffner, and Ann Ruffner, the wife of Richard E. Putney, Moses M. Fuqua and his wife, the daughter of David Ruffner, and those creditors not already before the court whose debts are charged upon the property or any part of it, to the end that a full and final adjustment and payment of the charges may be made. And the cause is remanded to be further proceeded in according to the principles herein declared, to be varied only by such facts, hereafter made to appear, as may, according to the principles of equity, require a different rule of decision.

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554 *Lunsford v. Smith.

July Term, 1855, Lewisburg.

1. **Arbitration—Award.***—Certain legal questions are submitted by parties to a controversy to an arbitrator, and they agree to be bound by his award. Upon a suit being afterwards instituted by one of the parties against the other in relation to the subject matter of the submission, the award of the arbitrator deciding the questions submitted to him, is the law of the case.
2. **Secondary Evidence—Admissibility of.**—Testimony in relation to the correctness of the copy of a paper, is not admissible, unless the absence of the original paper is accounted for.
3. **Agents—Evidence of Authority.**†—To prove the authority of an agent, the parol directions of the principal to him may be given in evidence.

This was an action of debt on a bond for four hundred and thirty-five dollars, bearing date the 14th of May 1835, brought by James M. Smith against Thomas Lunsford. Issue was made up on the plea of payment, and by consent of parties it was entered of record, that under this plea the defendant might make any defense which he could make under any plea which he could file either under the common law or the act of assembly. Under this state of the record a trial of the cause was had, and there was a verdict and judgment for the plaintiff; which upon appeal was reversed by this court, on the ground that the court had improperly excluded evidence offered by the defendant which went to establish a good defense to the action which might have been set up under the act of April 6th, 1831, Sup. Rev. Code, p. 157.

When the cause went back, it was removed to the Circuit court of Montgomery county, where it came on again to be tried in May 1847: On this trial the defendant took three bills of exceptions. The first set
555 *out the evidence in the cause; and it appeared, that by deed bearing date the 12th of January 1825, Joseph H. Jett conveyed to John F. Sale four slaves described as then in the possession of Jane Harding, in the county of Northumberland, in trust to secure a debt due to William Terry, and for the indemnity of Terry as his surety. This deed was executed in the county of Bedford, and was acknowledged by the parties before the clerk of the County court of Bedford; and on the 24th of January it was produced in court and ordered to be certified to the County court of Northumberland. Upon the certificate of this order by the clerk, it was on the 13th of June 1825, ordered by the latter court to be admitted to record.

On the 14th of April 1825 an execution in the name of James M. Smith, executor of James Smith, against William Jett, Thomas Hughlett and Joseph H. Jett, for seven hundred dollars and sixty-nine cents, was put into the hands of the sheriff of Northumberland. This execution was levied on several slaves, the property of Joseph H. Jett, and among them two of those embraced in the deed to Sale. In these slaves Jane Harding had an estate for her life, and she lived until 1834. Jett's interest in the slaves was sold, however, and was purchased by James M. Smith. Another of the trust slaves was purchased of Jett in 1830 by G. H. Foushee.

Upon the death of Jane Harding, the trustee, at the instance of Thomas Lunsford, who had acquired Terry's interest under the deed of trust, advertised the slaves embraced in the deed of trust for sale; and the parties having met in Northumberland, they agreed to submit their rights to the award of the late Benjamin Watkins Leigh; and a statement of facts was drawn up by their counsel substantially as herein before stated; and it was added that Smith expected to prove that Jett verbally gave up his interest in the
556 *two slaves in which Jane Harding had a life estate, to the sheriff, to be sold under Smith's execution: And they then submitted to Mr. Leigh several questions, the third and fourth of which are as follows: Third. Was the said Jett's interest in said slaves such property as may be seized and sold under an execution of fieri facias? Fourth. Is the said property still liable under the said deed of trust? And if the last question is decided against the said Smith, then if it be proved that the said Jett gave up his interest in the said slaves to be sold under

*Arbitration.—See monographic *note* on "Arbitration and Award."

†Agents.—See monographic *note* on "Agencies" appended to Silliman v. Fredericksburg, etc., R. R. Co., 27 Gratt. 119.

the execution aforesaid, is such sale under such circumstances valid or not?

At the time this agreement for the submission to the award of Mr. Leigh was made, Lunsford purchased the slaves of Smith, and executed to him a bond for four hundred and thirty-five dollars, the amount of his claim under the deed of trust, upon the agreement that if Mr. Leigh decided in his favor, the bond was not to be paid; but if the decision was in favor of Smith then it was to be valid, as for so much of the purchase money of the slaves: The balance of the purchase money was paid.

Mr. Leigh made his award, by which he decided that the interest of Jett in the slaves was not such an interest as could be taken on a fi. fa. against Jett. But he further decided that if it could be proved that Jett gave up his interest in the slaves to be sold under the execution, that would give validity to the sale, and perfect the title of the purchaser. That the interest might be sold by Jett, and he might give up his interest to the sheriff to be sold by him, and the sheriff would then act as his agent: that the purchaser at the sheriff's sale would claim as a purchaser under Jett; that the deed of trust not having been properly recorded was not notice to the purchaser; and that actual notice of the deed was necessary to give the party claiming under the deed priority over him. But
557 *that the want of due registry would not impair the validity of the deed as against creditors whose debts have not attached upon the subject by force of legal process.

After the award was made Smith instituted this action, and the defendant relied upon his title under the deed of trust and the award of Mr. Leigh. Thereupon the plaintiff introduced evidence to prove that Jett give up his interest in the slaves to the sheriff to be sold under the execution; and for that purpose introduced the deposition of John H. Jett. The second, fifth and next to the last questions and answers thereto, were objected to by the defendant's counsel. The questions and answers are as follows:

2d. "You say these slaves were sold under an execution in favor of J. M. Smith v. William Jett, Thomas Hughlett and Joseph H. Jett. Do you think that the paper market A is a copy of said execution?" Answer. "I think it is. I never heard of Mr. Smith having any othor execution against them."

5th. "State whether you heard any directions given by Joseph H. Jett to Richard Hughlett, deputy sheriff, in relation to the slaves. If so, state what they were and at what time." Answer. I heard Joseph H. Jett tell Richard Hughlett, the deputy sheriff, to take the slaves and other property, and advertise and sell the reversionary interest which he had in the slaves to satisfy the execution before referred to. He gave up to the sheriff all the property he owned of every description."

"You say above that the sheriff sold (the slaves) in his character of sheriff. Did he state at the time that he sold only the remainder interest in them, and that he did so by direction of Joseph H. Jett?" Answer. "I was not present at the time the said negroes were cried off by the sheriff, and cannot therefore say with certainty in what character he sold them; but as I had
558 *heard Joseph H. Jett direct him to advertise and sell his interest in them, I suppose he sold them as sheriff of the county, and they were advertised with the other property of Joseph H. Jett to be sold."

The court overruled the objection to these questions and answers; and the defendant excepted.

After all the evidence in the cause had been introduced, the defendant asked the court to give three instructions to the jury: First. That if it should appear to the jury from the evidence in the cause, that Joseph H. Jett duly executed and delivered the deed of trust to Sale; and if it should further appear to them from the testimony, that the said deed of trust has never been recorded, yet the want of due registry of said deed will in no wise impair its validity against creditors whose debts have not attached upon the slaves by force of legal process.

Second. That if it should appear to them from the testimony in the cause, that Jett's interest in the slaves aforesaid was a vested remainder expectant on the life of Miss Harding, that then the levy of the execution in this case on the said slaves as the property of the remainderman, was illegal and void; and a purchaser of them under a sale made by the sheriff as sheriff, passes no right to the purchaser. There was no evidence in the record to which the third instruction asked was applicable.

The court refused to give any of the instructions asked by the defendant; and he again excepted.

The plaintiff then moved the court to instruct the jury as follows: If the jury believe from the evidence in this cause, that the execution which had been given in evidence was levied upon the remainder interest of Joseph H. Jett in the said slaves, by the sheriff of Northumberland county, and that said remainder interest was sold by the said sheriff under said execution, by the directions of said Jett, to the plaintiff, such
559 *sale vested a valid title of the remainder interest of said Jett, to the said slaves in the plaintiff, and the jury ought to find for the plaintiff. This instruction the court gave; and the defendant again excepted.

There was a verdict and judgment for the plaintiff for the amount of the bond, with interest from its date; whereupon the defendant applied to this court for a supersedeas; which was awarded.

Baxter, for the appellant.

J. T. Anderson, for the appellee.

ALLEN, P. This case has already been before this court. On that occasion it was decided, that under the agreement of the parties to give any matter in evidence under the plea of payment which the plaintiff in error might plead, either at common law or under the statute, it would have been competent to have pleaded by way of set-off

under the act of April 1831, Sup. Rev. Code 157, the facts which the evidence offered on that occasion tended to prove, and therefore that the court erred in rejecting such testimony.

Upon the second trial the evidence was again offered and admitted; and the case comes up now on an exception to a decision overruling a motion of the plaintiff in error to exclude portions of the deposition of John H. Jett; and to the refusal of the court to give three instructions asked for by the plaintiff in error; and to giving an instruction at the instance of the defendant in error. This court having held that under the agreement of the parties it was competent for the plaintiff in error to offer evidence tending to prove that the parties had agreed to refer the questions of law arising out of the controversy between them to the decision of Mr. Leigh, that said questions were so referred and were decided in favor of the plaintiff in error, his decision, according to the former judgment of this court, constitutes the law of the case.

560 *Mr. Leigh determined, 1st. That the deed of trust under which the plaintiff in error asserted a right to subject the slaves conveyed by the deed of trust to sale for the payment of his debt, had not been duly recorded, so as to make it good against the creditors of the grantor. "But that the want of the due registry would in no wise impair the validity of the deed as against creditors whose debts have not attached upon the subject by force of legal process." 2d. That a remainder or a reversion of a personal chattel is not such an interest as can be taken on a fi. fa. against the remainder or reversioner. And therefore it followed that the execution, under which the levy was made and the property sold to the defendant in error, did not authorize such levy in 1825, and could not sanction it at the time the decision was made, as that process was then functus officio. 3d. That as the remainderman could sell the property himself, if it could be proved that he gave up his interest in the slaves to be sold under the execution, this would give validity to the sale, and perfect the title of the purchaser.

After the testimony had been offered and read, the plaintiff in error moved the court to give three instructions to the jury, which the court refused to give; and he excepted. I think the court properly refused to give the third instruction as irrelevant; there being no evidence proving, or tending to prove, that the defendant in error had actual notice of the said deed of trust, at or before his purchase of the slaves at the sale made by the sheriff. But I can perceive no objection to the first or second instructions. Each was founded upon the decision of Mr. Leigh, and was pertinent to the issue the jury was trying. The first asked the court to instruct the jury that the want of registry of the deed of trust did not impair the validity thereof against creditors whose debts had not attached on the slaves by force

561 of legal process. And *by the second, the court was asked to instruct the jury, that if it appeared that the interest levied on was a vested remainder expectant upon a life estate, the levy of the execution on said slaves as the property of the remainderman, was illegal and void, and a purchase of them under a sale made by the sheriff, as sheriff, passed no right to the purchaser. Each of these propositions was settled by Mr. Leigh's decision in the affirmative; and whether sound law or not, as a general question, was the law of the case as settled by the referee. How far the effect of these legal propositions so settled would be controlled by another portion of his decision upon other facts, if proved, or whether the evidence tending to prove such other facts did prove them, were distinct and independent questions.

The plaintiff in error controverted the fact of a sale by the sheriff under the execution by the directions of the remainderman. There was parol proof, and there was the sheriff's return bearing upon this point; and the jury were to decide from all the facts in evidence before them, whether the purchaser at the sheriff's sale could claim as a purchaser under the remainderman himself. By the instruction given at the instance of the defendant in error, the jury were instructed, that if they believed from the evidence that the execution had been levied on such remainder, that the same was sold by the sheriff under the execution by the directions of the remainderman, such sale vested a valid title to such remainder in the purchaser. This instruction, like the others asked, was predicated on the decision of Mr. Leigh, and though somewhat obscure in not sufficiently distinguishing between a sale made by the sheriff as officer only, and a claim under such official act alone, and a claim as a purchaser under the remainderman himself, in consequence of his giving up his interest in the property to

562 the sheriff to be *sold, who in that case might be regarded as his agent to sell under the execution; yet I regard the instruction as substantially complying with the terms of the decision of Mr. Leigh. But it applies to but one branch of the case. The jury may not have believed that the facts were proved to which the instruction applied. And yet by the refusal of the court to give the instructions asked by the plaintiff in error, they may have concluded that the want of registry impaired the validity of the deed of trust against creditors, although their debts had not attached on the slaves by force of legal process; or that a fi. fa. could be levied on such a remainder expectant on an estate for life, and a sale made by the sheriff in virtue of the execution would pass the title to the purchaser. We cannot say that they did not find their verdict upon some such conclusion; which would have been directly against the law of the case as settled for the parties by Mr. Leigh, and subject to whose decision the note sued on was given. If the defendant in error had supposed that the instruction, unconnected with that part of the decision which related to a sale by the sheriff by the directions of the remainderman, was calculated to mislead the jury, he

could have moved the court to qualify it, by giving as an addition what in fact at his instance was given as an independent instruction. If all had been given, the whole of the legal questions propounded to and decided by Mr. Leigh would have been fairly before the jury. I think the court erred in refusing the first and second instructions asked for by the plaintiff in error; but that the third instruction asked for by him was properly refused, and that the instruction given at the instance of the defendant in error was substantially correct.

In regard to the deposition of John H. Jett, parts of which were excepted
563 to, it seems to me the objections *to the fifth interrogatory and the last interrogatory propounded but one, and the answers to said interrogatories were properly overruled. The question, and a most material one under the decision of Mr. Leigh, was whether the remainderman gave up his interest in the slave to be sold by the sheriff under the execution: and evidence of his directions before the sale, is the best if not only evidence to be adduced to prove the fact. I think, however, the court erred in overruling the objection to the answer to the second interrogatory. He was asked whether a paper shown to him marked A, was not a copy of the execution under which he had, in a previous answer, said the slaves were sold; to which he replied that he thought it was; he had never heard of the defendant in error having any other execution against the parties named. The paper is not filed. We do not know whether it was an official copy or a copy by some other person; and it was improper to give evidence of a copy without some account of the original.

I think the judgment should be reversed with costs to the plaintiff in error, the verdict set aside, and the cause remanded with instructions to award a new trial; and upon such new trial to exclude from the jury the second interrogatory and answer thereto in the deposition of John H. Jett, if again objected to; and if the same evidence is again adduced, to give to the jury the first and second instructions asked for by the plaintiff in error and refused, provided he again should ask the court to give the said instruction to the jury.

The other judges concurred in the opinion of Allen, P.

Judgment reversed.

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564 *Fiott & als. v. The Commonwealth.*

July Term, 1855, Lewisburg.

1. **Continuances—Refusal of.**†—Under what circumstances it is error to refuse a continuance of a cause.

2. **Aliens—Real Estate of—Case at Bar.**—A subject and citizen of Great Britain purchased land in Virginia in 1793, and he lived until 1818. By the treaty of 1794 between Great Britain and the United States, he was entitled to hold the land; and no proceedings having been instituted during the war of 1812 to escheat it, that war did not divest his rights but the land descended on his death to his heirs.

3. **Escheat—Evidence—Copy of Improperly Recorded Deed.**‡—In a case of escheat between the heirs of the alien and the commonwealth, both parties claiming under the same person, and the inquisition referring to a deed to the alien for the land, as recorded in the county of K, an office copy of said deed is evidence for the heirs, though it was not recorded upon proper proof.

On the 12th of March 1831, an inquisition was taken before the escheator of Cabell county; and the jury having been charged to enquire what lands and tenements John Fiott, late of the city of London and kingdom of Great Britain, merchant, now deceased, died seized of; whether he left any heirs, or made other disposition of said lands in his lifetime; and whether the said John Fiott was an alien at the time of his death; they found that the said John Fiott, late of the city of London, long before his death, was seized of a tract of land lying in the county of Cabell, containing about eight hundred acres, being part of a tract containing two thousand and eighty-four acres, conveyed to the said John Fiott by Charles Vancouver; as by deed dated the 27th day of July 1793, now of record in the County court of Kanawha county, would more fully appear; and being so seized, the said John Fiott,
565 on the —— day of —— 1818, *died; he the said John Fiott at the time of his death being an alien.

This inquisition was returned into the Circuit court of Cabell county; and at the April term 1833 of that court, John Fiott, John Fide and Philadelphia his wife, John Vaughan and Charles Vaughan, who claimed a freehold in the said lands, appeared by their attorney, and after craving oyer of the inquisition, filed a demurrer thereto, in which the attorney for the commonwealth joined. They also filed their traverse of the office found; and time was allowed the attorney for the commonwealth to reply or demur thereto. And it was ordered that the escheator of Cabell county be summoned to appear on the first day of the next term, to defend the rights of the commonwealth.

At the September term 1833 of the court, an order was made authorizing the traversers to take depositions in or near the city of London, before the American consul at London,

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*For monographic note on Deeds, see end of case.

†**Continuances—Matter of Sound Judicial Discretion—Appellate Practice.**—A motion for continuance is addressed to the sound discretion of the trial court, and, unless it plainly appears that such discretion has been abused, the appellate court will not interfere therewith. See the principal case cited as authority for this rule in Bank of Ravenswood v. Hamilton, 43 W. Va. 76, 27 S. E. Rep. 296; Davis v. Walker, 7 W. Va. 450; State v. Harrison, 36 W. Va. 738, 15 S. E. Rep. 985; Marmet Co. v. Archibald, 37 W. Va. 783, 17 S. E. Rep. 301; Apperson v. Cabell, 1 Va. Dec. 559. See also, *foot-note* to Hewitt v. Com., 17 Gratt. 627; monographic *note* on "Continuances" appended to Harman v. Howe, 27 Gratt. 676.

‡**Escheat.**—See monographic *note* on "Escheat" appended to Sands v. Lynham, 27 Gratt. 291.

or the secretary of legation of the United States. At the September term 1836, the attorney for the commonwealth had leave to withdraw his joinder in the demurrer; and on his motion, the said demurrer was stricken out, as having been improvidently received. The plaintiffs then moved for leave to withdraw their traverse; and in lieu thereof to file their monstrans de droit, which was allowed; and the attorney for the commonwealth took time to plead, reply or demur; and the cause was continued. At the term of the court the plaintiffs were allowed to withdraw from the papers their monstrans de droit, and file an amended one; and the attorney was allowed until the first day of the next term to plead, reply or demur. At the next term of the court the attorney for the commonwealth craved oyer of the deed of conveyance from Charles Vancouver to the said John Fiott, whereof mention was made in the monstrans de droit, and demurred generally to the monstrans de droit;
566 *and the plaintiffs joined in the demurrer. The cause was from thence regularly continued until the May term 1839, when the plaintiffs had leave to withdraw their joinder in the demurrer; and also to withdraw the paper of which oyer had been craved by the attorney for the commonwealth, and to file in lieu thereof the parchment copy purporting to be the original conveyance of the 27th of July 1793, from Vancouver to John Fiott, Charles and John Vaughan. And the attorney for the commonwealth had leave until the next term to change the pleadings on her part, so far as he might deem it necessary by reason of the substitution aforesaid.

The monstrans de droit as amended, after insisting that the inquisition of escheat was insufficient in law, sets out that John Fiott and Ede and wife are the heirs at law of John Fiott deceased, and as such capable of taking and holding the land in the inquisition mentioned; and that Charles and John Vaughan are citizens of the United States. That it is not true, as stated in the inquisition, that the land was, on the 27th of July 1793, conveyed by Vancouver to John Fiott deceased; but that it was conveyed to him and said Vaughan. That it is not true that Fiott was seized of the land; but that he and the Vaughans were jointly seized. And that it was not true that at the time of the death of John Fiott he was such an alien, within the meaning of the laws and treaties of the United States and the laws of Virginia, as to be incapable by reason thereof to hold lands in any of the United States; but that he was at the time of acquiring seizin of said lands, and up to the time of his death, a citizen of London in England, and a subject of the king of Great Britain, and that by the treaties between that king and the United States, the rights and interests of the said John Fiott were preserved to him, and his claim to seizin of said lands recognized
567 *and declared to be good and valid.

And they further averred that John Fiott died after the ratification of the treaty of 1794, and that he left at his death the plaintiffs John Fiott, and Philadelphia Fiott who intermarried with John Ede, his children and lawful heirs, capable of inheriting said lands; and to whom the said lands descended, and in whom the title was vested on the death of said Fiott, and remained vested in them in common with the said Vaughans, at the time of the pending of the inquisition aforesaid.

At the October term 1839, the attorney for the commonwealth withdrew his demurrer, and replied generally to the monstrans de droit, and issue was thereupon joined; and by consent the cause was continued. At the April term 1840, the death of Charles Vaughan was suggested; and in December a scire facias was issued to revive the suit in the name of his heirs: And at the April term 1841, the suit was revived. At the April term 1842, the death of John Vaughan was suggested, and in May a scire facias was issued to revive the suit in the name of his heirs; and at a special term in November the suit was revived.

At the April term 1843, the plaintiffs moved for leave to amend their monstrans de droit, which was refused; and the cause was continued at their costs; but with the express notice to them and their counsel, that after the unexampled delays in preparing the cause for trial, no further continuance could take place on account of the absence of Apperson, their agent, or for the failure to take the necessary depositions, or to have proper parties before the court. And if unfortunately a continuance should be again asked for, it must be supported on strict legal grounds, fully verified by affidavits, and accounting for past neglects.

At the April term 1844, it was ordered that the attorney for the commonwealth do appear here on the next Wednesday to show
568 cause why the inquisition *should not be quashed for errors apparent on its face. At the September term an order was made discharging the rule; and the plaintiffs excepted. And in October 1846, by consent, other commissioners were authorized to take the depositions in London.

In April 1847, the cause was called for trial, when the plaintiffs moved the court for a continuance, which was refused; and they excepted. The case was then tried, and there was a verdict and judgment for the commonwealth; the court having overruled a motion for a new trial.

Upon the motion to quash the inquisition, the plaintiffs, after deducing the title to the land from the patent by regular conveyance to Vancouver, introduced a deed bearing date the 27th of July 1793, from Vancouver to John Fiott and Charles and John Vaughan, conveying the land to them, from which it appeared that Fiott paid for the land, and the Vaughans only took in trust for him. The acknowledgment of this deed is certified by James Sanderson, styling himself lord mayor of London, but there is no seal to it. They proved that Charles and John Vaughan were citizens of the United States, and the parties in whose names the suit was revived are their heirs. They also offered to intro-

duce two depositions taken upon interrogatories, before the American consul at London, at the time but not at the place designated in the notice, for the purpose of proving that the plaintiffs John Fiott and Philadelphia Ede were the children and heirs of John Fiott deceased; that Philadelphia was married to John Ede, and that John Fiott the elder died in 1818: And the proof is conclusive if true, of which the record shows no reason to doubt. These depositions were taken in February 1844. But the attorney for the commonwealth objected to the depositions, on the ground that they were not taken at the place designated in the notice; and the court sustained the objection, and refused to read them.

569 *On the motion for a continuance of the cause, the plaintiffs proved, to the satisfaction of the court, that Mr. Apperson, who was the agent of the plaintiffs, lived in Mount Sterling, Kentucky; and that directly after the last term of the court, the counsel for the plaintiffs, who lived in Charleston, Kanawha, wrote to him to make arrangements to have the London depositions retaken, and that Apperson did not answer said letter. That the counsel was absent from home for six or eight weeks, but again wrote to Apperson early in January 1847, apprising him that one hundred dollars had bad been placed in the hands of Prime, Ward & King of New York, to obtain a bill on London to defray the expenses of taking the depositions (this being the cost of taking the two depositions in London); and that said counsel immediately gave notice to the escheator of Cabell that the depositions would be taken at a certain place in London on the 27th of March 1847, and had taken the other necessary steps to have the depositions taken: but if taken, they had not arrived.

They also offered the depositions of the same witnesses twice taken in this cause, which the attorney for the commonwealth had apprised the counsel of the plaintiffs he would object to being read on the trial of the cause; and they offered that if the attorney would agree to the reading of either of the said depositions, they would go to trial; which offer the attorney rejected.

It was also known to the court that the cause had been continued before the last term, that the plaintiffs might take these depositions; and that at the last term the court refused to continue the cause any longer for the purpose of taking the deposition; but it being suggested that the counsel for the plaintiffs had some important papers in the cause which he had forgotten and had left in Kanawha, the court laid it over until the last Friday of the term; but

570 when that *day arrived, the court was occupied in a cause which took up the balance of the term. And upon this state of facts, the court refused either to continue the cause or to pass until the latter part of the term, in order to see whether the depositions might not arrive during the time.

On the trial of the cause the plaintiffs having traced the title under which they claimed from the patent to Charles Vancouver, then offered in evidence an original deed from Vancouver to John Fiott, Charles and John Vaughan, bearing date the 27th day of July 1793, and purporting to be acknowledged before James Sanderson, lord mayor of London. The certificate was without seal; and though it stated that he was lord mayor of London, there was no other evidence of the fact. The attorney for the commonwealth objected to the introduction of the deed as evidence, on the grounds that there was nothing to show that Sanderson was lord mayor of London, and because the deed was not a recorded deed in Virginia. The defendants then produced to the court an order of the County court of Kanawha, made July 7th, 1794, directing a deed from Vancouver to Fiott and the Vaughans to be admitted to record, and also an office copy of the deed, and asked the court to examine the order and deed, and decide whether it had not been recorded in Virginia; which examination the court made, but was not satisfied that it was the same deed, because of some discrepancies between the original deed offered and the copy produced, and excluded the deed from the jury.

The plaintiffs then proved that John and Charles Vaughan resided in the United States, and that the persons in whose names the suit was revived were their heirs. And they thereupon moved the court to quash the inquisition for errors apparent upon its face: which motion the court overruled.

571 *The plaintiffs then asked for instructions, which were refused; but it is unnecessary to state them.

After the verdict was rendered, the plaintiffs asked for a new trial, on the ground that they were improperly forced into trial; and of surprise by the rejection of the deed offered in evidence by them. But the court overruled the motion; and they excepted. On the application of the plaintiffs, this court granted a supersedeas to the judgment.

Price and Fisher, for the appellants, insisted:

1st. That the inquisition should have been quashed, because it did not respond to the enquiry whether John Fiott left heirs. The inquisition found that he was a subject of the king of Great Britain; and he was therefore upon this question to be so considered. And under the treaty of 1794 between Great Britain and the United States, his heirs were enabled to inherit land in Virginia. See the 9th clause of the treaty, 2 United States Laws, p. 476; Blight's lessee v. Rochester, 7 Wheat. R. 535; Harden v. Fisher, 1 Id. 300; Hughes v. Edwards, 9 Id. 489; Craig v. Radford, 3 Id. 594; Orr v. Hodgson, 4 Id. 453; Inglis v. Trustees Sailor's Snug Harbor, 3 Peters' R. 99; Shanks v. Dupont, Id. 242; State of Georgia v. Brailsford, 3 Dall. R. 1; Jackson v. Wright, 4 John. R. 75; Stephens v. Swann, 9 Leigh 404; Hubbard v. Goodwin, 3 Id. 492; 1 Tuck. Conn. 66. The land having descended to the heirs, and they being entitled to hold, it could not be escheated on account of the alienage of John Fiott.

2d. That the original deed from Vancouver to Fiott was certified by the lord mayor of London, and was properly authenticated to make it evidence; and therefore it was error to exclude it on the trial. Cales v. Miller, 8 Gratt. 6; Hassler's lessee v. King, 9 Gratt. 115. Moreover, it was expressly referred to in the inquisition as having been re-
572 corded in the county of Kanawha; *and it was upon that deed thus recorded, that the inquisition found that John Fiott had been the owner of the land, and based the escheat.

3d. That the depositions which had been taken and were objected to by the attorney for the commonwealth, clearly showed that the plaintiffs John Fiott and Philadelphia Ede were the only children and heirs at law of John Fiott the elder; and under the circumstances it was error to compel the plaintiffs to go into the trial before the depositions had been again taken.

The Attorney General for the commonwealth, insisted:

1st. That if the inquisition was insufficient in law on its face, it passed no title to the commonwealth; and therefore it was unnecessary to quash it: If sufficient on its face, it should not have been quashed.

He insisted further, that the inquisition was sufficient. That there were two causes for which lands would escheat: One, when a citizen dies without heirs; the other, when an alien dies. An alien may hold lands against all persons, and against the commonwealth until office found. But when he dies his land does not descend to his heirs, but it becomes at once the land of the commonwealth without an office found; and the office is only necessary to ascertain the fact. When therefore the inquisition found that John Fiott was an alien, it was unnecessary to enquire or find whether he left heirs.

He insisted further, that if by the treaty of 1794 an alien heir might inherit lands, that was an exception to the general rule, and need not be found by the inquisition, but should be set up by the party claiming the benefit of the exception in his monstrans de droit. This is the principle applicable to pleadings generally, and there is nothing in the statute in relation to escheats to change it. 1 Rev. Code of 1819, p. 353. See Hill's Case, 5 Gratt. 682.

573 *He further submitted, whether the treaty applied to persons who purchased land in this country after the peace of 1783; and whether it was not confined to those who held lands prior to that time, and adhered to England. All the cases he had seen related to the latter class of persons; unless perhaps the title of Denny Martin to Lord Fairfax's lands.

He further insisted, that the treaty of 1794 was terminated by the war of 1812. Vattel, book 3, § 175; Id. book 4, § 8. That the treaty of Ghent did not restore this provision of the treaty of 1794, upon which the plaintiffs relied; and John Fiott having died in 1818, his heirs could not inherit from him in Virginia.

2d. He referred to the proceedings in the cause, and the great delay which had occurred in the trial of the cause, to show that the court properly required the parties to proceed to try the cause.

3d. That the deed was not properly certified to render it admissible either as evidence or to record. To do either, it must have been certified in the usual manner in which deeds were certified by the lord mayor of London. Deeds are required to be acknowledged before a court or chief magistrate of a city, because they have seals, and are accustomed to authenticate deeds and other papers. And there is no case in our courts in which it has been held that a certificate of a mayor or other chief magistrate of a city was good without a seal. In Hassler's lessee v. King, the certificate was under seal, and therefore it was presumed to be in the usual form.

ALLEN, P. It seems to me that under the circumstances of this case and the facts certified by the court, as having been proved in support of the motion for a continuance made by the plaintiffs at the May term 1847, that the court erred in overruling the
574 motion and *forcing them into a trial. The proceeding commenced in April 1833; but the issue on which the cause was tried was not made up until the October term 1839. For this delay the commonwealth was as much responsible as the plaintiffs. The time from 1840 until the November term 1842 was occupied in efforts to revive in the names of the representatives of two of the plaintiffs whose death had been suggested. At the April term 1843 the plaintiffs, upon affidavit, obtained a continuance, but were warned by the court that no further continuance would be granted unless the application should be supported on strict legal grounds. The cause was afterwards continued generally until the April term 1844, when a rule was awarded against the attorney for the commonwealth, returnable at the same term, to show cause why the inquisition should not be quashed. The cause stood upon this rule, perhaps for advisement, and was regularly continued until the spring term 1846, when the rule was discharged, as appears by an entry made at the fall term 1846; and at that term an agreement was made that depositions might be taken in London, before certain officers therein named. At the succeeding term held on the 3d of May 1847, the trial was had. From this statement it would seem that although the cause had not been prosecuted with much diligence, the delays were not altogether attributable to the plaintiffs. But there are other facts showing that they were making efforts to prepare for a trial. It seems that on the 8th day of July 1841, they took in London the depositions of two witnesses upon notice, before the American consul. The depositions were taken on interrogatories at the time, but it appears from the consul's certificate they were not taken at the place mentioned in the notice; and for this reason were objected to by the attorney for the commonwealth.

The depositions of the same witnesses

575 were retaken, *and the same error was committed; the American consul certifies that they were taken on the first day of February 1843 at his office in the city of London, being the day, but not the place, mentioned in the notice. To the reading of these depositions the commonwealth's attorney apprised the plaintiffs' counsel he would object. The plaintiffs again, through their agent residing in the state of Kentucky, proceeded to take steps to have the depositions retaken the third time. The sum of one hundred dollars was placed in the hands of persons in New York to obtain a bill on London to defray the expenses of taking the depositions, that being the real cost of taking the two depositions in this cause in London; and notified the attorney for the commonwealth that the depositions would be taken in the city of London on the 27th March 1847. But the depositions, if taken under this notice, had not arrived in this country, or been received by the clerk of the court on the 27th of April 1847, when the cause was called for trial. It further appears from the facts certified, that some delay occurred between the October term 1846 and the April term 1847, in giving the notice and taking the necessary steps to take the depositions, owing to the fact that it was necessary to correspond with the agent of the plaintiffs who resided in Kentucky, and the absence of their attorney from his home in Kanawha county for six or eight weeks of the time. Still it would seem that notice was given to take the depositions in time to have received them by the most expeditious mode of communication between this country and England. Whatever may have been the negligence of the parties prior to the October term 1846, they seem to have proceeded with reasonable diligence after the agreement at October term 1846. Their agent resided in another state, and some time would necessarily be consumed in corresponding with 576 *him, and in providing the means for taking depositions in England. Applications for continuances are addressed to the discretion of the court, and much must be left to the tribunal which has the parties before it, and must determine from a variety of circumstances occurring in its presence whether applications for continuances are made in good faith, or are merely intended to protract the controversy: And even when made in good faith, a reasonable degree of diligence should be exacted. The opposite party should not be kept in court and exposed to the risk of losing his testimony by the negligence of the other side.

But in this case it does not appear that the commonwealth could be subjected to any inconvenience by a delay for a term. Under the inquisition, if regularly returned and recorded, she was entitled to the possession. The inquest of office is her evidence of title. On this she rests; her right to the land cannot be controverted by any person who does not show an interest in the subject. According to our statute, as expounded by this court in the case of French v. The Commonwealth, 5 Leigh 512, the parties suing out the monstrans de droit are plaintiffs, and must show a good right to the subject. Until they show their interest, they cannot be heard in opposition to the right of the commonwealth, as ascertained by the office found. And it does not appear that she was in a condition to suffer any injury from the loss of testimony of otherwise, by continuing the cause. That the application was made in good faith, is manifest from the previous efforts of the plaintiffs to procure this testimony at a considerable expense, and the sum expended to retake the depositions the third time; and from the offer made at the time to go into the trial, if the attorney for the commonwealth would waive the objection to the depositions.

The materiality of the testimony, if 577 credited, is *clear. The inquisition finds that John Fiott, late of the city of London, long before his death, was seized of the tract of land in Cabell county, containing about eight hundred acres, part of a tract of two thousand and eighty-four acres conveyed to said John Fiott by Charles Vancouver, as by deed dated the 27th of July 1793, now of record in the County court of Kanawha county, will more fully appear; and being so seized, that he died in 1818, being at the time of his death an alien: and that he had made no disposition thereof in his lifetime.

The depositions prove that John Fiott was a subject of the king of Great Britain; that he died in England in 1818, leaving John and Philadelphia, two of the plaintiffs, his children and heirs.

The inquisition shows that John Fiott acquired title to the land by a conveyance from Vancouver, dated in July 1793, and recorded in the County court of Kanawha county. An alien may take by purchase. The conveyance clothed him with the title, and no inquest or office found divested him of the title before his death. The title thus vested in him was confirmed by the ninth article of the treaty of 1794; and upon his death in 1818, descended to his children and heirs.

It does not appear that any attempt was made to confiscate the property or divest the title of the heirs by office found during the war of 1812, or since. It is therefore unnecessary to enquire what would be the effect of the war upon such rights.

But it has been determined by the Supreme court that the termination of a treaty by war does not divest rights of property already vested under it. Society for, &c., v. New Haven, 8 Wheat. R. 464; Fox v. Southack, 12 Mass. R. 143.

Upon the exhibition of the proof contained in the depositions, the said heirs would be entitled under the authority of Hannon 578 v. Hannah, 9 Gratt. 146, to exhibit *the copy of the deed rejected on the trial as evidence, whether properly recorded or not; as the inquisition refers to it and both claim under it; and having thus shown their interest, could avail themselves of any objection to the inquisition upon a motion to quash, or show upon the trial their claim to the land, and that the same was superior to the right

acquired by the commonwealth; as under the treaty of 1794 the lands could not be escheated on account of the alienage of their ancestor, and they were authorized to take by descent.

I think the judgment should be reversed, and the cause remanded for a new trial.

The other judges concurred in the opinion of Allen, P.

Judgment reversed.

DEEDS.

I. Definitions and Distinctions.

II. Requisites and Validity.
- A. Requisites.
  - 1. Description of Property Conveyed.
  - 2. Parties.
    - a. The Grantor.
      - (1) In General.
      - (2) Infants.
      - (3) Insane Persons.
      - (4) Married Women.
      - (5) Agents, Attorneys, Officers of Corporation, etc.
      - (6) Partners.
      - (7) Cotenants.
      - (8) Commissioners in Chancery.
    - b. The Grantee.
  - 3. Signing.
  - 4. Sealing.
  - 5. Delivery.
    - a. In General.
    - b. Escrow.
  - 6. Acceptance.
- B. Validity.
  - 1. In General.
  - 2. Deed Made during War.
  - 3. Misrepresentation.
  - 4. Fraud.
  - 5. Undue Influence.
  - 6. Mistake.
  - 7. Alteration.
  - 8. Invalidity Cured by Possession.

III. Construction and Operation.
- A. General Rules of Construction.
- B. Estate Conveyed.
  - 1. Property Conveyed in General.
  - 2. Easements and Appurtenances.
- C. Reservations and Exceptions.
- D. Conditions.
- E. Warranties.

IV. Recordation.
(See monographic *note* on "Recording Acts.")

V. Evidence.
- A. Recitals as Evidence.
- B. Admissibility.
  - 1. Admissibility of Deed.
  - 2. Evidence to Prove Execution and Contents.
  - 3. Parol Evidence to Vary Deed.
  - 4. Evidence Showing Deed to Be Mortgage.
- C. Competency of Witnesses.
- D. Weight of Evidence.
- E. Effect of Proof of Lost Deed.

VI. Equity Jurisdiction.
- A. Rescission and Cancellation.
- B. Reformation.
- C. Setting Up Deeds.

VII. Tax Deeds.
- A. In General.
- B. Authority of Officer Making Deed.
- C. Recitals.
- D. Validity.

Cross References to Monographic Notes.

Acknowledgments, appended to Taliaferro v. Pryor, 12 Gratt. 277.

Bonds, appended to Ward v. Churn, 18 Gratt. 801.

Commissioners in Chancery, appended to Whitehead v. Whitehead, 23 Gratt. 376.

Deeds of Trust.

Easements, appended to Hardy v. McCullough, 23 Gratt. 251.

Estoppel, appended to Bower v. McCormick, 23 Gratt. 310.

Fraudulent and Voluntary Conveyances, appended to Cochran v. Paris, 11 Gratt. 348.

Infants, appended to Caperton v. Gregory. 11 Gratt. 505.

Insanity, appended to Boswell v. Commonwealth, 20 Gratt. 860.

Judicial Sales, appended to Walker v. Page, 21 Gratt. 636.

Partition.

I. DEFINITIONS AND DISTINCTIONS.

Deed Defined.—A deed is a written contract on paper or parchment sealed and delivered. 2 Min. Inst. (4th Ed.) 661; American, etc., Co. v. Burlack, 35 W. Va. 647, 14 S. E. Rep. 319.

Deed Indented.—A deed beginning "this indenture" is a deed indented to every legal purpose. Currie v. Donald, 2 Wash. 58.

Deed of Lease.—No set form of words is necessary to constitute a deed of lease. The nature and effect of the instrument must be determined in accordance with the intentions of the parties as gathered from the whole instrument. Upper Appomattox Co. v. Hamilton, 83 Va. 319, 2 S. E. Rep. 195; Mickie v. Lawrence, 5 Rand. 571.

Deeds and Wills Distinguished.—A deed passes a present interest in property, while a will passes a future interest. An instrument which passes a present interest, although intended to take effect *in futuro*, is a valid deed. Lauck v. Logan, 45 W. Va. 251, 31 S. E. Rep. 986.

Where a deed is irrevocable by the grantor it is not to be considered a will in disguise on the ground that nearly all of his personal estate is conveyed thereby, and that he reserves to himself the possession and control of the property during his life. Lightfoot v. Colgin, 5 Munf. 42.

Deeds and Executory Agreements Distinguished.—The question whether an instrument is a deed or an executory contract to convey is purely one of intention. Where words of present grant or present assurance are used in an instrument and nothing else appears to overcome these words, the instrument will take effect as a deed. But words of present grant and assurance may be overcome by the presence in the instrument of other words which contemplate a future conveyance. Mineral Co. v. James, 97 Va. 403, 34 S. E. Rep. 37.

In Jones v. Neale, 2 P. & H. 339, a written agreement, not under seal and unrecorded, between two partners, that certain real estate belonging to the concern should be assigned to one of the partners as his separate property, was held to be merely executory, and incapable of passing the legal title to the property. And the partners subsequently divesting themselves of their title by the execution of a deed to third persons, thereby annulled the agreement.

II. REQUISITES AND VALIDITY.

A. REQUISITES.

1. DESCRIPTION OF PROPERTY CONVEYED.

Object of Description.—The main object of a description of the land sold or conveyed, in a deed of conveyance, is not in and of itself to identify the land sold—that it rarely does or can do without helping evidence—but to furnish the means of identification, and when this is done it is sufficient, under the maxim that "that is certain which is capable of being made certain." Thorn v. Phares, 35 W. Va. 771, 14 S. E. Rep. 399.

Applying a Deed to Specific Property.—Intrinsic certainty in a deed relative to specific property is impossible. The description can be made certain only by proof or recognition of the identity of the subject to which it relates, or other objects or things that more or less directly and distinctly indicate and determine it. In the application of deeds and other instruments to lands and lots, extensive latitude is allowed for the discovery and proof, not only of visible monuments and other objects, but of mathematical lines of other lands and lots, and various classes of facts, to which the description or suggestion may apply. Warren v. Syme, 7 W. Va. 474.

When General Description Prevails over Calls.—Where a deed contains a general description of the land conveyed which can be made certain by the proof of surrounding circumstances, or identified by reference to the land itself or other objects that more or less distinctly indicate or determine it, and such deed also contains courses and distances of the land, such general description will control, if it satisfactorily appears from the deed itself or any recital or writing referred to therein, that it was the intention of the grantor to convey the land so generally described, and the courses and distances, in so far as they limit or differ from such general description, will be disregarded. Adams v. Alkire, 20 W. Va. 480; Florance v. Morien, 98 Va. 26, 34 S. E. Rep. 890.

General Description Sufficient.—A deed from a sheriff which conveyed all "the right, title and interest, vested in the sheriff by law, in and to certain property, conveyed by a debtor to his children" without specifically naming the property, was held sufficiently described to pass the title. The identity of the property is a matter of proof, and as soon as it is identified, the deed operates on it. Shirley v. Long, 6 Rand. 735.

In a deed, the only description of the land conveyed, was, "all the lands of the grantor in the county of H." This was held sufficient description to pass the property included within such description. Vanmeter v. Vanmeters, 3 Gratt. 148.

Insufficient Description.—A description of land in a deed consisted only of the words: "a piece of land near Bacon Quarter Branch." This was held too vague and indefinite a description to create any right of property in any particular parcel of land. George v. Bates, 90 Va. 839, 20 S. E. Rep. 828.

Erroneous Description—Innocent Mistake.—The description of boundaries in a deed of land was erroneous, and included land belonging to a third party; but the erroneous description of the boundaries arose from an innocent mistake, common to both vendor and vendee; and the vendee held the land as the vendor had held it, by the true boundaries. It was held, that the mistake should be corrected, but the vendee was entitled to no relief on account of that part of the land included within the boundaries inserted by mistake in the conveyance, which did not pass to the vendee by reason of the better title thereto of the coterminous owner. Keyton v. Brawford, 5 Leigh 39.

Repugnant Descriptions.—If two descriptions of land are given in a deed, each of which is equally explicit, but which are repugnant to each other, that description will prevail, which appears from the whole deed best expresses the intention of the parties. Therefore, where there were two repugnant descriptions in a deed, but the grantor only owned the land answering to one of them, the deed was held operative to convey the land which answered to the description. State Sav. Bank v. Stewart, 93 Va. 447, 25 S. E. Rep. 543.

In Clark v. Hutzler, 96 Va. 73, 30 S. E. Rep. 469, the statement in a deed that the lot conveyed was situated on the northeast corner of two streets mentioned, when in fact it was on the southwest corner of said streets, was held not to affect the deed where it appeared that the grantor owned no property on the northeast corner, but did own the lot on the southwest corner; that possession of the last-mentioned lot had been taken and held for a number of years; and there were other sufficient descriptions of the lot of the southwest corner contained in the deed.

Rejecting a False Description.—It is one of the maxims of the law that a false description does not render a deed inoperative, if after rejecting so much of the description as is false, there remains a sufficient description to ascertain with legal certainty the subject-matter to which the instrument applies. This rule of construction is said to be derived from the civil law. *False demonstratio non nocet cum de corpore constat.* State Sav. Bank v. Stewart, 93 Va. 451, 25 S. E. Rep. 543; Preston v. Heiskell, 32 Gratt. 48.

Where a deed contained a description of the land, part of which was true and part false, it was held that it was immaterial whether the true or the false description of the land was placed first in the deed, as in either case the court would reject the false wherever found, and give effect to the intention of the parties, if so expressed as to enable the premises intended to be conveyed to be identified. State Sav. Bank v. Stewart, 93 Va. 447, 25 S. E. Rep. 543.

Reference in a Deed to a Map—Effect.—Where a map of land is referred to in a deed for the purpose of fixing its boundary, the effect is the same as if it were copied in the deed. State Sav. Bank v. Stewart, 93 Va. 447, 25 S. E. Rep. 543.

Calls for Boundaries in a Deed.—Where a deed called for a corner which stood on the bank of a stream not navigable, the courses being up the line of said stream, though trees were marked and stakes planted along the top of said stream, the boundary of the tract was held to be the same as if the deed had called for the water-edge of the stream at low-water mark as the boundary. Carter v. Ry. Co., 26 W. Va. 644.

The mere circumstance that lines and corners are known to have been run and marked, or are found marked near where the courses and distances mentioned in the deed run, is not conclusive that they are the lines and corners of the land referred to in the deed. And when there is no such approximation in the courses or length of the lines, or the marks on the corners, to the description in the deed, as to warrant the presumption that they are the boundaries of the land to which the deed relates, such

marked lines should be disregarded. W. M. & M. Co. v. Peytona C. C. Co., 8 W. Va. 406.

Correspondence of the Boundaries with the Land.—There is no uniform rule that the length of one line, as mentioned in a deed, shall control the course of another line, or that the latter shall control the former. Other circumstances will determine the adoption of the one or the other. W. M. & M. Co. v. Peytona C. C. Co., 8 W. Va. 406.

Though the quantity of the land mentioned in the deed will not control the boundary, when ascertained by the description, with other paramount circumstances, nevertheless, the correspondence of quantity given by a line in question, with the quantity mentioned in the deed, or an approximation to such correspondence, may be considered as tending to establish such line as the true one. W. M. & M. Co. v. Peytona C. C. Co., 8 W. Va. 406.

Change in Position of Objects Called for in the Deed—Effect.—Where a deed to a railroad company described the land conveyed by reference to the time of the road of such company as then located, but not built, it was held, that the boundary lines were not affected by a subsequent change in the location of the road. King v. Norfolk, etc., R. Co., 90 Va. 210, 17 S. E. Rep. 868.

Prior Parol Agreement—Merger.—Where a deed conveyed land by well-defined boundaries, it was held, that a parol agreement made before the execution of the deed, that other adjoining lands beyond those boundaries should be included in it, or an agreement made after its execution, that it should extend to include other adjoining lands, could not have the effect to embrace these lands within the deed. Pasley v. English, 5 Gratt. 141.

2. PARTIES.

a. The Grantor.

(1) **In General.**

The Grantor Must Be Named.—Every deed must be executed by a competent grantor, who, by its terms, transfers to the designated grantee real estate therein described; and the identity of the grantor must appear by the deed. Adams v. Medsker, 25 W. Va. 127.

Deed to Land Held Adversely—Possession of Grantor.—A deed made by a party not in possession of the land which it purports to convey, cannot operate to pass title to the land if the land is in the actual adverse possession of a third party. Hopkins v. Ward, 6 Munf. 38; See v. Greenlee, 6 Munf. 303; Tabb v. Baird, 3 Call 476; Clay v. White, 1 Munf. 162; Birthright v. Hall, 3 Munf. 536; Early v. Garland, 13 Gratt. 1.

(2) **Infants.**

Infants' Deeds Voidable.—An infant, by reason of his general inability to make a valid contract, does not possess the requisite legal capacity to make a valid deed of conveyance. The deed of the infant, however, is not absolutely void, but only voidable, and it may be ratified or disaffirmed by him after attaining his majority. Birch v. Linton, 78 Va. 584; Darraugh v. Blackford, 84 Va. 509, 5 S. E. Rep. 542.

Ratification.—Mere silence for any period short of the statutory bar, unaccompanied by some confirmatory act, does not amount to a ratification of the conveyance. Birch v. Linton, 78 Va. 584.

Disaffirmance.—No notice of disaffirmance is required by the infant, entry or action by him being sufficient. Birch v. Linton, 78 Va. 584.

Infant Feme Covert.—A deed of an infant *feme covert* may be avoided when she becomes of full age and discovert. Then being *sui juris* she may ratify it expressly, or impliedly, as by accepting a compensation allowed by a deed to which she, or her counsel for her had consented. Darraugh v. Blackford, 84 Va. 509, 5 S. E. Rep. 542.

Disaffirmance Must Be within a Reasonable Time.—A disaffirmance of a deed made by an infant must be made within a reasonable time after attaining his majority. What is a reasonable time will depend upon the circumstances of the particular case. Wilson v. Branch, 77 Va. 65. In this case a woman executed a deed while an infant, and then married. Eighteen months after the death of her husband, and thirty-two years after attaining her majority she disaffirmed the deed. This was held a valid disaffirmance under the circumstances of the case.

(3) **Insane Persons.**

General Rule as to Capacity.—Where legal capacity is shown to exist in the grantor, and he has sufficient understanding to clearly comprehend the nature of the business, and consented freely to the special matter upon which he was engaged, no fraud or undue influence appearing, the validity of the deed cannot be impeached. It is not the propriety or impropriety of the disposition, but the capacity to make it, and the fact that it was freely made, with the full assent of the grantor, that must control the judgment of the court. Jarrett v. Jarrett, 11 W. Va. 627.

In Greer v. Greers, 9 Gratt. 330, two deeds were made by an old man shortly before his death, by which he conveyed the whole of his property, which he had not before disposed of, to one of his sons. It was held, that the principles which are applicable to last wills, in respect to the state of mind and degree of capacity sufficient to make a valid devise, were equally applicable to the case of this grantor; and the grantor not laboring under a total or temporary deprivation of reason, was of legal capacity to make a valid disposition of his property, if he was capable of recollecting the property which he was about to dispose of, the manner of distributing it, and the objects of his bounty.

In Jarrett v. Jarrett, 11 W. Va. 584, it was said that it requires more capacity to make a valid deed, than it does to make a valid will.

Rule as to Old Age and Eccentricities.—A grantor in a deed may be extremely old, his understanding, memory and mind enfeebled and weakened by age, and his actions occasionally strange and eccentric, and he may not be able to transact any affairs of life, yet, if age has not rendered him imbecile so that he does not know the nature and effect of the deed, this does not invalidate the deed. If he be capable, at the time, to know the nature, character, and effect of the particular act, that is sufficient to sustain it. Buckey v. Buckey, 38 W. Va. 168, 18 S. E. Rep. 383; Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. Rep. 102.

Presumption as to Sanity.—It is a familiar and well-settled rule of law that the legal presumption is that all men are sane and the burden of proof is on him who alleges unsoundness of mind in an individual. Miller v. Rutledge, 82 Va. 867, 1 S. E. Rep. 202; Porter v. Porter, 89 Va. 118, 15 S. E. Rep. 500.

The presumption of law is always in favor of the sanity, at the time the deed was executed, of a person whose deed is brought in question; and the burden of proof then lies upon him who asserts unsoundness of mind, unless a previous state of insanity has been established; in which case the burden is shifted to him, who claims under the deed. Anderson v. Cranmer, 11 W. Va. 562; Jarrett v. Jar-

rett, 11 W. Va. 584; Buckey v. Buckey, 38 W. Va. 168, 18 S. E. Rep. 383; Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. Rep. 201.

Burden of Proving Insanity.—Shortly after his liberation from the insane asylum "as restored," the grantor, a childless man, granted all his property to his wife to whom he attributed his success, and was much attached. Ten years afterwards the grantor committed suicide. Upon a suit in equity for cancellation of the deed, it was held that as the evidence did not show any continuous and chronic insanity, but only a temporary derangement, from which the records of the asylum showed that he had recovered, the burden of proof was on the party attacking the deed, to show insanity at the time the deed was executed, and as that was not done the deed was allowed to stand. Cropp v. Cropp, 88 Va. 753, 14 S. E. Rep. 529.

Weakness of Mind—Undue Influence Presumed.—Whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will upon proper and seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside, since from these circumstances, imposition or undue influence will be inferred. Fishburne v. Ferguson, 84 Va. 87, 4 S. E. Rep. 575.

A person reduced to a state of mental imbecility by habitual intoxication, made a voluntary and irrevocable deed of gift of his whole estate, to a cousin, to the disherison of his half-sisters, without any reasonable motive assigned for his act. It was held, that fraud and imposition could be inferred from the circumstances, and from the nature of the contract, and the deed of gift was held fraudulent and void. Samuel v. Marshall, 3 Leigh 567.

The Time at Which Grantor's Competency Must Exist.—The point of time to be looked to by the court or jury, in determining the competency of a grantor to make a deed, is that when the deed was executed; but the condition of the grantor's mind, both before and after the execution of the deed, is proper to be considered, in determining what was his mental condition at the time the deed was executed. Anderson v. Cranmer, 11 W. Va. 562; Jarrett v. Jarrett, 11 W. Va. 584; Buckey v. Buckey, 38 W. Va. 168, 18 S. E. Rep. 383; Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. Rep. 201.

Where the legal capacity of the grantor to make a deed is shown, and there is no fraud or undue influence established, he has the legal right to make an unjust, unnatural, or unreasonable conveyance of his property. Hale v. Cole, 31 W. Va. 576, 8 S. E. Rep. 516. In this case the deed of a father made upon meritorious consideration alone and which disinherited his only child, was held valid.

Deed of a Weak-Minded Grantor to a Child for Benefits Received.—The rule is well settled that a court of equity will not avoid a conveyance when made by one, who though weak and in feeble health, is not of unsound mind, where he deliberately disposes of his property to a child in consideration of the latter's undertaking to provide for his support, if it appears that he was aware of the consequences of his act, and that it could not be recalled. The fact that the act was done by reason of the influence resulting from affection and attachment, or the mere desire to gratify the wishes of another, if the free agency of the party is not impaired, does not affect the validity of the act. Orr v. Pennington, 93 Va. 268, 24 S. E. Rep. 928.

Deed of an Uneducated Deaf Mute.—In Morrison v. Morrison, 27 Gratt. 190, the deed of an uneducated deaf and dumb man acknowledged before a justice and recorded, was sustained upon proof that the deed was explained to him, and that he was believed to understand it; there being no evidence of any fraud on the part of the grantee.

Deed to a Bona Fide Purchaser.—Where a *bona fide* purchaser, without notice of fraud, receives a deed from two persons, one of whom fraudulently induced the other to join therein, he is not responsible in equity; but the loss ought to fall on the fraudulent vendor. In such case, the circumstance that the person defrauded is of weak understanding, but not an idiot or lunatic, is not sufficient to affect the right of the *bona fide* purchaser. Whitehorn v. Hines, 1 Munf. 557.

(4) **Married Women.**

Deed of a Married Woman Must Be Executed by the Husband.—The deed of a *feme covert*, to be valid must be executed by the husband also. But if it appears by sufficient evidence that the deed was executed by the *feme covert*, it will be valid as to her, if it appears by the testimony of even a single witness, that it has been executed by the husband also. Sexton v. Pickering, 3 Rand. 468.

Effect of a Wife Uniting with Her Husband.—The effect of a wife uniting with her husband in a deed is not to vest any estate in the grantee, separate and distinct, from that conveyed by the husband, but simply to relinquish a contingent right in the nature of an encumbrance upon the land conveyed, which if not so relinquished, would attach and be consummate upon the death of her husband. Corr v. Porter, 33 Gratt. 278.

When a husband unites in a deed though it may be void as to the wife for a fatal defect in the certificate, yet the grantee may elect to take the husband's interest in the land in full satisfaction of the contract, unless it can be shown for some other cause that the deed is also void as to the husband. Watson v. Michael, 21 W. Va. 568. On this subject, see generally, monographic *note* on "Husband and Wife."

(5) **Agents, Attorneys, Officers of Corporation, etc.**

President of a Corporation.—The president of a corporation is the proper party to execute a deed for the corporation, and a deed executed by the president under the seal of the corporation is a valid deed. Merchants' Bank v. Goddin, 76 Va. 503.

Where the deed of a corporation was signed by the corporation, by its president, with the corporate seal affixed, and the certificate of the notary stated that "Thomas L. Rosser, president, whose name is signed to the writing hereto annexed," acknowledged the same before him in his county, this was held a sufficient execution of the deed by the corporation. Banner v. Rosser, 96 Va. 238, 31 S. E. Rep. 67.

In Rauch v. Oil Co., 8 W. Va. 36, a paper which purported to be the deed of a corporation, and which recited the corporation as grantor, but which was signed and sealed by the president in his own name without the seal of the corporation being attached, was held not to be a valid deed of the corporation.

Trustee or His Personal Representative.—A deed made by a trustee under a power of sale in a deed of trust, conveys an absolute estate in a court of law, whether the conditions of the trust deed have

been complied with or not. Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 S. E. Rep. 232; Taylor v. King, 6 Munf. 358; Harris v. Harris, 6 Munf. 367.

But the burden of proof is on a purchaser from the personal representative of a trustee in a deed of trust to show that the conditions made a prerequisite to the exercise of the power of sale have been complied with. Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 S. E. Rep. 232.

Powers of Attorney Construed Strictly.—Powers of attorney are to be construed strictly, and though the intention of the parties is to be considered in construing the language used, the authority of the attorney is never to be considered greater than warranted by the language of the instrument or indispensable to the effective operation of such authority. Therefore, a power of attorney which simply authorized the attorney to demand and receive all real and personal property of the principal, was held not to confer authority upon him to sell the real estate of the principal and make a deed for the same. Such deed was held void. Hotchkiss v. Middlekauf, 96 Va. 649, 32 S. E. Rep. 36.

Authority to Execute a Deed Must Itself Be under Seal.—It is a general rule that one acting under a power of attorney cannot execute a deed for his principal unless the power of attorney be sealed. The authority must be equal in dignity and solemnity with the thing to be done. Preston v. Hull, 23 Gratt. 600; Hotchkiss v. Middlekauf, 96 Va. 649, 32 S. E. Rep. 36; Campbell v. Fetterman, 20 W. Va. 398.

How an Attorney Must Sign.—No particular form of words is necessary in the signature of a deed by an attorney in fact, provided the act be done in the name of his principal. It was therefore held to be immaterial whether the attorney signed it "B. W., attorney for R. C.," or "R. C. by B. W., his attorney." Jones v. Carter, 4 H. & M. 184.

Execution of a deed by an attorney in fact for his principal is sufficient, if he sign the name of the principal with the seal annexed, stating it to be done by him as attorney for the principal; or if he sign his own name with a seal annexed, stating it to be done for the principal. Shanks v. Lancaster, 5 Gratt. 110; Bryan v. Stump, 8 Gratt. 241.

A deed made by an attorney in fact for his principal, and properly executed as a deed of his principal, was held a deed of the principal, although in the body of the deed the attorney warranted the land, but did so for, or on the part of, and by the authority of his principal, as conferred by his power of attorney. Shanks v. Lancaster, 5 Gratt. 110.

A deed for the conveyance of land, purporting to be made by A., attorney in fact for B., witnessed "that the said attorney in fact, A., for and in consideration, etc., doth release and quit-claim," etc., and concluded, "in testimony whereof the said B. hath hereunto set his hand and seal," but it was signed with the name of A. (not styled attorney), the scroll being annexed to the signature. It was held that this was not the deed of B., and did not convey his title to the land. Martin v. Flowers, 8 Leigh 158.

Deed Made by Attorney of a Husband and Wife.—A deed purporting to be made by an attorney in fact of a husband and wife for them, but whose power of attorney was defectively acknowledged as to the wife, was nevertheless held a valid deed as to the husband. Shanks v. Lancaster, 5 Gratt. 110.

Power of Attorney to Appoint Other Attorneys.—Where a power of attorney is given to appoint other attorneys, the second attorney must be authorized to act in the name of the original donor of the power, and not in the name of the first attorney. Where the second attorney is only authorized to act in the name of the first, a deed for land belonging to the donor of the power, made by him, is not valid to pass the land. Stinchcomb v. Marsh, 15 Gratt. 202.

Presumption in Favor of Power.—A deed having been executed by a person professing to act under a power of attorney from the owner of the land conveyed, and a sufficient time having since elapsed to bar a writ of right, without any claim having been made by the original owner or his heirs, it was held, that a presumption amounting to full proof arose, that the person professing to act under the power was duly authorized to execute the deed. Goodwin v. McCluer, 3 Gratt. 291.

Recital of Power in Deed.—In making a deed in execution of, or in pursuance of a power, it is not always necessary to recite the power therein, but it is the better and safer practice to do so. Smith v. Henning, 10 W. Va. 596.

Power Coupled with Interest.—A deed duly executed and delivered, which conveys the legal title to real estate to a vendee, although a mere power to sell, is a power of sale coupled with an interest and is, therefore, incapable of being revoked by the death of the grantor. McNeill v. McNeill, 43 W. Va. 765, 28 S. E. Rep. 717.

(6) **Partners.**

Conveyance by a Partner to Secure a Partnership Debt—To Secure His Own Debt.—A conveyance by one partner of an undivided moiety of real estate owned by the partnership, in trust to secure a creditor of the partnership, passes a good title both at law and in equity to such moiety, and such creditor is entitled to priority over all other creditors of the firm; but when such property is conveyed by one partner in trust to secure his individual creditors, the property remains subject to the payment of the partnership debts. Jones v. Neale, 2 P. & H. 339.

Lease by One Partner.—A deed of lease with covenants, was executed by one partner in the partnership name. It was held, that though the deed was not obligatory upon his partners, yet, the agreement for the lease for the use of the partnership, of which the deed was intended as evidence, was binding on the partnership, and was not extinguished by the deed. Kyle v. Roberts, 6 Leigh 495.

Deed by a Partner—Assignment.—Though one partner cannot in general bind his copartner by deed, so as to make it operative in law as a deed, yet, an assignment by one partner of the effects of a firm, which would be lawful if there were no seal, will not be allowed in equity to be defeated by the circumstance of a seal being annexed to the instrument. McCullough v. Sommerville, 8 Leigh 415.

(7) **Cotenants.**

Deed to Undivided Interest.—One of several cotenants may convey at his pleasure his undivided interest in the land held in common, without the knowledge or consent of his companions in interest; and the effect of this deed will be to make the grantee a tenant in common in the land with all the rights and liabilities with reference thereto of his grantor. Worthington v. Staunton, 16 W. Va. 208.

Deed to a Particular Tract.—A deed from a cotenant for part of land held in common, cannot in any way operate to the prejudice of the other tenants in common. They have the right to have the land partitioned unaffected by such deed. Such deed will become operative and pass the land to the grantee, if the other tenants in common confirm

and ratify it before partition, or after the partition, if that portion is allotted to the purchaser thereof, and in either case such deed will be binding on both grantor and grantee. Worthington v. Staunton, 16 W. Va. 208.

(8) **Commissioners in Chancery.**

Authority of the Commissioner.—The decree of court directing commissioners to sell certain lands, is no authority for them to make a deed for the land of the purchaser. Evans v. Spurgin, 6 Gratt. 107. But where they executed a deed under such circumstances, and the court by a final decree in the cause ratifies and confirms it, this order of confirmation gives full effect and validity to the deed, and relates back to the time of its date, so as to invest the purchaser with a legal title to the land. Worthington v. Staunton, 16 W. Va. 208.

Excess of Authority.—Where a commissioner's deed departs from the description given in the record of the property conveyed, and conveys more than the former owner was entitled to, the deed is void as to the surplus, as the commissioner has exceeded his authority to this extent. Scott v. Moore, 98 Va. 668, 37 S. E. Rep. 342.

What Amounts to a Confirmation of the Deed.—A commissioner of the court who was directed to sell the tract of land and convey the sum to the purchaser, made such sale and conveyance, and reported the same to the court which confirmed the right. This was held a sufficient confirmation of the deed, though no deed or copy thereof was returned with the report. Va., etc., Co. v. Fields, 94 Va. 102, 26 S. E. Rep. 426.

Commissioner's Deed Procured by Fraud.—Where a commissioner was induced to execute a deed conveying property, by the fraud of the purchaser, or by misrepresentation, it was held that the purchaser could not rely on the deed as an estoppel; but he might be proceeded against by a rule to have the deed annulled, and the property subjected to sale. Williams v. Blakey, 76 Va. 254.

Void Ab Initio.—Where a special commissioner sold lands on terms other than those prescribed in the decree of sale, and without reporting his proceedings and obtaining confirmation, conveyed the land to a purchaser, though six months later the court did confirm the sale and deed, it was held that a bill would lie to cancel the deed as void *ab initio*. Miller v. Smoot, 86 Va. 1050, 11 S. E. Rep. 983.

Effect of Confirmation.—Although a deed made by commissioners of a court is not in exact accordance with the directions of the court, yet it is immaterial where it appears that they reported their action and it confirmed the deed. Harman v. Stearns, 3 Va. Law Reg. 454, 95 Va. 58, 27 S. E. Rep. 601.

Correction of Deed by Commissioner.—Where a party is appointed a special commissioner in a chancery cause, and empowered and directed to execute and deliver a deed to a party to a suit, for a tract of land therein designated, and such special commissioner, in endeavoring to obey the directions of said decree, conveys the property by a misdescription, such commissioner, when the mistake is discerned, may correct the same by a subsequent deed. Guinn v. Bowers, 44 W. Va. 507, 29 S. E. Rep. 1027.

Title That Passes by Deed.—The prayer of the bill being for a sale of the land, and the decree and sale being of the land, and the deed conveying it, the title of all parties to the suit passed by the deed. Zollman v. Moore, 21 Gratt. 313. As to deeds by commissioners in chancery, see generally, monographic *notes* on "Commissioners in Chancery" appended to Whitehead v. Whitehead, 23 Gratt. 376; "Judicial Sales" appended to Walker v. Page, 21 Gratt. 636.

b. The Grantee.—It is an elementary principle that every deed must have a grantee as well as a grantor. The grantee should be named and definitely pointed out in the deed, but where the deed fails to name a grantee this defect may be supplied by a court of equity where enough appears on the face of the deed to show who was intended as grantee. Lagorio v. Dozier, 91 Va. 492, 22 S. E. Rep. 239; Adams v. Medsker, 25 W. Va. 127.

3. SIGNING.—Under the Saxon rule in England, it was only required that deeds should be subscribed with the sign of the cross. After the Norman Conquest sealing became a requisite, but signing of all kinds ceased to be required. 2 Min. Inst. (4th Ed.) 728; 2 Bl. Com. 309. After the statute of frauds was enacted it became essential that every deed purporting to convey lands should be signed by the party to be charged therewith. 2 Min. Inst. (4th Ed.) 728.

But in Virginia we have not adopted a similar phraseology to the English statute of conveyances and it is doubtful whether as a general proposition it is necessary that a deed be signed; but in view of the fact that the tendency of the modern decisions is to require a deed to be signed, it is at least prudent that this should be done. 2 Min. Inst. (4th Ed.) 728.

In West Virginia in at least one case, it has been held that signing is indispensable to the validity of a deed. Adams v. Medsker, 25 W. Va. 127. And in American, etc., Co. v. Burlack, 35 W. Va. 647, 14 S. E. Rep. 323, HOLT, J., said: "Among the essential elements of a deed, signing has come in as a new one, and sealing has degenerated, with us, unto a mere flourish with the pen."

4. SEALING.

At Common Law—A seal at common law was defined by LORD COKE to be "an impression upon wax." Jones v. Logwood, 1 Wash. 42; 2 Min. Inst. (4th Ed.) 728.

Under Statutes.—In Virginia it is provided by statute that, "any writing, to which a natural person making it shall affix his scroll by way of seal, shall be of the same force as if it were actually sealed. Va. Code, § 2841. The authorities upon the question as to when a scroll is affixed by way of seal, hold that a scroll affixed to an instrument not required by law to be under seal, must be recognized in the body of the instrument, in order to be valid as a deed. Baird v. Blaigrove, 1 Wash. 170; Austin v. Whitlock, 1 Munf. 487; Anderson v. Bullock, 4 Munf. 442; Jenkins v. Hurt, 2 Rand. 446; Peasley v. Boatwright, 2 Leigh 195; Turberville v. Bernard, 7 Leigh 302; Cromwell v. Tate, 7 Leigh 301; Clegg v. Lemessurier, 15 Gratt. 108; Lewis v. Overby, 28 Gratt. 627; Buckner v. Mackay, 2 Leigh 488; Gover v. Chamberlain, 83 Va. 286, 5 S. E. Rep. 174.

But as to instruments which would be without legal effect unless sealed (as a conveyance of a freehold), it seem sufficient to affix a scroll without recognizing it in the body of the instrument. Ashwell v. Ayres, 4 Gratt. 283; Parks v. Hewlett, 9 Leigh 511; Clegg v. Lemessurier, 15 Gratt. 108; Smith v. Henning, 10 W. Va. 596; Cosner v. McCrum, 40 W. Va. 339, 21 S. E. Rep. 739.

In Virginia it has been held that an actual seal of a corporation, affixed to an instrument not required by law to be under seal, must be recognized in the body of the instrument in order to be valid

as a deed. Bradley Salt Co. v. Norfolk, etc., Co., 95 Va. 461, 28 S. E. Rep. 567.

Effect of Acknowledgment Where Scroll is Not Recognized in Body of Instrument.—Where the scroll attached to the signature of the grantor is not recognized in the body of the instrument, this informality is cured by the subsequent acknowledgment of the deed for recordation. Ashwell v. Ayres, 4 Gratt. 283; Cosner v. McCrum, 40 W. Va. 339, 21 S. E. Rep. 739; Smith v. Henning, 10 W. Va. 596. See monographic *note* on "Acknowledgments" appended to Taliaferro v. Pryor, 12 Gratt. 277.

Scroll Used by Way of Seal—Validity.—The object of attaching a seal to a deed is to give solemnity to the act. There is no difference in point of solemnity, between the act of impressing wax, and that of making a scroll, therefore a scroll is of equal validity to constitute a deed, as an impression made by a seal on wax. Jones v. Logwood, 1 Wash. 42; Buckner v. MacKay, 2 Leigh 488.

Ancient Writing Purporting to Be a Deed—Whether or Not It Is a Sealed Instrument, a Question for the Jury.—Where a copy of a paper purporting to be a deed of real estate was offered in evidence as a deed, and the copy did not disclose anything by way of trace, scroll, or device to show that the original was sealed, but the original, executed upwards of fifty years before purported to be under the hand and seal of the grantor, the attesting witnesses declared that it was sealed and delivered in their presence; the justices who took the acknowledgment declared that the grantor acknowledged the same to be his act and deed; it was admitted to record as a deed; possession of the land was taken under it by the grantee, and the taxes paid on it by him, it was held that it should be submitted to the jury to determine whether or not the original was a sealed instrument. Reusens v. Lawson, 91 Va. 226, 21 S. E. Rep. 347.

Extra Seal Attached to a Deed—Surplusage.—The validity of a deed is not affected by having on it an extra seal. Kyger v. Sipe, 89 Va. 507, 16 S. E. Rep. 627.

5. DELIVERY.

a. In General.

Delivery of a Deed Essential to Its Perfection.—"Delivery is essential to the perfection of a deed, and it lies in parol; though signed and sealed, a deed is not effectual until delivered. The delivery may be actual, as by manual tradition to the grantee, or to another for his use; or it may be constructive, as where it is placed within the power and control of the grantee. It may be proved by evidence express, or it may be inferred from circumstances. It may be inferred from the solemnities of signing, sealing, acknowledgment and attestation, though the custody of the instrument be retained by the grantor; but the inference is presumptive and *prima facie*, and may be repelled by proofs of a contrary intent." BALDWIN, J., in Pollock v. Glassell, 2 Gratt. 456.

Delivery Depends upon Intention of the Parties.—Delivery of a deed depends on the intention of the parties, and though not in formal words, may be shown by the circumstances, the date of the deed is *prima facie* the date of the delivery, but only *prima facie*. Acknowledgment of a deed is not conclusive evidence of its delivery, but is only a circumstance tending to show delivery. Ferguson v. Bond, 39 W. Va. 561, 20 S. E. Rep. 591; Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. Rep. 201.

Effect of Delivery.—Where a deed has been once completed by delivery, so as to pass title to land, its subsequent oral cancellation or destruction, though by consent of both parties, does not divest the grantee of title, but it still remains in him. Where it is clear that a deed has been delivered, it is still a deed, though afterwards found in the possession of the grantor. Ferguson v. Bond, 39 W. Va. 561, 20 S. E. Rep. 591.

Undelivered Deed—Effect.—A deed was executed and acknowledged, ready for delivery, but was not delivered, but was laid away by the grantor where he kept his papers, together with his will executed at the same time. After the grantor's death the supposed deed and will were found among his papers. Such paper was held not to be a deed because of want of delivery. Lang v. Smith, 37 W. Va. 725, 17 S. E. Rep. 213.

The Time of Delivery—Presumption.—If a deed is dated, the law presumes it to have been delivered upon the day of its date; and when it is proved by witnesses who say nothing as to the time of delivery, and is recorded, it stands recorded as a deed proved to have been delivered at its date. There is no distinction in principle, between the presumption of delivery arising from the proof by witnesses, and the acknowledgment before a justice or a notary. Harman v. Oberdorfer, 33 Gratt. 497; Renick v. Ludington, 20 W. Va. 511.

While a deed will be presumed to have been delivered on, and will take effect from its date, this presumption will yield to evidence to the contrary. Raines v. Walker, 77 Va. 92. Certified acknowledgment is not inconsistent with prior delivery, and is not sufficient to overcome the presumption. Raines v. Walker, 77 Va. 92; Hardy v. Norfolk, etc., Co., 80 Va. 404.

Contract for Sale of Land—Presumption as to Delivery of Deed.—In a contract for sale of land no day was specified for delivering the deed and possession of the land, but the money was payable after the delivery of the deed. It was held that it must be understood that the deed was to be delivered, and possession given without delay. Therefore, where this was not done the vendor was made to account for, and pay the profits of the land received by him after the contract; and the vendee to pay interest on the money from the time when it would have been payable if the deed had been immediately delivered. Hundley v. Lyons, 5 Munf. 342.

Possession by the Grantee Prima Facie Evidence of Delivery.—The possession of a deed by the grantee which has been duly executed and acknowledged, with all the formalities by law, is *prima facie* evidence of its delivery. Therefore, where a father sought to set aside a deed to his son, on the sole ground that the son wrongfully came into possession of it, the burden of proving such wrongful possession was held to be upon the father. Ward v. Ward, 43 W. Va. 1, 26 S. E. Rep. 542; Newlin v. Beard, 6 W. Va. 110.

Acknowledgment in Court—Effect as to Delivery.—A deed of bargain and sale admitted to record on the acknowledgment of the bargainor in court, without any actual delivery thereof to the bargainee, was determined to be good in law, as a deed delivered; the bargainee having entered upon the land immediately after the purchase, having paid a part of the purchase money, retained possession according to the bargain; and, upon being informed of the deed, approved thereof, and claimed title to the land thereby intended to be conveyed. Com. v. Selden, 5 Munf. 160.

Delivery to a Third Person—Presumption.—The grantor in a deed placed it in the hands of a third person, to be delivered at an indefinite time to the grantee. Before the delivery the deed was returned to the grantor who destroyed it. It was held, that the presumption of law was against the delivery of the deed, and in favor of the grantor's right to destroy it, and such presumption could not be overcome unless the grantor showed by preponderance of affirmative evidence that the grantor at the time he placed such deed in the hands of such third person, intended absolutely to part with the control and dominion over the same. Davis v. Ellis, 39 W. Va. 226, 19 S. E. Rep. 399.

Delivery Cannot Be Made after Grantor's Death.—So long as the deed is within the control and subject to the domain and authority of the grantor, there is no delivery, without which there can be no deed; and there can be no delivery of such deed after the death of the grantor. Lang v. Smith, 37 W. Va. 725, 17 S. E. Rep. 213.

Return of the Deed to Grantor for Acknowledgment—Effect.—Where a purchaser to whom a deed had been fully executed put the deed into the hands of the vendor, that he might acknowledge it for the purpose of having it recorded, such delivery to the vendor was held not a surrender of the title under the deed. Rootes v. Holliday, 6 Munf. 251.

Delivery Presumed from Possession by Grantee.—When a duly executed deed is found in the possession of the grantee, the law presumes that it has been legally delivered to him; but this presumption may be rebutted. Newlin v. Beard, 6 W. Va. 110.

Proof of Delivery.—A deed takes effect from the time of its delivery; and such delivery, like any other fact, may be established, either by direct proof, or by circumstances. Harman v. Oberdorfer, 33 Gratt. 497.

b. Escrow.

Rule as to Delivering a Deed as an Escrow to the Grantee.—The general rule is that a deed cannot be delivered as an escrow to the grantee therein. This rule is applicable only to the cases of deeds which upon their face are complete contracts, requiring nothing but delivery to make them perfect according to the intention of the parties; it does not apply to deeds which upon their face import that something more is to be done besides delivery to make them complete and perfect contracts according to the intention of the parties. Hicks v. Goode, 12 Leigh 479; Wendlinger v. Smith, 75 Va. 309; Miller v. Fletcher, 27 Gratt. 403.

A deed, perfect on its face, cannot be delivered as an escrow to the grantee or obligee, upon a condition upon which it is to be a valid deed. In all such cases the condition is void, and the deed is at once operative; and parol evidence is inadmissible, to prove that a deed, perfect on its face, was delivered to the grantee on a condition. Miller v. Fletcher, 27 Gratt. 403.

Deed Perfect on Its Face.—If the instrument is on its face complete and perfect, according to the intention of the parties, and delivery is made to the obligee, or his previously constituted agent, without notice that it is conditional, the obligee is not required to make enquiry whether it is the deed or bond of all the signers, or any of them, because it is presumed that all the obligors authorized its delivery, and he has the right to treat it as absolute and unconditional. Newlin v. Beard, 6 W. Va. 123.

Escrow Delivered to the Grantee without the Grantor's Assent.—A deed delivered to a third person to be by him delivered to the grantee upon the performance of the specified condition, does not take effect, until such condition is performed, although such third person may have delivered it to the grantee without the performance of the condition. White v. Core, 20 W. Va. 272.

Person Claiming Title under an Escrow Is a "Freeholder."—A deed was delivered as an escrow to a third person to be by him delivered to the grantee upon the payment of the purchase price. It was held in this case that the grantee in the deed was a freeholder, and duly qualified as such to serve as a juror. Com. v. Burcher, 2 Rob. 826.

Intention to Deliver as an Escrow Must Appear.—Where a deed is intended to be delivered as an escrow it should be so stated, otherwise the delivery will be treated as an absolute delivery. Currie v. Donald, 2 Wash. 58.

Escrows Not within the Statute of Registry.—A deed delivered as an escrow, in the proceedings of a court of equity, administering a trust fund, is not within the intendment of the statute of registry; therefore, it was held that a judgment recovered against a grantor in a deed delivered as an escrow, which was not recorded, was not a lien on the land included in the deed. Trout v. Warwick, 77 Va. 731.

6. ACCEPTANCE.

Acceptance—Presumption—Disclaimer.—A deed must not only be delivered by the grantor, but must be accepted by the grantee. Acceptance may be express, by signing the deed or otherwise, or may be implied from the circumstances. The assent of the grantee will be presumed, where the deed is beneficial to him, until dissent appears. Where dissent or disclaimer appears, the deed is inoperative, and the title to the thing granted reverts to the grantor by remitter from such disclaimer. Guggenheimer v. Lockridge, 39 W. Va. 457, 19 S. E. Rep. 874; Bowden v. Parrish, 86 Va. 67, 9 S. E. Rep. 616.

Acceptance of a deed by the grantee is presumed from the delivering of the deed, and until he renounces it the law presumes it to be beneficial to him. Bowden v. Parrish, 86 Va. 67, 9 S. E. Rep. 616.

Effect of Acceptance.—A deed was made upon consideration that the grantees would pay the debts of the grantor, and pay him $500 a year for his life. The grantees did not execute the deed, but they accepted it, and took possession of and held the lands. It was held, that the grantees having accepted the deed were personally liable for the debts of the grantor. Vanmeter v. Vanmeters, 3 Gratt. 148; Hobson v. Whitlow, 80 Va. 784.

Ratification and Acquiescence.—Ratification and acquiescence imply knowledge, and in order to waive a right a person must have knowledge of its existence, therefore, a party cannot ratify a deed when he does not know of its existence, or of the circumstances attending its execution. Hotchkiss v. Middlekauf, 96 Va. 649, 32 S. E. Rep. 36.

B. VALIDITY.

1. IN GENERAL.—A paper which purports to be a deed, but which lacks one of the essential characteristics of a deed, such as a granting clause, is not valid as a deed. The effect of such paper is simply an acknowledgment that the grantee has an equitable title to the land. Weinrich v. Wolf, 24 W. Va. 299.

2. DEED MADE DURING WAR.

Not Necessarily Invalid.—The fact that a deed was made, acknowledged, and recorded during the war, does not render it null and void, but there must be

some special circumstances alleged to show the deed void. Henderson v. Alderson, 7 W. Va. 217.

Deed Not in Aid of Rebellion—Consideration—A deed, even if the consideration was confederate money, if within the scope of legitimate contract and not in aid of rebellion, regularly acknowledged before and recorded by proper officers of the state government, then under the power of the Confederate States government, is good. Henderson v. Alderson, 7 W. Va. 217.

In this case it was held irregular and error for the court, upon motion of a person not a party to the suit, and the record not showing that he had an interest in the subject-matter of the suit, to order a commissioner to ascertain and report whether the consideration of the deed was confederate money or good money; or whether the consideration of the deed was legal or illegal.

3. MISREPRESENTATION.

What Amounts to Misrepresentation.—In order to rescind a conveyance in equity for misrepresentation, it must appear that false representations were made, that they were material, that they were relied upon by the grantee, and that they were made to induce him to enter into the contract. Beckley v. Riverside Land Co. (Va.), 23 S. E. Rep. 778.

In this case the false representations relied on by the grantee, were representations made by the grantor to the effect that certain industries had been secured to locate upon the land near the land granted. It was proved that the grantee had heard the president of the land company, upon whose land the grantor had represented that the industries were going to locate, state publicly before the conveyance, that the industries had not been secured. Under these circumstances it was held, that the grantee was not entitled to a rescission of the conveyance in equity.

Fraudulent Misrepresentations—Pleading.—Where a deed is procured by fraudulent misrepresentations, the defence cannot be shown under the general issue, and can only be made at law in the mode provided by statute (Va. Code of 1887, § 3299). The defendant should file a special plea alleging the fraud, or special circumstance, which would entitle him to relief in equity. The facts should be set forth with sufficient precision to apprise the plaintiff of the character of the defence intended to be made, and to enable the court to decide whether the matter relied on constitutes a valid claim to equitable relief. Burtners v. Keran, 24 Gratt. 42; Wyche v. Macklin, 2 Rand. 426.

4. FRAUD.—In a court of common law, fraud may be given in evidence to vacate a deed, under the plea of *non est factum*, if such fraud relates to the execution of the instrument; as if it be misread to a party, or his signature be obtained to an instrument which he did not intend to sign. But fraud committed in a settlement of accounts which preceded, or in a statement of facts which induced its execution, cannot be pleaded or given in evidence. Taylor v. King, 6 Munf. 358; American, etc., Co. v. Burlack, 35 W. Va. 647, 14 S. E. Rep. 319. As to relief in equity in case of fraud, see *post*, "VI. Equity Jurisdiction."

5. UNDUE INFLUENCE.

What Constitutes Undue Influence.—Suggestion and advice, addressed to the judgment, are not undue influence. To annul a deed for undue influence, it must appear that it was such as to destroy free agency, and to substitute the will of another for that of the person nominally acting. It must appear to the satisfaction of the court that the party had no free will but stood *in vinculis*. Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. Rep. 201.

Influence acquired over the grantor by reason of acts of kindness and attachment, does not constitute such undue influence as will vitiate a deed otherwise valid. Hale v. Cole, 31 W. Va. 576, 8 S. E. Rep. 516; Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. Rep. 201.

Effect of Undue Influence.—Whenever a deed is tainted with undue influence this will render it voidable. In all such cases courts of equity have jurisdiction to set aside and cancel the deed, and to place the parties in the position occupied by them before the imposition was practiced. Davis v. Strange, 86 Va. 793, 11 S. E. Rep. 406; Pusey v. Gardner, 21 W. Va. 469; Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. Rep. 201. As to relief in equity in cases of undue influence by rescission, cancellation, and reformation, see *post*, "VI. Equity Jurisdiction."

6. MISTAKE.—Where there is a mutual and material mistake in the execution of a deed, or as to the property conveyed by the deed, this will render the deed void; or the deed may be reformed in equity to accord with the prior agreement of the parties. The evidence to show the mistake must be clear and strong, so as to show the mistake to the entire satisfaction of the court. Blessing v. Beatty, 1 Rob. 287; Long v. Israel, 9 Leigh 556; French v. Chapman, 88 Va. 317, 13 S. E. Rep. 479; Chapman v. Persinger, 87 Va. 581, 13 S. E. Rep. 549; Snyder v. Grandstaff, 96 Va. 473, 31 S. E. Rep. 647; Allen v. Yeater, 17 W. Va. 128; Hansford v. Chesapeake Coal Co., 22 W. Va. 70; Schuttler v. Brandfass, 41 W. Va. 201, 23 S. E. Rep. 808; Robinson v. Braiden, 44 W. Va. 183, 28 S. E. Rep. 798. As to relief in equity in cases of mistake, by rescission, cancellation, and reformation of the deed, see *post*, "VI. Equity Jurisdiction."

7. ALTERATION.

Alteration of a Deed by a Party.—Where a deed is altered by a party claiming under it in a material part, such party cannot recover upon the agreement so altered, nor can he avail himself of the contract in its original and true form. There is no distinction between deeds and other written instruments in this respect. Newell v. Mayberry, 3 Leigh 250.

A Mixed Question of Law and Fact.—Whether alterations made after the signing, sealing, and delivery of the instrument, were made with or without the knowledge and consent of the grantor, is a question of fact, which must be submitted to the jury; but whether such alterations are material or not, is a question of law to be decided by the court. Keen v. Monroe, 75 Va. 424.

Filling Up a Blank.—Any alteration made in a deed which does not materially change its effect, does not render the deed void. Whiting v. Daniel, 1 H. & M. 391. In this case, a deed of conveyance for slaves having been signed, sealed, and delivered, with a blank left for the date, the donee afterwards inserted the date. No fraud or imposition appearing to have been practiced in obtaining it, and no evil design in filling up the blank, the deed was adjudged to be good, the date not being a material part.

8. INVALIDITY CURED BY POSSESSION.—In Kinney v. Beverley, 2 H. & M. 318, a deed which was defective because not indented, and because it expressed no consideration, was held to be cured by the verdict of the jury in an action of ejectment finding twenty years' possession in the party claiming under the deed.

A deed, though invalid to pass the title to land, may nevertheless be sufficient to constitute color of title in the party claiming under it, which will ripen into title by possession claimed under it for the period of the statutory bar. Shanks v. Lancaster, 5 Gratt. 110; Mullan v. Carper, 37 W. Va. 215, 16 S. E. Rep. 527; Swann v. Thayer, 36 W. Va. 46, 14 S. E. Rep. 423. On this subject, see monographic *note* on "Adversary Possession" appended to Nowlin v. Reynolds, 25 Gratt. 137.

III. CONSTRUCTION AND OPERATION.

A. GENERAL RULES OF CONSTRUCTION.

Rule for Ascertaining Intention of Parties.—The effect of language used in a deed is to be gathered from a careful examination of the whole deed, and not merely of disjointed parts, so as to give effect to the whole. The intention of the grantor, as derived from the deed itself, should be sought after and, if discovered, should be carried into effect, if it can be done consistently with the rules of law. If the words and provisions are doubtful, they are to be taken most strongly against the grantor. If susceptible of different constructions, the circumstances attending the transaction, the situation of the parties, and the state of the thing granted at the time of the grant, should be taken into consideration, for the purpose of ascertaining the probable intent. Allemong v. Gray, 92 Va. 216, 23 S. E. Rep. 298; Bailey v. Hill, 77 Va. 492; Bradley v. Zehmer, 82 Va. 689; Hurst v. Hurst, 7 W. Va. 289, 339; Temple v. Wright, 94 Va. 338, 26 S. E. Rep. 844.

Punctuation.—In the interpretation of a deed very little consideration is given by the courts to punctuation. It is never allowed to interfere with the usual and natural sense and meaning of the language employed. O'Brien v. Brice, 21 W. Va. 704.

Construed Most Strongly against Grantor.—Where it is doubtful on the face of the deed what land was intended to be conveyed, or what was the true meaning of the parties, the general rule of construction is that the deed will be construed most strongly against the grantor, so as to give it effect, rather than it should be void for uncertainty. Carrington v. Goddin, 13 Gratt. 587.

Deed Construed as a Whole.—In the construction of a deed, the paramount rule is to construe it so as, if possible, to give effect to every part of it, and in order to discover the intention of the parties, to look not only to the terms of the instrument, but also to the subject-matter and the surrounding circumstances. Bailey v. Hill, 77 Va. 492.

In construing a written instrument it is the duty of the court to construe it as a whole, taking and considering all the parts together, and giving effect to the intention of the parties whenever that is reasonably clear and free from doubt. The common-law rule that the habendum clause of a deed must yield to the granting clause, in case of repugnance between the two, has no application except where the repugnance is such that the intention of the grantor cannot be determined with reasonable certainty from the whole instrument. Temple v. Wright, 94 Va. 338, 26 S. E. Rep. 844.

Intention of the Parties Governs.—The legitimate purpose of all construction of written instruments is to ascertain the intention of the parties making the same, and, when this is determined, effect will be given thereto, unless to do so will violate some established rule of property. Where the description in a deed consists of several parts, some of which are incorrect, if it can be ascertained from those which are correct what was intended to be conveyed, the incorrect parts will be rejected, and the deed made to take effect. If the language is ambiguous, the court, in order to arrive at the intention of the parties, may look at their subsequent acts, and the manner in which the thing granted has been used and enjoyed under the grant. Gibney v. Fitzsimmons, 45 W. Va. 334, 32 S E. Rep. 189; State Sav. Bank v. Stewart, 93 Va. 447, 25 S. E. Rep. 543; Clark v. Hutzler, 96 Va. 73, 30 S. E. Rep. 469; Preston v. Heiskell, 32 Gratt. 48; Ocheltree v. McClung, 7 W. Va. 232; Upper, etc., Co. v. Hamilton, 83 Va. 319, 2 S. E. Rep. 195; Mickie v. Lawrence, 5 Rand. 571.

Whether an Instrument Is a Deed or Will.—The rule of construction for determining whether an instrument is a will or a testamentary paper or a deed is that, if it passes a present interest, though the right to possession or enjoyment does not accrue until the death of the maker, it is a deed or contract, but, if it does not pass any interest or title whatever till his death, it is a will or testamentary paper, and is not valid as a deed or contract. In determining whether an instrument is a testamentary paper, or a deed meant to take effect *in presenti*, the courts do not allowed language peculiar to either class of instrument, nor even the belief of the maker as to the character of the instrument, nor the name he gives it, to inflexibly control its construction. But giving due weight to these circumstances, courts look further, and, weighing all the circumstances surrounding the parties and attending the execution of the instrument, give to it such construction as will give effect to the manifest intention of its maker. Lauck v. Logan, 45 W. Va. 251, 31 S. E. Rep. 986.

An instrument in form and name a deed of conveyance, acknowledged as such, and delivered to the grantee, whereby, for a consideration the grantor purported to convey a tract of land, closed with this clause: "It is hereby distinctly understood and stipulated that this deed shall take and be in full force and effect immediately after the said grantor shall depart this life, and not sooner." This was held to be a valid deed conferring a vested remainder on the grantee, to come into enjoyment upon the death of the grantor. Lauck v. Logan, 45 W. Va. 251, 31 S. E. Rep. 986. See also, Pollock v. Glassell, 2 Gratt. 439.

Whether an Instrument Is a Deed or a Contract to Convey.—Whether an instrument is a deed or merely a contract for a conveyance is a question of intention to be determined from the instrument itself. Words of present grant and assurance create a presumption that an executed conveyance was intended, but this presumption may be overcome by other words in the instrument showing that a future conveyance is contemplated. If, taken as a whole, it appears that a mere agreement for a conveyance was all that was intended, the intent shall prevail, for the intent, and not the words, is the essence of every agreement. Mineral Co. v. James, 97 Va. 403, 34 S. E. Rep. 37.

Deed, Will or Power of Attorney.—An instrument purporting on its face to be a deed, was signed, sealed, and acknowledged before a notary, and admitted to record. This deed conveyed absolutely, and without reservation or condition, all the property of the grantor to a trustee to be held for the benefit of the grantor for the term of her natural life, and after her life for the benefit of her chil-

dren, if any, and if none, for the benefit of her heirs at law. It was held, that this was neither a will nor a power of attorney; but was a deed, and therefore irrevocable. Claiborne v. Radford, 91 Va. 527, 22 S. E. Rep. 348.

Construction a Question of Law—Context.—The general rule is that the construction of all written instruments is a question of law for the court, and that the terms of every such instrument are to be understood in their plain, ordinary, and proper sense, and where words have a primary meaning they must always be understood in that sense, unless the context shows that they were otherwise intended. Holston, etc., Co. v. Campbell, 89 Va. 396, 16 S. E. Rep. 274.

Technical Words Presumed to Be Used Technically.—In construing a deed technical words are presumed to have been used technically, unless the contrary appears on the face of the instrument; and words of definite legal significance, are to be understood as used in their definite legal sense. Nye v. Lovitt, 92 Va. 710, 24 S. E. Rep. 345. In this case a grant to "Jane C. Lovitt, during her natural life, and at her death then to the heirs of her body and their heirs forever," was construed to give to the heirs of the body of Jane C. Lovitt a contingent remainder in the land conveyed, and the persons answering the description of the "heirs of her body" at the time of her death took the fee-simple estate.

Context—Commissioner's Deed.—In construing a deed, its entire context must be considered; and where a deed was made in a pending suit by commissioners appointed for that purpose, it was held, that the deed was to be considered together with the report of the commissioner ascertaining the boundaries of the land so conveyed, and the decrees directing and confirming the sale. Byrd v. Ludlow, 77 Va. 483.

Construing Two Deeds Together.—Where a deed was made to correct a mistake and supply an omission in a previous deed between the same parties, it was proper for the court to construe the two deeds together. King v. Norfolk, etc., R. Co., 90 Va. 210, 17 S. E. Rep. 868.

But in construing one deed, another deed from the same grantor to a different grantee, which refers to a different subject-matter, cannot be looked to in order to ascertain the meaning of the grantor in the first deed. Nye v. Lovitt, 92 Va. 710, 24 S. E. Rep. 345.

Application of Rule in Shelley's Case.—In order for the rule in Shelley's Case to apply to a deed, the word "heirs" must be used in its technical sense. A deed to the grantor's grandson provided that after the death of the grandson the estate should go to such persons as answered the description of his "heirs at his death." It was held, that the rule in Shelley's Case was not applicable to this deed, as the word "heirs" was not used in its technical sense, and the act of 1785 dispensing with words of limitation in a grant of a fee-simple estate, was not intended to extend the rule to cases to which it did not formerly apply. Taylor v. Cleary, 29 Gratt. 448.

B. ESTATES CONVEYED.

1. PROPERTY CONVEYED IN GENERAL.

Deed Porporting to Convey River Bed.—The ownership of the bed of a navigable river is in the commonwealth, and cannot be the subject of private grant; a deed, therefore, purporting to convey such a river bed, was held void. Home v. Richards, 4 Call 441.

Bed of a Non-Navigable Stream.—Where an individual having title to lands lying on both sides of a watercourse not navigable, makes a deed to the land lying on one side thereof and bounded thereby, the grantee in such deed is entitled to a moiety of the bed of the watercourse, unless the deed clearly excludes such construction of it. Hayes v. Bowman, 1 Rand. 417; Mead v. Haynes, 3 Rand. 33; Crenshaw v. Slate River Co., 6 Rand. 245; Carter v. Ry. Co., 26 W. Va. 644. But this rule of course is inapplicable, where the grantor reserves expressly or by implication the bed of a stream when granting the lands on either side thereof. Carter v. Ry. Co., 26 W. Va. 644.

Deed to Slave to Take Effect in Futuro—Increase.—Where a gift of a slave woman was made, to take effect *in futuro*, children born before the date at which the gift was to take effect, were held to belong to the grantor. Patterson v. Franklin, 7 Leigh 590.

Entire Interest of Grantor Passes.—A deed of conveyance in which the grantors recited that the property conveyed was subject to a life estate, when in fact it was subject to an estate for years only, was held good as a transfer of the entire estate of the grantors in the property. Wiseley v. Findlay, 3 Rand. 361.

Effect of a Conveyance to a "Mother and Her Children."—The effect of a conveyance to a mother and her children presents some conflict in Virginia. In the late case of Vaughan v. Vaughan, 97 Va. 322, 33 S. E. Rep. 603, JUDGE RIELY, in a dictum said, that such words standing alone would undoubtedly convey a joint estate to the mother and her children. There is no doubt that this is the plain and natural import of such words, but these words have been construed in a number of Virginia cases to have a different effect. The rule which has been laid down in a long line of Virginia cases is, that where the context and language of the instrument, whether a deed or will, taken together as a whole, manifests an intention that the mother shall take the whole estate, although expressed to be to her and to her children, the mentioning of the children in such case merely indicates the motive or consideration for the gift, and does not vest in them any interest in the estate. Rhett v. Mason, 18 Gratt. 541; Mauzy v. Mauzy, 79 Va. 537; Richardson v. Seever, 84 Va. 259, 4 S. E. Rep. 712; Bain v. Buff, 76 Va. 371; Waller v. Catlett, 83 Va. 202, 2 S. E. Rep. 282; Fackler v. Berry, 93 Va. 565, 25 S. E. Rep. 887; Walke v. Moore, 95 Va. 729, 30 S. E. Rep. 374; Jones v. Jones, 96 Va. 749, 32 S. E. Rep. 463.

In the recent case of Lindsey v. Eckels (Va. 1901), 7 Va. Law Reg. 547, the court seems to approve the dictum of JUDGE RIELY, in Vaughan v. Vaughan, 97 Va. 322, 33 S. E. Rep. 603. Though the question was not squarely presented in this case, the view expressed by the court would seem to indicate that should the question arise they would construe a conveyance to a "mother and her children" to carry a joint estate.

Deed to Two Persons—Share of Each in Property.—Upon a joint purchase by two parties, in the absence of proof of any agreement between them to the contrary, they are entitled to the land in equal proportions. Jarrett v. Johnson, 11 Gratt. 327.

Purchase by Partners—Effect.—Where real estate is purchased for partnership purpose and a conveyance is made to the partners in the name of the firm, the partners are tenants in common of the

estate and hold the legal estate subject to the equities of the partnership. Jones v. Neale, 2 P. & H. 339.

Deed to Land Which Is in Adverse Possession of Another.—A deed purporting to convey land which was at the date of the deed, and continued to be, in the actual adverse possession of another, was held to be ineffectual to pass title to the grantee therein. Kincheloe v. Tracewells, 11 Gratt. 587; Early v. Garland, 13 Gratt. 1.

Deed by a Tenant in Common—Estate Conveyed.—A deed from a tenant in common, carries to his grantee only the undivided interest of the grantor, no matter by what description the property is conveyed. Woods v. Early, 95 Va. 307, 28 S. E. Rep. 374.

Deed Assigning "All Debts Due" the Grantor.—A deed which assigned all the debts of the grantor due at the time of the making of the deed, was held not to pass debts contracted, which had not become due and payable at the time of the assignment. Collins v. Janey, 3 Leigh 389.

Under the words in a deed, of "all debts due to the grantor," it was held, that the indebtedness of a partner of the grantor to the partnership passed; these words were also held to pass a claim which the grantor had against a foreign government, for damages for the detention of his ship. Griffin v. McCaulay, 7 Gratt. 476.

Shares in a National Bank.—A deed which conveyed all the grantor's property "real and personal" was held to embrace and convey all the shares which he owned in a national bank. Feckheimer v. Bank, 79 Va. 80.

Deed to Trees to Be Chosen by the Grantee—Assignment.—Where there was a deed of sale to timber trees standing, to be chosen by the vendee, it was held that an interest passed which the vendee might assign before making the election; and the assignee having chosen and marked the trees, he was allowed to maintain trover upon a conversion of them by the vendor, although the vendor had no notice of the election. McCoy v. Herbert, 9 Leigh 548.

Description in a Deed—Property Conveyed.—A deed executed by a father to his two daughters upon certain trusts, declared on the face of the deed, contained the following clause, descriptive of the property conveyed: "First. All his household and kitchen furniture at present at the family residence in the town of L. and on the home farm; all live stock, grain, hay, and products of all kinds; all his farming implements of every description on the home place or Gabbert land; all debts, claims, and rights of recovery which the said grantor then possessed, and any and all other personal estate of any and every description whatsoever." *Held*, that this description included all money possessed by the grantor at the time said deed was executed and delivered, and that any subsequent attempt to dispose of the same by will or otherwise would be inoperative. Fry v. Feamster, 36 W. Va. 454, 15 S. E. Rep. 253.

Right in Adjoining Lands Passes by Deed.—After the conveyance of a parcel of land in fee simple, a deed contained the following clause: "Also the right of digging for coal under the adjoining land lying east of said lot,"—and after describing it, continued, "together with all and singular the tenements, hereditaments and appurtenances to the said lot or parcel of ground belonging, with the right of digging for coal as aforesaid, except the right of ferry and the use of the river shore for the purpose of ferrying to and from the same at any place convenience may require." Also a covenant warranting the lot or parcel of ground, "with the right of digging for coal as aforesaid." It was held, that this was a conveyance of the absolute property in the coal, and the grantee had the exclusive right to mine and remove the same. List v. Cotts, 4 W. Va. 543.

Conveyance to "High-Water Mark."—The general rule is, that a conveyance to "high-water mark" carries with it as an incident of the conveyance, the land between high and low-water mark. The grantor may limit this riparian right of the grantee and exclude the land between high and low-water mark from the operation of the deed, but his intention to do so must clearly appear from the deed. Waverly, etc., Co. v. White, 97 Va. 176, 33 S. E. Rep. 534; Groner v. Foster, 94 Va. 650, 27 S. E. Rep. 493.

Remainders—Time of Vesting.—Where conveyance is made in trust for the benefit of a wife for life, and after her death to go to her children, the children who are in existence at the time of the execution of the deed take vested remainders at once, and their estate does not await the expiration of the life estate. Diehl v. Cotts (W. Va. 1900), 37 S. E. Rep. 546.

Vested Remainders—After-Born Children.—Where land is conveyed to the "lawful heirs" of a husband and wife, who have at the time of the conveyance children living, the children living at time of the deed take vested remainders, which will open up and let in after-born children. Buford v. North Roanoke, etc., Co., 90 Va. 418, 18 S. E. Rep. 914.

Deed in Consideration of Future Support.—It is a well-settled rule that where land is conveyed in consideration of the future support of the grantor, or in consideration that the grantee will pay him an annuity for life, such agreement as to the consideration, does not create a lien upon the land so conveyed. Brawley v. Catron, 8 Leigh 522; McCandlish v. Keen, 13 Gratt. 615, and *foot-note*; Crim v. Holsberry, 42 W. Va. 667, 26 S. E. Rep. 314.

Deed Only Passes the Grantor's Interest.—Land was devised to a party and his heirs, but if he died without heirs the property was to go to a third party. The devisee made a deed to the land during his lifetime and then died without heirs. It was held, that the deed only passed the devisee's interest in the land, and it was impossible for the purchaser to hold adverse possession of the land before the death of the devisee without heirs. Elys v. Wynne, 22 Gratt. 224.

Variance between Granting Clause and Habendum.—A deed in the granting clause, "granted and conveyed to A" the land therein described, and concluded, "to have and to hold to the *said* B." It was held that this deed was not sufficient to show title to the land in B. Cox v. Douglass, 20 W. Va. 175.

Conveyance of "All the Property" of the Grantor—Effect.—A conveyance of "all the estate, both real and personal" to which the grantor was "entitled in law or equity, in possession, remainder or reversion," was held valid to pass the grantor's whole estate. But the registry of a deed conveying land by such general description, is no notice in law, to a subsequent purchaser of the grantor, of the existence of said deed. Mundy v. Vawter, 3 Gratt. 518.

Words of Purchase—Construction.—By a deed dated in 1769, certain slaves were given to a daughter of the donor, and her husband for and during their natural lives, or that of the longest liver of them; and, after the decease of them both, the said slaves and their increase to be equally divided among the heirs of her body; and, in default of such heirs, to return and be divided equally between the donor's

son and other daughter, their heirs and assigns forever. By virtue of this deed, the first female donee took an estate for life only; the words "heirs of her body," coupled with the words, "equally to be divided between them," being to be construed not as words of limitation, but of purchase, describing the persons intended to take. Self v. Tune, 6 Munf. 470.

Released Deed—Effect.—Under the provision of sec. 2439 of Code of 1887 a release deed is effectual to convey all the right, title, and interest of the grantor in the premises released, whether he was at the time in the possession of the premises or not. Harman v. Stearns, 95 Va. 58, 27 S. E. Rep. 601.

Where Grantor Takes a Purchase Money Mortgage.—Where land is conveyed and the purchaser at the same time gives back a mortgage or other encumbrance to secure the purchase money, he does not thereby acquire any such seisin or interest as will entitle his wife to dower, or his creditor to subject the land for his debts discharged by the mortgage. In such cases, the deed and the mortgage are regarded as parts of the same contract, and constitute but a single transaction, investing the purchaser with seisin for a transitory instant only. In the same manner a deed of defeasance forms with the principal deed but one agreement, although it be by separate and distinct instruments. Gilliam v. Moore, 4 Leigh 32; Wilson v. Davisson, 2 Rob. 384; Summers v. Darne, 31 Gratt. 791; Cowardin v. Anderson, 78 Va. 89; Straus v. Bodeker, 86 Va. 543, 10 S. E. Rep. 570; Roush v. Miller, 39 W. Va. 638, 20 S. E. Rep. 663; George v. Cooper, 15 W. Va. 666; Hurst v. Dulaney, 87 Va. 444, 12 S. E. Rep. 800.

If both instruments bear date the same day, it will be presumed that they were executed at the same time in the absence of proof to the contrary. And even where the mortgage bore date subsequently to the date of conveyance, and it appeared that they were acknowledged on the same day and recorded at the same time, it was held, that it might be inferred that they were executed together, and intended to take effect at the same time. Summers v. Darne, 31 Gratt. 791. As to the effect of deed of trust to secure purchase money, see generally, monographic *note* on "Deeds of Trust."

Deed of Trust to Secure Part of the Purchase Money—Effect.—A conveyance was made to a husband, who as a part of the same transaction, reconveyed it to a trustee to secure two-thirds of the purchase money, although none of the purchase money had been paid. He subsequently sold the land to his grantor for the amount agreed to be paid by him, and conveyed same to his grantor by a deed from himself and wife, which was lost before being admitted to record. It was held, that whatever might be the claim of the wife on the one-third of the purchase price for which no lien was reserved, she had no claim on the land for dower. Building, etc., Co. v. Fray, 96 Va. 559, 32 S. E. Rep. 58.

Proviso in a Deed as to Boundaries—Present Grant.—A party agreed to sell a tract of land, parcel of a larger tract held by him, to consist of equal quantities of bottom and hill land, the boundaries of the bottom being fixed, but its quantity unknown. The grantor by deed conveyed a tract of land within specified bounds supposed to contain equal quantities of bottom and hill land, with a proviso, inserted after the conveying part of the deed, that if the specified bounds contained less, or contained more, hill than bottom, in the one case, one of the lines described in the deed should be drawn in so as to exclude the excess of hill land, and in the other case, that the same line should be thrown out so as to include as much of hill as bottom. It was found by survey that the lines described in the deed, contained seventy-six acres less of hill than bottom, so that the line specified in the proviso was thrown further out to include the seventy-six acres of hill. It was held, that the proviso was not a mere contract to convey the additional seventy-six acres of hill land, but that the seventy-six acres of hill land were conveyed by the deed, and that with sufficient certainty. Richards v. Mercer, 1 Leigh 125.

Meaning of the Word "Contiguous."—Where land was described in the deed as a certain "estate and the lands contiguous thereto," a tract of land separated therefrom by intervening lands of other parties, and distant three-quarters of a mile, was held not to be embraced within the deed. Holston, etc., Co. v. Campbell, 89 Va. 396, 16 S. E. Rep. 274.

Grant to a Town—Rights of the Town.—An act of assembly of 1799, provided, that a deed of conveyance made by James M. Marshall, to the justices of the county of Frederick, and the mayor and aldermen of the borough of Winchester, for the public square, occupied by the county buildings, should be as good and valid as if such deed had been made to an individual. It was held, that this act did not confer upon the city of Winchester the exclusive right to determine and direct the uses to which the property should be applied. County of Frederick v. City of Winchester, 84 Va. 467, 4 S. E. Rep. 844.

Effect of a Conveyance "Forever to Hold for Life."—A deed conveyed land to the grantee forever, to hold for his lifetime. In such case as the premises would only convey a fee by virtue of the statute, and by the statute the whole deed was to be looked to in order to ascertain what estate was intended to be passed, it was held, that the *habendum* in this deed was not void, but was valid to pass the life estate to the grantee. Humphrey v. Foster, 13 Gratt. 653.

Effect of a Second Deed by a Grantor.—The owner of land having conveyed it by deed duly executed and delivered, a second deed from him to the same grantee is wholly inoperative. Evans v. Spurgin, 6 Gratt. 107.

2. EASEMENTS AND APPURTENANCES.

Rights Which Pass as an Incident to the Grant.—Where property is conveyed, everything which belongs to it or which is used with it, and which is reasonably essential to its enjoyment, whether specially mentioned therein or not, passes as incident to the principal thing, or as a part of it. Scott v. Moore, 98 Va. 668, 37 S. E. Rep. 342.

A conveyance of property to which an easement is appurtenant, and without which the easement cannot be granted, made by an assignee in bankruptcy, implies the transfer of the easement with the property—notwithstanding it does not appear that the use of the easement was necessary to the enjoyment of the property, or that at the time of the conveyance the easement was, in fact used with the property. Warren v. Syme, 7 W. Va. 474.

General Rules as to Easement and Appurtenances.—Where, at the time of the purchase of real estate, there is a road, or right of way, used by the public, such as a public highway, or a road used so long that there may be a presumption of a dedication to the public, the purchaser takes this land subject to such right; and he is not protected even by deed of warranty against incumbrances. Dea-

cons v. Doyle, 75 Va. 258; Jordan v. Eve, 31 Gratt. 1; Patton v. Quarrier, 18 W. Va. 447.

Where no private right of way or other easement is reserved in the deed itself, and the purchaser has no notice of any such claim, he takes the property without the burden of any such claim, either from the grantor or any person claiming under him. Deacons v. Doyle, 75 Va. 258; Scott v. Beutel, 23 Gratt. 1; Patton v. Quarrier, 18 W. Va. 447.

Where the deed conveys, without reservation, the grantee takes all conveyed by the deed unincumbered, unless in some way notice is brought home to him that the land is sold subject to the incumbrances of some easement or privilege in another person, or in the public. Deacons v. Doyle, 75 Va. 258; Patton v. Quarrier, 18 W. Va. 447.

Present Grant—Easement by Implication.—A writing between parties, signed and sealed, by which the owner of a lot and the owners of other adjacent lots, agree that the latter, who sunk a well on the lot of the former, should have access to it forever, and might use water from it at all times—the writing indicating that the parties contemplated no other assurances, was held to be a present grant of the right to use the well. Such a deed though it contains no express declaration that the right granted should pertain to the adjacent lots, but provides that neither of the grantees should dispose of the easement, unless at the same time he should dispose of his lot, was held to annex a servitude by implication to the respective lots, as an easement appurtenant to each. Warren v. Syme, 7 W. Va. 474.

Easement Appurtenant—Restraint upon Alienation.—A provision in a deed, creating a servitude upon an estate and annexing to it another estate, as an easement appurtenant to the latter, declaring that the grantee shall not dispose of the easement separately from the property to which it is annexed, is not a restraint upon alienation that is objectionable. Warren v. Syme, 7 W. Va. 474.

Right of Drainage—Necessity for a Deed.—The right of drainage through the lands of another is an easement requiring for its enjoyment an interest in such lands which cannot be conferred except by deed of conveyance in writing. Pifer v. Brown, 43 W. Va. 412, 27 S. E. Rep. 399.

Grant Does Not Create an Easement—West Virginia Statute.—When the owner of two tracts of land has used a way to and from one, over the other, no matter how long, and he grants the former tract without mention of any way, unless the way is necessary to the enjoyment of the tract granted, the mere grant of the land does not create or confer a way appendant, appurtenant, or in gross. The statutory declaration that a deed unless an exception be contained therein, shall be construed to include appurtenances, does not apply to the *creation* of easements, but only to the transfer of those already existing. Standiford v. Goudy, 6 W. Va. 364. Upon the subject of easements and appurtenances, see generally, monographic *note* on "Easements" appended to Hardy v. McCullough, 23 Gratt. 251.

C. RESERVATIONS AND EXCEPTIONS.

Reservation in a Deed Must Be Certain.—Where there is an intention on the part of the grantor to except from the operation of the deed certain land which would otherwise be covered by such deed, the land intended to be excepted must be described with certainty in order to withdraw it from the operation of the deed. Butcher v. Creel, 9 Gratt. 201.

But uncertainty in a reservation in a deed may be cured by the election of the grantor; but such election must be made within a reasonable time. Benn v. Hatcher, 81 Va. 25.

Reservation of a Vendor's Lien—Equitable Estate.—A vendor's lien may be reserved on the face of a deed conveying an equitable as well as a legal estate, and in the absence of fraud or injustice, the vendor may take a reconveyance of the property conveyed in discharge of the balance of the purchase price. If, however, such reconveyance be set aside, the vendor's lien, in the absence of fraud or injustice, will be revived and enforced for the benefit of the vendor. In such case, the doctrine of estoppel has no application. Dingus v. Minneapolis, etc., Co., 98 Va. 737, 37 S. E. Rep. 353.

Construction of a Reservation.—A deed of conveyance contained the following clause: "The parties of the first part reserve unto themselves and do not convey by this deed, the equal one-half part of the usual royalty of one-eighth of all the petroleum or oil in and underlying the tract of land hereby conveyed." This provision was held to be an exception from the operation of said deed, reserved to the grantors, of the title in fee to the one-sixteenth of the oil in place in and underlying said tract of land, and to be delivered to them when produced as royalty, without expense to them for production. Harris v. Cobb (W. Va. 1901), 38 S. E. Rep. 559.

Reservation of a Tract Already Sold but to Which No Deed Has Been Made.—A deed conveying a tract of land by boundary, excluded a tract of fifty acres, theretofore sold to another, other than the grantee in such deed. This deed was held not to pass the title to the fifty acres excluded, even though no deed for said fifty acres had been made to such other person who purchased it. Low v. Settle, 32 W. Va. 600, 9 S. E. Rep. 922.

Retaining a Narrow Strip of Land—Presumption.—Generally, it will not be presumed that a party granting land intends to retain a long narrow strip next to one of his lines; but if the courses and distances approximate closely to a line or corner of the tract owned by the grantor—especially if the description in the deed corresponds, exactly or substantially, with the description in the title papers under which the land is held—it will be presumed that the lines mentioned are intended to reach the corners and run with the lines of the tract, though the trees marked and described have disappeared before the making of the deed. W. M. & M. Co. v. Peytona C. C. Co., 8 W. Va. 406.

Support of the Grantor as Consideration—Effect.—By deed, land was conveyed upon a consideration that the grantees would support the grantor for life. The deed taken as a whole showed the intention to be to charge the real estate conveyed as security for the performance of the consideration. It was held not necessary that a lien on the land for such support should be expressly reserved on the face of the deed. McClure v. Cook, 39 W. Va. 579, 20 S. E. Rep. 612.

D. CONDITIONS.

Whether a Condition Is Precedent or Subsequent Depends upon Intention of the Parties.—Whether a condition contained in a deed is a condition precedent or subsequent, is a question of intention in the grantor, to be gathered from the whole instrument. But whether the condition be precedent or subsequent, if the act of the party who imposed the condition makes its performance impossible, or unnecessary, the condition is no longer binding, and

the estate conveyed by the deed, in which it is contained, is discharged therefrom. Jones v. Chesapeake, etc., R. Co., 14 W. Va. 514.

General Words Insufficient to Create a Condition.—When, in a deed of bargain and sale, made by a contributor to an incorporated academy, the clause of conveyance to the president and trustees is accompanied by general words, that, alone, might or might not create or imply a condition, upon the failure to perform which the estate in the president and trustees would, *ipso facto*, or upon entry, determine and revert to the bargainor, followed by words declaring and defining a condition on which the estate will revert; and, in a subsequent deed, without the appearance of any other intent than the release and extinguishment of the right of reverter, the general words are transcribed, and the special provision is omitted—the former words are not construed to create or imply such a condition. Mercer Academy v. Rusk, 8 W. Va. 373.

Condition for the Benefit of a Stranger to the Deed.—A condition reserved in a common-law conveyance, for the benefit of a stranger to the deed is void, and a court of equity will not enforce as a charge, a provision in a deed, which was void at law, as a condition. Kellam v. Kellam, 2 P. & H. 357.

Inconsistent Conditions.—Stipulations, reservations, exceptions, or conditions in a deed, which are inconsistent with, and tend to depreciate or destroy, the estate or interest granted, are void. Riddle v. Town of Charleston, 43 W. Va. 796, 28 S. E. Rep. 830.

Restraint upon Alienation.—The unlimited power of alienation is an essential incident of a fee-simple estate. Therefore, where a deed conveyed land to four grantors in fee simple, a subsequent clause giving one of them power to dispose of the whole at her pleasure was held invalid, applying the rule that where two clauses in a deed are repugnant, the first shall prevail. Blair v. Muse, 83 Va. 238, 2 S. E. Rep. 31.

Distinction between a Condition and a Charge.—A provision in a deed declaring that the property conveyed should be subject to the maintenance of the grantor, was held not to be a condition upon the breaking of which the grantor might re-enter, but was simply a charge upon the land, and only enforcible in equity. Pownal v. Taylor, 10 Leigh 172.

Grant for a Particular Purpose is Not upon Condition.—A grant of land was made for a consideration to a trustee upon a trust that he should "at all times permit all the white religious societies of Christians and members of such societies to use the land as a common burying ground and for no other purpose." This was held not to be a grant upon a condition subsequent, and the heirs of the grantor who brought ejectment after it had ceased to be used for the purpose named in the deed, failed in their action. Brown v. Caldwell, 23 W. Va. 189.

Grant of Land to a Municipality upon Condition—Construction.—A party granted to a corporation of a town, having by charter a general power to purchase and hold lands, an acre of ground for the use of the town for the purpose mentioned in the deed. The deed then stated that the land was granted in consideration of the courthouse and jail having been built thereon, and also in consideration that the said courthouse and jail, and the judiciary proceedings of the town, should be continued to be kept and held upon the premises; with a covenant by the grantor that the corporation should peaceably enjoy the property so long as the judicial proceedings of the town should continue to be held thereon: and with a proviso that in case the judicial proceedings should ever be discontinued to be held on the land thereby conveyed for that purpose, the property should revest in the grantor. The courthouse and jail and the judicial proceedings of the town continued to be maintained and held on the land so granted; but the corporation erected other buildings thereon, and leased them to individuals. It was held, such use of the land was competent to the corporation, under the terms of the grant, and the grantor had no right to interfere. Bolling v. Mayor, 8 Leigh 224. See also, Crow v. Supervisors, 5 W. Va. 245.

Breach of a Condition Subsequent—Effect.—At common law where there was a breach of a condition subsequent in a deed granting land, it was necessary that there should be an entry by the grantor or his heirs in order to work a forfeiture of the estate. In West Virginia (and in Virginia also, see Va. Code, 1887, sec. 2796 *et seq.*) the necessity of entry by the grantor of his heirs has been abolished by statute, and the grantor may maintain ejectment upon the failure of the grantee to perform the condition by which his estate is determined. Martin v. Ohio R. R. Co., 37 W. Va. 349, 16 S. E. Rep. 589.

Right of Re-entry for Rent in Arrear.—Where a deed was made reserving a yearly rent, with a condition that the grantor might re-enter if the rent was not paid, after demand made upon the premises, if no property was found on the land, whereof distress could be made, it was held that the grantor, upon demand made, and failure to pay, no property being found on the land, might re-enter, and grant over to another. Wartenby v. Moran, 3 Call 491.

E. WARRANTIES.

Kinds of Warranties.—Warranties of title in conveyances are either "general" or "special." If the grantor would limit his liability, he must insert a covenant of "special warranty." If he does not do so, but conveys with "warranty," the covenant must be regarded as a general warranty, as the deed is always construed most strongly against the grantor. Allen v. Yeater, 17 W. Va. 128.

No Implied Warranty upon a Grant of Land.—A grant of land is a mere transfer of such title or right thereto as the grantor, at the time of the grant, may hold or have, absolutely or contingently. A grant does not imply an assertion of title in the grantor, or a covenant with the grantee to warrant the land. W. M. & M. Co. v. Peytona C. C. Co., 8 W. Va. 406.

Though the grantor has an equitable estate at the time of a conveyance, if there is no general warranty, and no recital in the deed that the grantor has a legal estate, such deed only gives a lien on the equitable estate, and does not operate by way of estoppel as to a legal estate afterwards acquired. Doswell v. Buchanan, 3 Leigh 365.

Where a vendor by his deed conveys a tract of land by metes and bounds, for an entire sum, stating in his deed the quantity to be a definite number of acres, this on its face is a sale not by the acre, but in gross, and *prima facie* without any implied warranty of quantity. Hansford v. Chesapeake Coal Co., 22 W. Va. 71; Anderson v. Snyder, 21 W. Va. 632.

The Warranty Cannot Enlarge the Estate Conveyed.—Where a deed conveyed the "entire interest" of the grantor in certain lands, and contained a clause of general warranty, it was held that the warranty was limited and restricted to the interest conveyed, and did not warrant the land, as a covenant of

warranty applies to the estate conveyed, and it cannot enlarge that estate. Hull v. Hull, 35 W. Va. 155, 13 S. E. Rep. 49.

Application of Warranties to the Land Conveyed.—When a grantor, having title to a part of a tract of land, but not in fact having title to the residue thereof, covenants to warrant generally a quantity not exceeding that to which he has title, and to warrant specially a quantity equal to or exceeding that to which he has not title, the covenant of general warranty will be construed as applicable to the land to which the covenantor has title, and the covenant of special warranty, to the land to which he has not title. W. M. & M. Co. v. Peytona C. C. Co., 8 W. Va. 406.

Encumbrance on Property Conveyed—Effect of Warranty.—A person bought land and took from his vendor a deed with general warranty. The land at the time of the conveyance was encumbered with a deed of trust executed by his vendor. It was held that such purchaser had the right to have the unpaid purchase money remaining in his hands applied to the discharge of the said trust debt, the same not being otherwise satisfied. Douglass v. Rutherford, 25 W. Va. 708.

Deficiency in the Land—Effect.—A vendor sold a tract of land at a specified price without specifying in the written contract of sale the quantity of land sold, and bound himself to make a good deed to the purchaser therefor, and he afterwards conveyed the land by deed with general warranty, giving metes and bounds, and describing the tract as containing a fixed number of acres, more or less. It was shown by parol proof, that at the time of the sale the vendor represented the tract as containing the number of acres mentioned in the deed, and that on the faith of this representation the vendee made the purchase, and it was subsequently discovered that the quantity was materially less than that specified in the deed. It was held that in the absence of proof that the sale was one of hazard, the vendee was entitled in a court of equity, to compensation for the deficiency in the land. Sine v. Fox, 33 W. Va. 521, 11 S. E. Rep. 218; Depue v. Sergent, 21 W. Va. 326.

Easements on Land Conveyed—Effect of Warranty.—Land lying on the Ohio river was conveyed by a deed of general warranty, and called for low-water mark on said river as one of its boundaries. It was held, that the warranty was not broken by reason of the fact that the public owned an easement therein, and the state, or one of its municipal corporations, had perpetually enjoined the purchaser from building a wharf or private landing on the land below high-water mark, without obtaining a license to do so. Barre v. Flemings, 29 W. Va. 314, 1 S. E. Rep. 731.

Subsequently-Acquired Title—Effect.—The general rule is that where land is conveyed without warranty, the grantor is not estopped from setting up an after-acquired title. Doswell v. Buchanan, 3 Leigh 365.

But where a conveyance recites expressly or impliedly, that the grantor is seized of a particular estate which it purports to convey, the grantor is estopped to deny that such estate passed, although there is no warranty whatever. Reynolds v. Cook, 83 Va. 817, 3 S. E. Rep. 710; Townsend v. Outten, 95 Va. 536, 28 S. E. Rep. 958.

Where land conveyed with general warranty is not owned by the grantor at the time, but is subsequently acquired by him, such acquisition enures to the benefit of the grantee, because the grantor is estopped to deny, against the terms of his own warranty, that he had the title in question; but it does not operate actually to transfer the estate subsequently acquired. In fines, feoffments and other common-law recoveries, the warranty not only precluded the grantor or feoffor, but actually transferred the after-acquired estate or interest to the grantee or feoffee. Burtners v. Keran, 24 Gratt. 42; Raines v. Walker, 77 Va. 92; Gregory v. Peoples, 80 Va. 355. Upon the subject of estoppel by deed, see generally, monographic *note* on "Estoppel" appended to Bower v. McCormick, 23 Gratt. 310.

Release of Interest—Subsequent Assertion of Title.—The grantee in a deed released all her interest in the property conveyed, in consideration of the conveyance to her of other property by the grantor, which last-mentioned conveyance was made on condition that she should execute such release. It was held, that she could not thereafter assert any title or interest under the first-mentioned deed. Townsend v. Outten, 95 Va. 536, 28 S. E. Rep. 958.

Operation of a Warranty upon a Contingent Remainder.—Under the Va. statute (Code of 1887, § 2418) which provides that "any interest or claim to real estate may be disposed of by deed," a contingent remainder may be conveyed by deed; and a conveyance of a contingent remainder, where made with general warranty of title, was held to operate as an estoppel against the grantor who subsequently claimed that he had no estate in the land at the time of the conveyance. Young v. Young, 89 Va. 675, 17 S. E. Rep. 470; Burtners v. Keran, 24 Gratt. 42.

When a Deed with Warranty Amounts to Eviction.—Where at the time of a conveyance of land with general warranty, the land conveyed is actually in possession of a third party holding the same under a paramount title, the conveyance in itself amounts to an eviction *eo instanti*. Rex v. Creel, 22 W. Va. 373.

Conveyances under the Statute of Uses.—Conveyances operating under the statute of uses only pass such estate as a grantor had at the time; the warranty merely serving as a remedy, or operating to estop the grantor from denying the ownership of the estate at the time of the execution of the conveyance. Burtners v. Keran, 24 Gratt. 42.

Deed of Lease and Release.—A deed of lease and release with warranty, only conveys what the grantor may lawfully convey. Carter v. Tyler, 1 Call 165.

Effect of a Deed of Bargain and Sale.—A bargain and sale of land, intended, under the statute on the subject, to operate as a present conveyance or transfer, is not an assertion of title that will estop the bargainor, his heirs or assignees, from subsequent assertion of an after-acquired title, and does not imply a covenant of warrant. W. M. & M. Co. v. Peytona C. C. Co., 8 W. Va. 406.

Special Warranty—Effect.—A covenant of special warranty is not intended to bind the covenantor to indemnify the covenantee against eviction or damage by reason of any title or claim, not at the time of the execution of the covenant, in the covenantor or some person acquiring it from or through him. W. M. & M. Co. v. Peytona C. C. Co., 8 W. Va. 406.

If at the time of the execution of a grant or bargain and sale of land, with a covenant of special warranty, the title to the land be in a third person, not because of any act or default of the covenantor, and such person afterwards asserts and enforces the title against the covenantee, the covenant is

not thereby broken, and the covenantor is in no way responsible. In such case, if the covenantor, himself afterwards acquires the title to the land, the title does not, by reason of the special warranty, vest in the convenantee, and the covenantor is not estopped to assert it or grant it to another. W. M. & M. Co. v. Peytona C. C. Co., 8 W. Va. 406.

What Does Not Amount to a Covenant.—In a deed of conveyance of a freehold estate, words of lease do not amount to a covenant for quiet enjoyment. Black v. Gilmore, 9 Leigh 446.

IV. RECORDATION.

See monographic *note* on "Recording Acts."

V. EVIDENCE.

A. RECITALS AS EVIDENCE.

Parties against Whom Recitals Are Evidence.—Recitals in a deed are evidence against the grantor and all parties claiming under him, but such recitals are not evidence against third persons claiming not under but adversely to the deed. Recitals in deed do not operate as estoppels in favor of strangers who have not acted on or been misled by them; and formal statements and admissions unacted upon are not conclusive. Estoppels are founded upon and limited by intention, and do not extend to objects which were not contemplated. Hence, a recital in a deed may be an estoppel for one purpose, and not for another. Wiley v. Givens, 6 Gratt. 277; Hannon v. Hannah, 9 Gratt. 146; DeFarges v. Ryland, 87 Va. 404, 12 S. E. Rep. 805; McCullough v. Dashiell, 78 Va. 634. As to estoppel by a deed, see generally, monographic *note* on "Estoppel" appended to Bower v. McCormick, 23 Gratt. 310.

Recital Not Evidence against Strangers.—A recital in a deed, under the bankrupt act of 1841, that a person was, by the United States district court, declared a bankrupt, and that the grantor was assignee and was ordered to sell the property granted, is not evidence of the facts recited, against a person claiming the property otherwise than through or under the grantor. Warren v. Syme, 7 W. Va. 474.

A recital in a deed of partition that a person died, and that the parties to the deed are his heirs, is not evidence of these facts against strangers. Warren v. Syme, 7 W. Va. 474.

Presumption as to Truth of Recitals.—Where actual possession of land had been taken and held under a deed for a sufficient length of time to bar recovery by the original owner, such possession being adverse, it was held, that the regularities of the proceedings as recited in the deed would be presumed in support of the possession. Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 S. E. Rep. 232.

In Harman v. Stearns, 95 Va. 58, 27 S. E. Rep. 601, it was held, that a recital in a deed that the grantor therein was a widow, would be accepted as true, in the absence of evidence to the contrary, although it appeared from a will under which she claimed title that she was a married woman forty-seven years prior to the execution of the deed.

If plaintiffs in equity charge in their bill that a deed of marriage settlement under which they claim was executed before the marriage, though recorded afterwards; it being, also, expressed in the recital of the deed, that the same is made in contemplation of a marriage "shortly intended to be solemnized," etc.; and that allegation be not denied or noticed in the answer; it must be considered as admitted to be true, without further proof. Scott v. Gibbon, 5 Munf. 86; Browning v. Headley, 2 Rob. 340.

Recital That the Consideration Had Been Paid.—The vendor conveyed a tract of land by deed of absolute bargain and sale, in which there was a recital that the consideration had been fully paid. The vendor took the vendee's bonds for the amount of the purchase price, and continued to live on the land by virtue of parol agreement, that he should retain possession until the contract on the part of the vendee should be fully complied with. Notwithstanding the recital in the deed, the vendor was held to have an equitable lien on the land against a purchaser from the vendee having actual notice of the parol agreement. Duval v. Bibb, 4 H. & M. 113.

A vendor of land executed a conveyance to a purchaser, in which he acknowledged receipt of the purchase money, and subjoined to the deed a receipt in full for the same; yet upon proof that in fact the whole purchase money was not paid, he was allowed to recover the balance due him in equity. Wilson v. Shelton, 9 Leigh 342.

A deed conveying land contained an acknowledgment on its face that the purchase money had been paid, though in truth no payment thereof had been made. In an action for the purchase money, the defendant relied upon the recital as an estoppel, and the plaintiff believing that the estoppel would prevent their recovery at law, dismissed their action, and filed a bill in equity against the purchaser. It was held, that the plaintiffs were entitled to relief in equity in such case. Radcliff v. High, 2 Rob. 271.

Recital That Possession of Premises Had Been Delivered.—In Sheffey v. Gardiner, 79 Va. 313, it was held, that the fact that a deed recited that immediate possession had been delivered, was not sufficient to estop the covenantee from denying that he had gotten possession, even though his declaration in an action for breach of warranty of title, alleged no eviction.

Deed of Bargain and Sale—Recital of Consideration—Effect.—Prior to the Va. Code of 1850, the deed of bargain and sale was the ordinary conveyance of land, though others were sometimes used. Any valuable consideration, however small, is sufficient to support this conveyance; and the acknowledgment in the deed, of the payment, is conclusive of the fact, so far as to give effect to the conveyance. Ocheltree v. McClung, 7 W. Va. 232.

Recital of Authority to Make the Deed.—As against strangers setting up a title adverse to that conveyed by an officer authorized to sell, the recital of such authority as set forth in the deed should be taken as true. Robinett v. Preston, 4 Gratt. 141. In this case it was held not incumbent upon a person claiming under such deed, to produce any additional evidence of the authority of the officer to sell and convey the land. Robinett v. Preston, 4 Gratt. 141.

B. ADMISSIBILITY.

1. ADMISSIBILITY OF DEED.

Ancient Deed Unaccompanied by Possession.—A deed more than thirty years old, but which was not accompanied by possession, was held not admissible in evidence without proof of execution. Dishazer v. Maitland, 12 Leigh 524.

If the party relies alone upon the possession as proof of the authority of the instrument, such possession must, as a general rule, have continued not less than thirty years along with the deed. But in the absence of such possession, other circumstances are admissible to raise a presumption in

favor of the genuineness of the instrument. One of such circumstances often relied on, is the fact that the instrument is procured from the proper custody, and is otherwise free from just suspicion. Nowlin v. Burwell, 75 Va. 551.

Deed Made under Decree.—Where a deed of court was a necessary link in a claim of title, in order to show the authority of an officer to make the deed, it was held, that the decree and deed were admissible in evidence without the whole record, where the decree itself satisfactorily established the fact. Masters v. Varner, 5 Gratt. 168.

Unproved Deed without Possession.—A deed is not admissible in evidence in an action of ejectment where there is no proof of its legal execution, and no sufficient evidence of possession under it; and evidence of possession fifteen years after the date of said deed by a purchaser from the grantee therein, under his deed, was held not sufficient to entitle the former deed to be admitted. Shanks v. Lancaster, 5 Gratt. 110.

Unstamped Deed.—A deed though not stamped in accordance with an act of congress, is admissible in evidence; the act of congress not applying to proceedings in state courts. And it seems it is admissible in evidence in the United States courts, unless the omission to stamp it was with fraudulent intent. Hale v. Wilkinson, 21 Gratt. 75; Talley v. Robinson, 22 Gratt. 888.

Ancient Deed—Copy of Ancient Deed.—A deed of more than thirty years' standing requires no further proof of its execution than the bare production, where the possession has gone according to its provisions, and there is no apparent erasure or alteration. Roberts v. Stanton, 2 Munf. 129.

A legally certified copy of an ancient deed, recorded on the grantor's acknowledgment, and accompanied with possession of the land by the grantee, ought to be received as evidence, without any proof of the loss or destruction of the original. Rowletts v. Daniel, 4 Munf. 473.

In Caruthers v. Eldridge, 12 Gratt. 670, it was held, that an ancient deed might be introduced as evidence, though possession might not have been held for thirty years in accordance therewith, where such an account was given of the deed as might have been reasonably expected under all the circumstances of the case, and which afforded the presumption of genuineness.

Defectively Executed Deed.—If the proof, or acknowledgment, of a deed, made by a nonresident, of land lying in Virginia, be not certified according to law, though it should be admitted to record, it cannot be read in evidence as a recorded deed. But it will be sufficient at the trial, to prove the execution by one witness, though he be not a subscribing witness, if the subscribing witness be dead, or cannot be procured. Turner v. Stip, 1 Wash. 319.

A deed not acknowledged and not certified according to law, though actually admitted to record, cannot be read in evidence as a recorded deed, because recordation upon a defective acknowledgment is not a valid recordation. Raines v. Walker, 77 Va. 92. On the subject of acknowledgments, see generally, monographic *note* on "Acknowledgments" appended to Taliaferro v. Pryor, 12 Gratt. 277.

Deed Improperly Admitted to Record.—The clerk of a county or corporation court has no authority to admit to record a deed which does not convey land lying in its county or corporation. And a copy of such deed, authenticated by the clerk, is not competent evidence in the place of the original. Pollard v. Lively, 2 Gratt. 216.

Deed Not Required by Law to Be Recorded.—A certified copy of the deed recorded upon the acknowledgment of the grantor, not required by law to be recorded, is evidence against the grantor, and all claiming under him, *subsequent* to the acknowledgment. But it is not evidence against any person, deriving title from the grantor, *before* the acknowledgment. Ben v. Peete, 2 Rand. 539.

Copies of Deeds.—A copy of a deed acknowledged by the grantor before justices, by them certified to the clerk for record, and by him certified to be a true copy, was held admissible as primary evidence, equivalent to the original. Baker v. Preston, Gilmer 235.

A copy of a deed may be read in evidence, upon the oath of the party, that he has searched the clerk's office and all other places where he suspected that the deed might be found, and has not been able to find the original. Ben v. Peete, 2 Rand. 539.

Office Copies of Foreign Deeds.—The statutes of Virginia concerning the authentication of foreign deeds, apply to the original deeds, not copies. Office copies of deeds registered in another state, are not admissible as evidence in this state, unless duly authenticated according to the laws of the United States, and an office copy of a deed registered in North Carolina, is not admissible as primary evidence in this state, unless there be some statute of North Carolina making it so. Petermans v. Laws, 6 Leigh 523.

Copy of a Copy of a Foreign Deed.—An original deed conveying land lying in Virginia was admitted to record outside of that state, upon proof and authentication which were not sufficient to have it admitted to record in Virginia. A copy of this deed was subsequently admitted to record in Virginia, but the absence of the original deed was not accounted for. It was held, that a copy of the copy so admitted to record was not admissible in evidence to establish the recitals in the deed. Barley v. Byrd, 95 Va. 316, 28 S. E. Rep. 329.

Reservation in a Deed.—The plaintiff in an action of ejectment may introduce in evidence a deed for the purpose of supplying the link in his chain of title by means of a reservation contained in such deed, from which the grant to him may be presumed as against the defendant. Va., etc., Co. v. Fields, 94 Va. 102, 26 S. E. Rep. 426.

Indorsement on a Deed.—An indorsement on the back of a deed, relating to the subject-matter of the deed, is in fact a part of the deed, and should go to the jury as evidence along with the deed. Stone v. Hansbrough, 5 Leigh 422; Shermer v. Beale, 1 Wash. 11; Gordon v. Frasier, 2 Wash. 130.

Altered Deed.—Every alteration on the face of a written instrument detracts from its credit, and makes it suspicious; and this suspicion the party claiming under it is ordinarily bound to remove. Elgin v. Hall, 82 Va. 680; Slater v. Moore, 86 Va. 26, 9 S. E. Rep. 419.

Commissioner's Deed.—In Cales v. Miller, 8 Gratt. 6, it was held, that a party offering in evidence a deed which purported to be executed by a commissioner under a decree of court, and conveying land, must offer with it so much of the record of the cause in which the decree was made, as would show the authority of the commissioner to convey the land described in the deed.

Where a deed made by a commissioner under a

decree was offered in evidence as a connecting link in the party's chain of title, it was held necessary that such party should introduce with it, so much of the record of the suit in which such decree was made, as would satisfactorily show that the parties who had the legal title to the land were parties to the suit, and as would identify the land. Waggoner v. Wolf, 28 W. Va. 820.

2. EVIDENCE TO PROVE EXECUTION AND CONTENTS.

Attesting Witnesses.—It is a general rule, that the evidence of a subscribing witness of a deed, is the best and it must be adduced if it can be had; and if it cannot, proof of his handwriting will be required. Gilliam v. Perkinson, 4 Rand. 325.

Proof of the Grantor's Handwriting.—Where the subscribing witnesses of a deed are dead, and it is shown to be impracticable to prove their handwriting, evidence of the handwriting of the party himself is admissible. Gilliam v. Perkinson, 4 Rand. 325; Raines v. Philips, 1 Leigh 483.

Declarations of an Agent as to Omissions from Deed.—The declaration of a person who had been the agent in procuring a deed for another, made either before the negotiation of the deed was commenced, or after the execution of the deed was complete, were held not competent evidence against the grantee in the deed, to show that provisions which were intended to be inserted in the deed, had been fraudulently omitted. Smith v. Betty, 11 Gratt. 752.

Extrinsic Evidence to Identify the Land.—Where land is conveyed by a general description, extrinsic evidence is admissible to ascertain the location of adjoining tracts of land called for, so as to apply the deed to its proper subject-matter. Where the land conveyed can be sufficiently identified with the aid of extrinsic evidence, this is all that is required. Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 S. E. Rep. 233.

Proof That a Deed Was Misunderstood.—Proof that a deed when read was misunderstood in a very material effect, may tend to show that it was misread, and is therefore admissible evidence. But if the deed was correctly read, the misunderstanding of it by a party cannot affect its validity as a deed. Harrison v. Middleton, 11 Gratt. 527.

Variance between Deed and Prior Agreement—Presumption.—Where there is a variance between a preliminary contract for the sale of land, and the subsequent deed of conveyance, the presumption is that the deed expresses the final will and intent of the parties, and the burden of describing this is on the party who denies the effect of the deed. This presumption must be rebutted by the clearest and most satisfactory proof. Snyder v. Grandstaff, 96 Va. 473, 31 S. E. Rep. 647; Donaldson v. Levine, 93 Va. 473, 25 S. E. Rep. 541; Carter v. McArtor, 28 Gratt. 360.

Proving the Execution—Burden of Proof.—The burden of proof of the formal execution of a deed, when put in issue under the plea of *non est factum*, rests upon the party claiming under the deed; and that proof must show that the deed was signed, sealed and delivered by the authority of the grantor as his deed. Newlin v. Beard, 6 W. Va. 110.

Proving the Contents of a Lost Deed—Memorandum of the Grantee's Attorney.—In a suit to set up a lost deed alleged to have been made more than one hundred years before the commencement of the suit, a memorandum in the handwriting of the grantee's attorney, found among the papers of the grantee, which stated that the land had been granted to the grantor, and by him and wife conveyed with general warranty to the grantee, was held, not in itself, evidence of the execution of such deed; nor was such memorandum admissible as a declaration against interest in a suit where no relief was sought against the attorney, or his personal representative; nor was it admissible as part of the *res gestæ*, as the transaction to be explained or proved was the execution of the deed, and the memorandum neither accompanied nor explained the fact in issue. Barley v. Byrd, 95 Va. 316, 28 S. E. Rep. 329. In this case, the certificate of the auditor showing that the lands were charged to the grantee for a great number of years after the date of the alleged deed, or any number of intermediate conveyances of those claiming under the alleged grantee, unaccompanied by possession, was held not sufficient to establish the execution of the deed.

Extrinsic Evidence to Show Real Date of Delivery.—No rule is now more firmly established than that the parties are not concluded by the date of the deed or the recital of the consideration therein. It is always competent to show by any relevant evidence that the delivery was in fact on a day different from the date, and to show the real nature and character of the consideration. Summers v. Darne, 31 Gratt. 791; Bruce v. Slemp, 82 Va. 352, 4 S. E. Rep. 692; Graybill v. Brugh, 89 Va. 895, 17 S. E. Rep. 558; Duval v. Bibb, 4 H. & M. 113, 4 Am. Dec. 506; Click v. Green, 77 Va. 827. But proof of the actual consideration upon which a deed is founded does not affect the right of a *bona fide* purchaser, without notice of the nature of the consideration. Duval v. Bibb, 4 H. & M. 113, 4 Am. Dec. 506; Click v. Green, 77 Va. 827.

3. PAROL EVIDENCE TO VARY DEED.

The Parol Evidence Rule.—It is a general rule of evidence, that parol testimony cannot be admitted to vary or add to a written contract, especially a contract or deed conveying lands. Broughton v. Coffer, 18 Gratt. 184; Sprinkle v. Hayworth, 26 Gratt. 392; Hurst v. Hurst, 7 W. Va. 298; Little, etc., Co. v. Rice, 9 W. Va. 636; Troll v. Carter, 15 W. Va. 567.

In the absence of fraud, accident, or mistake, the terms of the deed cannot be varied by parol evidence of what occurred between the parties either before or during its execution, all prior contracts, written or oral, between them in relation to that subject-matter, being merged in the deed. Shenandoah, etc., R. Co. v. Dunlop, 86 Va. 346, 10 S. E. Rep. 239.

Cases to Which the Parol Evidence Rule Does Not Apply.—Where a grantee in a deed has procured it by fraud, he will be held by a court of equity to be a trustee of the real owner, or if land purchased with the funds of one party is conveyed to another, the grantee will be held the trustee for the real purchaser, or if the scrivener of a deed has made a mistake in drafting it, the court of equity will correct such mistake; or a deed absolute on its face may be shown by parol evidence to be a mortgage to secure a loan or a precedent debt. These, however, ought to be regarded not as exceptions to the general rule, but as cases to which this rule has no application. Troll v. Carter, 15 W. Va. 567.

And a conveyance of land on its face absolute may be shown by parol evidence to have been made on condition that the grantee should pay the grantor's debts. Coffman v. Coffman, 79 Va. 504.

Showing a Deed to Be Voluntary.—A deed which purports to be made for a valuable consideration, cannot be shown to be voluntary in order to raise a trust in favor of the grantor, because such conveyance is directly at variance, not only with the statute of frauds, but with the rule that a written

instrument cannot be varied by parol evidence, and where there is in fact no consideration, but the deed recites a pecuniary consideration, even merely nominal, as paid by the grantee, this statement raises a conclusive presumption of an intention that the grantee is to take the beneficial estate, and destroys the possibility of a trust resulting to the grantor, and extrinsic evidence is not admissible to contradict the recital, and to show that there is in fact no consideration, except in cases of fraud and mistake. Eaves v. Vial, 98 Va. 134, 34 S. E. Rep. 978; Pusey v. Gardner, 21 W. Va. 469; Taylor v. King, 6 Munf. 358. Upon the subject of deeds which are fraudulent and voluntary as to creditors, see generally, monographic *note* on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348.

In Cases of Ambiguity.—The general rule is that parol evidence cannot be introduced to explain, alter or modify in any manner a written instrument. To this rule there is one exception, that is, when on the face of the written contract the meaning of the parties is ambiguous. In such case the situation of the parties, the circumstances surrounding them when the contract was entered into, and their conduct substantially in carrying into effect the written contract may be received in evidence; but this is the only character of parol evidence, which can be received to show the real intention of the parties in such ambiguous contract, and all other, such as the verbal declaration of parties, must be excluded. Crislip v. Cain, 19 W. Va. 438; Hansford v. Chesapeake Coal Co., 22 W. Va. 70; Heatherly v. Farmers' Bank, 31 W. Va. 70, 5 S. E. Rep. 754.

Where in addition to the specification of an exact quantity of land, it appears on the face of the deed or contract of sale, that the consideration for the land is a multiple of the number of acres specified; this, while it is *prima facie* a sale in gross, renders the deed or contract ambiguous, as to whether it was intended in fact as a sale in gross or by the acre; and in such case, parol evidence of the circumstances surrounding the parties is admissible to assist the court in interpreting the deed. Hansford v. Chesapeake, etc., Co., 22 W. Va. 70.

The state leased land for a term of years, and by the deed of lease agreed at the end of the term to surrender the building then, or thereafter to be erected thereon. These terms being unambiguous and no fraud or mistake being alleged, parol evidence was held inadmissible to vary or contradict them. Tait v. Central, etc., Asylum, 84 Va. 271, 4 S. E. Rep. 697.

Parol Evidence as to the Declaration of the Parties.—Parol evidence as to the acts or declarations of the parties, at the time of the execution of the deed, or afterwards, is inadmissible and incompetent as evidence to enlarge, restrict, explain or alter the intention of the parties, as expressed in the deed, or to vary the legal effect thereof, as clearly manifested by the deed itself. Hurst v. Hurst, 7 W. Va. 289; Hurst v. Hurst, 7 W. Va. 339.

Conflicting evidence as to conversations between the parties prior to the execution of a conveyance is not admissible to change the tenor of a deed. Hardin v. Kelley, 89 Va. 332, 15 S. E. Rep. 894.

A deed which is unambiguous in its terms, cannot be varied by parol testimony as to any contemporaneous understanding between the parties. Norfolk Trust Co. v. Foster, 78 Va. 413.

Parol Evidence to Show a Condition.—In Humphreys v. R. Co., 88 Va. 431, 13 S. E. Rep. 985, it was held, that parol evidence was admissible to show that a deed was delivered to the grantee to take effect only upon the happening of a condition, which was shown never to have happened.

To Show an Advancement.—In Bruce v. Slemp, 82 Va. 352, 4 S. E. Rep. 692, parol evidence was allowed to show that the real nature and character of the consideration of a deed and the design of the grantor was to create an advancement for his daughter.

Parol Evidence of Consideration.—A deed was made in consideration of "natural love and affection" and in the further consideration of "one dollar." It was held, that parol proof was admissible to show other valuable consideration. Harvey v. Alexander, 1 Rand. 219.

In Case of Equivocal Expressions.—While parol evidence is not admissible to vary, contradict, add to, or explain a written instrument; yet, in the case of *equivocal expressions* in a deed the circumstances under which the deed was made, and facts collateral thereto, were held properly admissible in evidence, in order to show the intention of the parties. French v. Williams, 82 Va. 462, 4 S. E. Rep. 591; Crawford v. Jarrett, 2 Leigh 630.

Relinquishment of Title by Grantee.—Under some circumstances, parol evidence of continued possession on the part of the grantor and of the grantee's acknowledgment of his right may be given in evidence, for the jury to presume against a deed, that the grantee has relinquished or reconveyed his right. Biggers v. Alderson, 1 H. & M. 54.

Explaining a Warranty in a Deed.—Notwithstanding the fact that there was a clause of *general* warranty in a deed for land, a court of equity received a parol testimony to prove that such clause was contrary to the actual agreement, by which the land was to have been conveyed with *special* warranty only; a written agreement of the vendor to make the conveyance, not being produced on the part of the vendee to whom it was delivered. Bumgardner v. Allen, 6 Munf. 439.

Lost Deed—Parol Evidence.—Where it is sought to establish title to land under an alleged lost deed, by parol testimony, the proof of its existence and of its contents must be clear and conclusive. Thomas v. Ribble (Va.), 24 S. E. Rep. 241.

Proving the Contents or Effect of a Deed.—Generally, parol evidence, though not excepted to when it is offered or afterwards, is not competent to prove the contents or effect of a deed. Warren v. Syme, 7 W. Va. 474.

To Show That Property Was Conveyed to a Wife in Lieu of Dower.—Under the statute relating to dower, any estate conveyed by deed for a wife's jointure, in lieu of dower, though not so expressed, may be averred to have been so intended, and parol or other evidence, *dehors* the deed, is admissible, as to the relative situation of the parties, and circumstances of the grantor, from which such intention may be inferred. Ambler v. Norton, 4 H. & M. 23.

4. EVIDENCE SHOWING DEED TO BE MORTGAGE.

Deed Absolute on Its Face May Be Shown to Be a Mortgage.—A deed absolute on its face may be shown by extrinsic evidence to be a mortgage. Thompson v. Davenport, 1 Wash. 125; Ross v. Norvell, 1 Wash. 14; Edwards v. Wall, 79 Va. 321; Davis v. Demming, 12 W. Va. 246; Troll v. Carter, 15 W. Va. 567; Lawrence v. DuBois, 16 W. Va. 443; Hoffman v. Ryan, 21 W. Va. 415; McNeel v. Auldridge, 25 W. Va. 113; Gilchrist v. Beswick, 33 W. Va. 168, 10 S. E. Rep. 371; Vangilder v. Hoffman, 22 W. Va. 1; Matheney v. Sandford, 26 W. Va. 386; Ferguson v. Bond, 39 W. Va.

561, 20 S. E. Rep. 591; Shank v. Groff, 43 W. Va. 337, 27 S. E. Rep. 340; Zane v. Fink, 18 W. Va. 696; McNeel v. Auldridge, 34 W. Va. 748, 12 S. E. Rep. 851.

Intention of the Parties Governs.—Upon a question whether a deed is to be considered as a mortgage, or an absolute purchase, a court of equity governs itself by the intention of the party; and where the former appears to have been intended, the court will not suffer it to be turned into a purchase by any form of words, so as to preclude a redemption. Thompson v. Davenport, 1 Wash. 125.

Circumstances Tending to Show a Mortgage.—A deed absolute on its face may be shown to be a mortgage. The following circumstances have great weight in determining that an absolute deed is a mortgage. First, if the alleged price given for the property is grossly inadequate. Second, if the vendor remains in possession of the property. And, third, the fact that there were or had been, when the deed was executed, negotiations pending for a loan. Davis v. Demming, 12 W. Va. 246; Lawrence v. DuBois, 16 W. Va. 443; Gilchrist v. Beswick, 33 W. Va. 168, 10 S. E. Rep. 371. A conveyance of land by a debtor to a creditor for the payment of a debt, with a proviso that such conveyance should be void on the payment of a debt on a certain day, was held to be a mortgage, and not an absolute conveyance. Davis v. Demming, 12 W. Va. 246.

A deed of land, absolute on its face, may be shown by extrinsic evidence to be a mortgage, but the proofs must be clear, cogent and inconsistent, convincing the mind that an absolute conveyance was not intended. The facts that the grantor retained possession of the land, and that the price paid was inadequate, were held to be only circumstances to be weighed along with other circumstances in determining the character of the conveyance. Edwards v. Wall, 79 Va. 321.

The inclination of a court of equity in a close case, is to construe the instrument to be a mortgage. Gilchrist v. Beswick, 33 W. Va. 168, 10 S. E. Rep. 371.

Against Innocent Purchasers.—A deed absolute on its face, if shown to have been originally a mortgage by parol proof and by the surrounding circumstances, may be declared a mortgage, though the land has passed into the hands of a grantee, who paid no consideration for the land, or into the hands of a purchaser for value, who had notice of the character of the original transaction. Zane v. Fink, 18 W. Va. 693.

Deed Absolute in Form—Assignment.—A deed absolute on its face, was shown by evidence and surrounding circumstances to be a mortgage. The grantor, in order to redeem the property, borrowed the money from a third party, and the grantee in said deed, by endorsement thereon, assigned the deed to the grantor, and the grantor by like assignment, transferred the property to said third party. It was held, that the deed might still be shown by evidence and the circumstances to be a mortgage to secure said third party the money advanced by him to the grantor. Shank v. Groff, 43 W. Va. 337, 27 S. E. Rep. 340.

Parol Evidence.—Parol evidence is admissible to prove that an absolute deed was intended to operate as a mortgage; but it cannot be laid down as a general rule, that parol proof to contradict a deed, is not to be admitted in any case or that it is to be admitted in all cases. Ross v. Norvell, 1 Wash. 14.

Where the proof offered to establish that a deed absolute on its face was intended as a mortgage, consists only of the parol declarations of the parties, such proofs, in order to prevail, must be clear and strong, if unaided by proof of the situation and circumstances of the parties and their conduct prior to, at the time of, or after the execution of the deed. When on the parol evidence it is doubtful, whether the conveyance should be regarded as an absolute deed or a mortgage, courts of equity generally incline to hold it a mortgage. Vangilder v. Hoffman, 22 W. Va. 1.

Parties.—Where the issue is made in a suit in chancery, that a deed absolute on its face was intended as a mortgage, it is absolutely essential to the decision of that question, that the parties to the deed or their heirs, should all be parties to the suit. McNeel v. Auldridge, 25 W. Va. 113.

C. COMPETENCY OF WITNESSES.

Identification of Land Conveyed by the Grantor.—The grantor in a deed is a competent witness in all cases to identify the land intended to be conveyed by the deed. Carrington v. Goddin, 13 Gratt. 587. In this case a deed conveyed two small lots with other property, but upon its face it showed that it intended to convey all the property of the grantor. It was held, that while it was not competent to prove by the grantor that he intended to convey all the land in controversy by the deed, yet he was a competent witness, and was allowed to identify the land, and to show that it answered to the description embraced in the deed.

Trustee.—A mere naked trustee is a competent witness in a controversy in which a creditor seeks to set aside a deed on the ground of fraud. Harvey v. Alexander, 1 Rand. 219.

Executor.—An executor who conveyed land with special warranty, and who was not a party to the suit, and had no interest in the result of it, or in the record as an instrument of evidence, was held a competent witness to prove the facts in relation to his sale and conveyance of the land, in a contest between a creditor of his grantee and a purchaser from him. Borst v. Nalle, 28 Gratt. 423.

Attesting Witness to a Deed Executed to His Wife.—A husband who is a subscribing witness to a deed executed to his wife during the coverture, by which real estate is conveyed to the wife, is not a competent witness, either for the purpose of proving the due execution of the deed, or the purpose of having it admitted to record. Johnston v. Slater, 11 Gratt. 321. Upon this subject, see generally, monographic *note* on "Husband and Wife."

D. WEIGHT OF EVIDENCE.

Certificate of Acknowledgment.—The acknowledgment of a deed before justices, by the grantor, and their certificate of acknowledgment, is not conclusive evidence of the complete and perfect execution of the deed. A deed being acknowledged before justices who retain possession of it, it depends upon the condition of the grantor at the time whether the acknowledgment is a complete execution of the deed or not. In such case, the intention of the grantor may be ascertained by evidence of his previously declared purpose, though nothing is said at the time of the acknowledgment to indicate his intention. Hutchison v. Rust, 2 Gratt. 394.

Certificate of Notary.—In the absence of fraud, the certificate of a notary of the acknowledgment of a deed is conclusive evidence to all stated therein, as required by statute. Burson v. Andes, 83 Va. 445, 8 S. E. Rep. 249.

Testimony of Officer Who Took the Acknowledgment.—The evidence of an officer taking the acknowledgment to a deed, and of a person present

at its execution, is entitled to peculiar weight in considering the capacity of the grantor to make the deed. Buckey v. Buckey, 38 W. Va. 168, 18 S. E. Rep. 383.

Testimony of a Party Who Executed the Deed.—In Colquhoun v. Atkinsons, 6 Munf. 550, the testimony of the person who executed the deed, was received as fixing the time when it was executed; notwithstanding the testimony of two witnesses to his acknowledgment to the contrary *when not under oath*, he being entirely disinterested between the parties, and the falsehood of his evidence being improbable under the circumstances of the case.

Old Age as Evidence of Incapacity.—Old age is not in itself sufficient evidence of incapacity in the grantor as to invalidate his deed. Jarrett v. Jarrett, 11 W. Va. 584; Buckey v. Buckey, 38 W. Va. 168, 18 S. E. Rep. 383; Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. Rep. 201.

Capacity—Parties Present at the Execution.—A party sought to set aside a deed make by him, alleging that he was of unsound mind at the time of making the deed, and was therefore incapable of making a valid contract. It was held, that the testimony of witnesses who were present at the making of the deed, and the written acts of the party attesting his capacity, were more to be considered and relied upon than the opinions of the witnesses, based upon facts which might have been true, and yet which might not have been the result of unsoundness of mind. Beverley v. Walden, 20 Gratt. 147.

The evidence of witnesses present at the execution of the deed is entitled to peculiar weight. Jarrett v. Jarrett, 11 W. Va. 584; Buckey v. Buckey, 38 W. Va. 168, 18 S. E. Rep. 383; Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. Rep. 201.

Evidence of Insanity—Opinion of Nonexperts.—The mere opinions of witnesses not experts as to the sanity or insanity of the grantor, are entitled to little or no regard, unless they are supported by good reasons founded on facts which warrant them. Jarrett v. Jarrett, 11 W. Va. 584.

Capacity—Testimony of Physicians.—The evidence of physicians, especially those who attended the grantor, and who were with him considerably during the time it is charged that he was of unsound mind, is entitled to great weight. Next to physicians and those who were present at the execution of the deed, are those whose intimacy in the family has given them an opportunity of seeing the party at all times, and watching the operations of his mind. Jarrett v. Jarrett, 11 W. Va. 584.

Evidence of Attesting Witnesses.—Upon a charge of fraud in obtaining a deed, or incapacity in the grantor, the evidence of the attesting witnesses as to the capacity of the grantor at the time of executing the instrument, is to be chiefly regarded. Beckwith v. Butler, 1 Wash. 224; Gilliam v. Perkinson, 4 Rand. 325; Jarrett v. Jarrett, 11 W. Va. 584.

Possession as Evidence of Delivery.—Possession of a deed by the grantee is *prima facie* evidence of delivery; and where the defendants admit the signing and sealing, the rule of evidence is sufficiently complied with by the plaintiff when he produces the instrument before the jury, and it is then incumbent on the defendants to show some special matter in avoidance. Newlin v. Beard, 6 W. Va. 110.

E. EFFECT OF PROOF OF LOST DEED.—Proof that a deed conveying land was executed and delivered by the grantor to the grantee, and that the book in which it was recorded has been destroyed and the deed lost, has the same effect as if the deed had not been lost, nor the record destroyed, and as if the deed had been in evidence in the cause. Reusens v. Lawson, 91 Va. 226, 21 S. E. Rep. 347.

VI. EQUITY JURISDICTION.

A. RESCISSION AND CANCELLATION.

General Rule.—A writing solemnly signed, sealed, acknowledged before a magistrate and delivered by a person, is evidence of his intent, so convincing and conclusive, that at common law no evidence will be received to contradict it. In a court of equity, however, it may sometimes be proved that the deed was executed in mistake, and that in fact, it embodies provisions different from those the parties intended it to embody. But even in this court the deed is regarded as evidence so strong, that only other unequivocal evidence irresistibly conclusive, is sufficient to overthrow it. W. M. & M. Co. v. Peytona C. C. Co., 8 W. Va. 406.

Setting Aside a Deed for Fraud or Undue Influence—Burden of Proof.—In a suit to set aside a deed on the ground of fraud or undue influence, the burden of proof is upon the party alleging the fraud or undue influence, and such proof must be clear and convincing. But if the *indicia* of fraud be proved so that fraud may be presumed from the circumstances and conditions of the parties contracting, or if it is proved that the parties stood in an intimate and confidential relation, one to the other, or in any other way, the burden of proof shifts to the defendant, and he is obliged to repel by strong and clear evidence the presumption of fraud and undue influence arising from the circumstances of the transaction and the relation of the parties; and in such cases he must prove the truth of the defence set up in his answer. Todd v. Sykes, 97 Va. 143, 33 S. E. Rep. 517; Fishburne v. Ferguson, 84 Va. 87, 4 S. E. Rep. 575; Samuel v. Marshall, 3 Leigh 567.

Misrepresentation.—In order to rescind a conveyance in equity for misrepresentation, it must appear that false representations were made, that they were material, that they were relied upon by the grantee, and that they were made to induce him to enter into the contract. Beckley v. Riverside Land Co. (Va.), 23 S. E. Rep. 778.

Fraud.—Equity will not cancel and set aside a deed for fraud, unless such fraud be clearly proved. Tune v. Fallin, 87 Va. 410, 12 S. E. Rep. 750; Jeffries v. Southwest Va. Imp. Co., 88 Va. 862, 14 S. E. Rep. 661.

Undue Influence.—To annul a deed for undue influence it must appear that it was such as to destroy free agency, and substitute the will of another for that of a person nominally acting. It must appear to the satisfaction of the court that the party had no free will but stood *in vinculis*. Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. Rep. 201.

Where influence is acquired over the grantor by reason of acts of kindness and attachment on the part of the grantee, this is not such undue influence as will vitiate a deed otherwise valid. Hale v. Cole, 31 W. Va. 576, 8 S. E. Rep. 516; Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. Rep. 201.

In Davis v. Strange, 86 Va. 793, 11 S. E. Rep. 406, a father conveyed a large amount of property, according to an often-expressed intention to his natural daughter to whom he was very much attached. Afterwards, at the solicitation of his legitimate daughter and her husband, he went in company with his son-in-law's lawyer, to the place where his natural daughter was visiting, and there in the absence of any one to whom she could go for

advice, and in the belief that if she did not reconvey the property it would hasten the death of her father who was very feeble, she executed a conveyance of the property. It was held, that this deed was procured through undue influence and surprise, and it was set aside in equity.

Undue Influence—Lapse of Time.—In Pusey v. Gardner, 21 W. Va. 469, a deed was made by a daughter to her father just before her marriage. Thirty-five years afterwards a bill in equity was filed to set aside the deed on the ground of undue influence. The case not being a clear one and the failure to bring the suit earlier being unexplained the court would not set aside the deed, though it was not barred by the statute of limitations. Lapse of time, when it does not operate as a positive bar in equity, is evidence of assent, acquiescence or waiver.

Mistake.—Equity relieves against material mistakes of facts, as well as against fraud or undue influence in a deed. But the evidence to show such mistake must be clear and strong, so as to establish the mistake to the entire satisfaction of the court. Allen v. Yeater, 17 W. Va. 128.

In case of mistake, mutual and material, as to the number of acres conveyed upon a sale in gross, a court of equity will in some cases upon proper pleadings and proof, annul the deed and rescind the sale; but in the absence of fraud in either party, the court will not allow an abatement for a deficiency, or compensation for any excess. Hansford v. Chesapeake Coal Co., 22 W. Va. 70.

Where there is a mutual mistake as to the interest of the grantor in the lands conveyed, a court of equity will set aside and cancel the deed. Irick v. Fulton, 3 Gratt. 193.

In Weidebusch v. Hartenstein, 12 W. Va. 760, the grantor in a deed who was a German and did not speak the English language, brought a suit to rescind the deed on the ground of mistake. He alleged that the lawyer had drawn a deed, when it was his intention to have a will drawn, and that he signed the deed believing it to be a will and not a deed. It was held, that in order to set aside such deed, the proof of mistake should be the clearest and strongest, and the bill was dismissed as the proof was not sufficient considering the great length of time which had elapsed in this case.

Mistake of Law.—Mere mistake of law is not alone ground for relief against a deed; but when accompanied by fraud in any form, such as misrepresentation or concealment of facts, imposition, undue influence, or misplaced confidence, or where advantage has been in any way taken of one's ignorance of law to mislead him, or where there is a relation of trust and confidence, it will be ground for relief in equity. Schuttler v. Brandfass, 41 W. Va. 201, 23 S. E. Rep. 808.

Deed Which Does Not Conform to a Prior Agreement.—In Meade v. N., etc., R. Co., 89 Va. 296, 15 S. E. Rep. 497, it was held, that a deed granting a right of way would not be reformed or cancelled because the parties had verbally agreed that a trestle with a passway under it should be erected over a ravine on the grantor's land, which agreement was not inserted in a deed because the parties deemed it unnecessary. And where the attorney dictating the deed, informed the grantor that it was unnecessary to insert the verbal agreement, he having no authority to bind the grantee in the premises, such statement was held no ground for cancelling the deed.

Deed of a Tenant in Common.—A tenant in common conveyed part of the common subject by metes and bounds, with general warranty, and upon partition afterwards made, a material part of the land so conveyed was allotted to other tenants in common, so that the purchaser did not obtain the substantial inducement to his contract of purchase. The purchaser filed a bill in equity for relief. The court decreed a cancellation of the deed and placed the parties *in statu quo*. Worthington v. Staunton, 16 W. Va. 208.

Allegation of Mistake in Bill—Sufficiency.—A party sought relief in equity against an indorsement of a clerk on a deed, on account of the same being a mistake, and desired the court to adjudicate whether such mistake in the indorsement was sufficient to entitle him to relief in the cause. In such case it was held, that the allegation of mistake in the bill must be sufficient to put the fact in issue in the cause. Burley v. Weller, 14 W. Va. 269.

Failure to State Grounds for Cancellation—Pleading.—While it is proper and desirable that the plaintiff should set out in his bill the grounds on which he claims a deed is void, still, if such deed is exhibited with and made part of the bill, and it appears upon its face to be invalid, the court will not decline to declare it void simply because the plaintiff did not in his bill specify the particular ground upon which the court regards it void. Simpson v. Edmiston, 23 W. Va. 675; Carskadon v. Torreyson, 17 W. Va. 43.

Effect of Cancellation by the Grantor.—Where land has been conveyed by deed of bargain and sale the legal title of the grantee is not divested by the return of the deed to the grantor to be cancelled. Jones v. Neale, 2 P. & H. 339. The father by deed of gift conveyed land to his son, and shortly afterwards the son voluntarily returned the deed to the father to be cancelled, with the design to divest the title out of himself and restore it to the father, and the deed was cancelled. Upon a bill in equity to subject the land to the debts of the son, it was held, that the son's title was not divested by the cancellation of the deed, and the land was still subject to his debts. Graysons v. Richards, 10 Leigh 57.

Cancelling a Deed for Lands in Another State—Jurisdiction.—A person being within the commonwealth may be decreed to execute a deed for lands lying in another state, or to cancel a deed for such lands, when it has been obtained by fraud. Guerrant v. Fowler, 1 H. & M. 5.

B. REFORMATION.

Jurisdiction to Reform in General.—Equity has jurisdiction to reform deeds in two well-defined classes of cases only: First, where there has been an innocent omission or insertion of a material stipulation, contrary to the intention of both parties, and under a mutual mistake. Second, where there has been a mistake of one party accompanied by fraud or other inequitable conduct of the remaining parties. But so great and obvious is the danger of permitting the solemn engagement of parties, when evidenced by a deed, to be varied by parol evidence, that in no case will relief be granted except when there is a plain mistake, clearly made out by satisfactory and unquestionable proofs. Shen., etc., R. Co. v. Dunlop, 86 Va. 346, 10 S. E. Rep. 239; Meade v. Norfolk, etc., R. Co., 89 Va. 296, 15 S. E. Rep. 497.

Mistake.—Where a deed fails to express the intention of the parties because of mistake, the proper remedy therefor is a bill in equity for reformation. Lagorio v. Dozier, 91 Va. 493, 22 S. E. Rep. 239; Long v. Israel, 9 Leigh 556; Snyder v. Grandstaff, 96 Va.

473, 31 S. E. Rep. 647; Chapman v. Persinger, 87 Va. 581, 13 S. E. Rep. 549.

Mistakes of the Scrivener.—It is a well-settled rule that the courts of equity have jurisdiction to correct mistakes of the scrivener in drawing a deed, when he has not drawn it in accordance with the clearly established directions and instructions of the parties. Before the court will consent to correct a mistake in the terms of the deed, participated in by only one of the parties thereto, where no fraud or imposition is practiced, and where a party of ordinary intelligence, who can read, has deliberately executed a deed, the proof of mistake, where admissible at all, must be strong, clear, preponderating, and convincing to the mind of the court. Pennybacker v. Laidley, 33 W. Va. 624, 11 S. E. Rep. 39; Weidebusch v. Hartenstein, 12 W. Va. 760.

Mistake in Description.—In Blessing v. Beatty, 1 Rob. 287, sale was made of land embraced by a deed under which the vendor claimed, but by mistake the conveyance from the vendor embraced some land not conveyed by that deed, and omitted some comprised in it. On a bill by the vendee against the administrator and heirs of the vendor, it was held, that equity would correct the mistake, by directing a conveyance from the heirs of the vendor according to the calls of the deed under which the vendor claimed.

Omission of the Grantee's Name.—Where a deed of exchange was made and the name of the grantee was omitted, it was held, that the omission might be supplied, and effect given to the deed, where on the inspection of the deed enough appeared to show in whom the title to that parcel vested. Lagorio v. Dozier, 91 Va. 492, 22 S. E. Rep. 239.

Alteration by the Grantor.—A bill in equity alleged that the complainant had orally purchased from the defendant all the minerals in certain land, except lead and zinc; and that the defendant had altered the deed after it had been sent to him for execution, by limiting the interest conveyed, to the iron ore, without the plaintiff's knowledge, until after the deed had been recorded, and just before the commencement of the suit. A letter from the defendant to the complainant, within a week after the contract and before the execution of the deed, stated that he understood the agreement to cover all the minerals in the land, reserving to himself all the lead and zinc. It was held, that under these circumstances the complainant was entitled to a reformation of the deed. Pulaski Iron Co. v. Palmer, 89 Va. 384, 16 S. E. Rep. 275.

Deed Not in Accord with a Prior Agreement.—Although a deed or other instrument may be reformed, when through mistake or accident it does not accurately represent the agreement of the parties, it is necessary that both the agreement and the mistake shall be make out by the clearest and most satisfactory testimony. Where the mistake is established by other preliminary written agreements, equity more readily interferes than in cases where the mistake is to be established by parol evidence. But even when there is a preliminary article of agreement or settlement, it must be made plainly to appear that the parties intended in their final instrument merely to carry into effect the control or arrangement set forth in the prior agreement. The very circumstances that the final instrument of conveyance differs from the preliminary contract, affords of itself some presumption of an intentional change of purpose or agreement, unless there is some recital in it, or some other attendant circumstance, which demonstrates that it was merely in pursuance of the original contract. Carter v. McArtor, 28 Gratt. 356; Donaldson v. Levine, 93 Va. 472, 25 S. E. Rep. 541; Snyder v. Grandstaff, 96 Va. 473, 31 S. E. Rep. 647.

In Shenandoah, etc., R. Co. v. Dunlop, 86 Va. 346, 10 S. E. Rep. 239, it was held, that a deed would not be reformed to accord with a prior written contract, where it appeared that nothing was omitted by accident or mistake, but that the change was deliberately discussed and understandingly made, with only an unauthorized assurance by the grantee's agent that the grantee would comply with the prior contract.

Defect in the Execution of a Power.—As far as circumstances will permit, a court of equity will supply any defect in the execution of a power given by a will, to executors or trustees, to sell lands for the payment of debts or legacies. Roberts v. Stanton, 2 Munf. 129. In this case a conveyance by one executor or trustee only, instead of three, but in all other respects conformable to the intention of the testator in creating the trust, was supported in favor of a purchaser for valuable consideration; and this, notwithstanding that the will provided, that if one or more of the executors or trustees, should die before the object of the trust was accomplished, others should be appointed by the survivors, jointly with them to finish the execution of the trust.

Against Bona Fide Purchasers for Value.—In no case will a court of equity decree reformation of a deed to the injury of a *bona fide* purchaser for value. Robinson v. Braiden, 44 W. Va. 183, 28 S. E. Rep. 798. But a bill in equity to reform a deed, which charges mutual mistake in its execution, is not demurrable because of failure to charge notice to a purchaser for value. Such notice must be proved, but the defence must be made by plea or answer. Snyder v. Grandstaff, 96 Va. 473, 31 S. E. Rep. 647.

C. SETTING UP DEEDS.

Jurisdiction to Set Up Lost Deeds.—It is a well-settled rule that courts of chancery have jurisdiction in suits to set up lost deeds. Deeds set up in a suit in which the court has jurisdiction of the parties and the subject-matter, and the decree and the deed made in pursuance thereof, are proper evidence of the passing of the title by the lost deed, and they cannot be assailed in any collateral proceeding. Building, etc., Co. v. Fray, 96 Va. 559, 32 S. E. Rep. 58; Barley v. Byrd, 95 Va. 316, 28 S. E. Rep. 329.

Volunteers—Advancements.—As a general rule equity will not aid a volunteer in supplying legal defects in a prior deed, against a subsequent volunteer. Cases of advancements for younger children, otherwise unprovided for, form an exception to this rule. Ward v. Webber, 1 Wash. 274. In this case a father by deed conveyed to his daughter several tracts of land, with many slaves, etc. After this, the father got possession of the deed surreptitiously, and cancelled it. Upon a bill by the daughter, the court restored the deed to its legal force.

In Vaughn v. Moore, 89 Va. 925, 17 S. E. Rep. 326, a father executed, acknowledged and delivered a deed of gift of land to his son. After its delivery to the clerk for record, but before it was actually recorded the father had it destroyed, and conveyed the land to parties with notice of the son's equitable interest. It was held, that the deed so destroyed

should be set up in a court of equity in behalf of the son.

Effect of Decree Setting Up Deed.—In Building, etc., Co. v. Fray, 96 Va. 559, 32 S. E. Rep. 58, a decree of a court of chancery setting up an unrecorded deed of a husband and wife, which had been lost, was held not to operate to bar the wife, on the death of her husband, from claiming dower in the land. The execution and delivery by her lost deed, did not convey her interest, as admission to record was necessary.

Proof Required to Set Up Deed.—Where it is sought to set up a lost deed in a court of equity and by such deed to show title to land, courts of equity require the strongest and most conclusive proof of the former existence, contents and loss of the deed. Barley v. Byrd, 95 Va. 316, 28 S. E. Rep. 329; Thomas v. Ribble (Va.), 24 S. E. Rep. 241.

VII. TAX DEEDS.

A. IN GENERAL.

When a Purchaser Is Entitled to a Deed.—Under Va. Code, sec. 666, as amended by Acts of 1897-8, p. 343 the applicant to purchase land sold for nonpayment of taxes has no right to a deed until the survey and report therein required have been made, unless the court has decided that such survey is unnecessary. Glenn v. Christian, 96 Va. 679, 33 S. E. Rep. 1015.

To entitle a purchaser at a tax sale to have a circuit court, or the judge thereof in vacation to appoint a commissioner to execute a deed for the lot of land so purchased by him, he must bring himself within the provisions of the law governing the terms of his application; and therefore, the petition should show a clear legal right to have the deed made, and in the manner prayed for. Davis v. Jackson, 14 W. Va. 227.

Title Passed by a Tax Deed.—A deed from a clerk of court conveying to a purchaser land sold for taxes, was held to pass only such title as was vested in the party against whom the taxes were assessed, and on account of which the sale was made. Hotchkiss v. Middlekauf, 96 Va. 649, 32 S. E. Rep. 36.

The purchaser of land sold for taxes, who has obtained his tax deed therefor and had the same duly recorded in the proper county, becomes invested with such estate in and to the land so purchased by him, as was vested in the party assessed with the said taxes, on the commencement of, or any time during the years for which the said taxes were assessed. Summers v. County of Kanawha, 26 W. Va. 159.

Effect of Redemption.—Where the owner of land which has been sold for nonpayment of taxes, redeems the same within the time required by law, a court of equity has jurisdiction to set aside the deed to the purchaser. Wyatt v. Simpson, 8 W. Va. 394; Battin v. Woods, 27 W. Va. 58.

B. AUTHORITY OF OFFICER MAKING THE DEED.

Where the Clerk of County Court Is Purchaser.—The clerk of the circuit court, is only authorized to make a deed for land sold for the nonpayment of taxes when the clerk of the county court is himself the purchaser; and when a deed attempted to be made in pursuance of such delinquent sale by the clerk of the circuit court showed on its face that a person other than the clerk of the county was the purchaser, such deed being unauthorized, was held void and inoperative. Baxter v. Wade, 39 W. Va. 281, 19 S. E. Rep. 404.

Power Not Coupled with an Interest.—A commissioner for the sale of delinquent land conveys under a power, and is clothed with a mere naked authority. Having no interest in the land conveyed, the deed of the commissioner could avail nothing where his authority to make it did not affirmatively appear, unless there had been such a long acquiescence and possession under the deed as to justify a presumption in favor of the deed. Walton v. Hale, 9 Gratt. 194.

In Reusens v. Lawson, 91 Va. 226, 21 S. E. Rep. 347, it was held, that the clerk of a court in making a deed for the land sold for nonpayment of taxes, exercises a mere naked power, not coupled with an interest, and it is essential that every prerequisite to the exercise of such power, including the fact that he is clerk, be shown, in order to pass title by such deed. The deed itself is not sufficient for that purpose, though it is admissible to show color or claim of title, where title is claimed by adversary possession for the period of the statutory bar.

Sale Must Conform to the Statute.—The only authority for making a deed for lands sold for nonpayment of taxes is the sale of the land and the conforming to the requirements of the statute thereafter. The deed must conform to the report of the sale; and if the report of the sheriff shows that an entire tract of land was sold, this is no authority for executing a deed for a part of such tract; and if such deed is executed, it is void. Jones v. Dils, 18 W. Va. 759; Orr v. Wiley, 19 W. Va. 150.

Must Be Executed by Officer Who Makes the Sale.—Under the statute of the 9th of February 1814, concerning taxes on lands, the sheriff or any of his deputies has authority to make sale of lands forfeited for nonpayment of taxes; but whichever officer makes the sale, that officer alone is competent to convey the land to the purchaser. Therefore, a deed, in such case, reciting that the sale was made by the sheriff, but executed by a deputy for his principal, and acknowledged by the deputy for registry as his (the deputy's) own deed, whereby the land sold was conveyed to the purchaser, was held ineffectual to convey the title, and was not evidence for the purchaser, in ejectment against him for the land, brought by the original owner. Wilsons v. Doe, 7 Leigh 22.

Deed from a Marshal of a Federal Court.—A deed from a marshal of a federal court, to the purchaser of land sold for nonpayment of the direct tax imposed by congress, was held not sufficient evidence to support the title of the purchaser, on a trial in ejectment, but other proof was necessary to show the authority of the marshal to make such conveyance; under the several acts of congress recited therein. Christy v. Minor, 4 Munf. 431.

Proof of the Officer's Authority.—A party claiming title under a deed from a deputy sheriff for land sold for nonpayment of taxes under the statute (2d Rev. Code 1819, p. 543), must show that the person described as high sheriff was such, and that the grantor in the deed was his deputy. Though such deed recited an insufficient advertisement of the property conveyed it was not thereby vitiated, because it is not essential that the deed should recite the fact of advertisement. Hobbs v. Shumates, 11 Gratt. 516; Flanagan v. Grimmet, 10 Gratt. 421.

C. RECITALS.

Circumstances of the Sale.—The statute (2d Rev. Code, p. 1819, 542) which provided that a tax deed should state the circumstances of the sale, did not mean that the deed should state all the steps taken

by the various officers preceding the sale. It was held, not necessary under this statute to recite the advertisement of sale in the deed. And even where the tax deed was defective it was held that it was competent evidence, together with other evidence to show title by adverse possession in the grantee. Flanagan v. Grimmet, 10 Gratt. 421.

Insufficient Recitals.—A deed given for a tract of land sold for nonpayment of taxes under Code of Va. 1860, ch. 37, which did not show on its face by whom the sale was made, nor that the land had, in fact, been assessed with taxes, nor for what year or years, nor the amount of the taxes with which it was charged, and for what it was sold, was held defective, and not sufficient to show an outstanding title in the purchaser. Buchanan v. Ellicott, 4 W. Va. 681.

Recitals as Evidence.—In a controversy between a party claiming under a conveyance from a commissioner for the sale of delinquent land and a party claiming under an adverse title, recitals in the deed of the commissioner were not admissible in evidence against the party claiming adversely to the deed. Walton v. Hale, 9 Gratt. 194.

Weight of Recitals as Evidence.—In Jesse v. Preston, 5 Gratt. 120, it was held, that a deed of the collector made under the Act of Congress of the 9th of January, 1815, imposing direct taxes, did not furnish *prima facie* evidence of the regularity of the collector's proceedings, though his recitals in the deed stated specifically all the proceedings which the law required to be had to make the sale of the land conveyed by the deed legal, and also recited that all these proceedings had been had. The party claiming title under the deed of a collector must show that everything was done which the law required to be done before making the sale.

In Dequasie v. Harris, 16 W. Va. 345, a law making a tax deed *prima facie* evidence of any or all of the material facts recited in the deed, was held constitutional; but in construing such a law the court confirmed its operation strictly within the bounds prescribed by the statute.

Omission to Recite the Estate of the Owner.—An omission, in a list of sales of land for taxes, to state the estate of the owner, was held not to render the tax deed void. State v. Sponaugle, 45 W. Va. 415, 32 S. E. Rep. 283.

D. VALIDITY.

Defective Proceedings in Clerk's Office.—Where the proceedings appearing in the office of the clerk of the county court, upon which a tax sale and deed are founded, show fatal defects, the grantee in such deed will not be regarded as a *bona fide* purchaser; nor will his vendee be so regarded; because a purchaser of land for taxes and all of his vendees are deemed to have notice of whatever defects the records in the county clerk's office, on which his deed is founded, disclose. Simpson v. Edmiston, 23 W. Va. 675.

Noting the Return of Lands as Delinquent.—Failure to note in office the day on which lands were returned delinquent renders a deed void. Simpson v. Edmiston, 23 W. Va. 675; McCallister v. Cottrille, 24 W. Va. 173; Jackson v. Kittle, 34 W. Va. 207, 12 S. E. Rep. 484.

Void Tax Deed—Relief in Equity.—If land be listed by the commissioner of the revenue to a wrong person, sold by the sheriff as the property of such person, and conveyed by deed to the purchaser, the proper resort of the rightful owner for relief is to a court of equity, by which the deed may be cancelled, and a release, or reconveyance of the land decreed. Yancey v. Hopkins, 1 Munf. 419.

Jurisdiction to Set Aside.—A court of equity has jurisdiction to set aside an illegal or void tax deed. Simpson v. Edmiston, 23 W. Va. 675; Forqueran v. Donnally, 7 W. Va. 114; Jones v. Dils, 18 W. Va. 759; Orr v. Wiley, 19 W. Va. 150.

Improper Listing—Effect.—Land was sold for taxes and purchased by the state. The clerk of the court illegally placed such land on the land books for succeeding years in the name of the former owner. Upon such land again becoming delinquent, it was sold and a deed made to the purchaser. This sale was held void as the land was improperly listed, and the deed was set aside. Totten v. Nighbert, 41 W. Va. 800, 24 S. E. Rep. 627.

Enjoining a Judgment on an Invalid Deed—Limitation.—An agent whose duty it was to pay the taxes of his principal assessed in the name of the heirs of a party of whom the principal claimed he was the sole heir, failed to pay the taxes, and when the land was sold for the nonpayment of taxes, purchased the same, professedly for his principal but he took the deed to himself therefor, and brought an action of ejectment against them, being in possession of the land under his principal, and recovered a judgment. It was held, that a suit in equity to enjoin the enforcement of the judgment, brought immediately after its rendition, could not be defeated by the plea of the statute of limitations, though the deed to such agent was made more than eighteen years before the institution of the suit. Franks v. Morris, 9 W. Va. 664.

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579 *Hutsonpiller's Adm'r v. Stover's Adm'r.

July Term, 1855, Lewisburg.

1. **Judgments—Dissolution of Injunction to—Execution—Case at Bar.**—Upon the dissolution of an injunction to a judgment, execution may issue thereon within a year and a day from the dissolution of the injunction without a *scire facias*, though the injunction was in force for more than ten years.
2. **Same—Injunction Pending—Statute of Limitations—Effect.**—The statute of limitations to judgments does not run whilst an injunction to the judgment is pending.
3. **Same—Same—Death of Defendant in a Judgment.**—If the defendant in a judgment dies whilst an injunction to the judgment is pending, though the injunction may not be dissolved for more than five years after his death, the statute requiring judgments to be revived within five years does not run during the pendency of the injunction; and the judgment may be revived after the five years from the death of the defendant. And this though the judgment might have been revived whilst the injunction was in force.
4. **Same—Executions—Statute of Limitations—Time Omitted in Computing—Effect of Statute.**—The act, Code, ch. 186, § 13, p. 710, which directs that the time for which the right to sue out execution on a judgment is suspended by the terms thereof or by legal process shall be omitted in computing the limitation, applies to judgments recovered previous to the act, which are suspended by injunction at the time when the act went into operation.

5. **Same—Same—Suspended by Injunction—Instruction—Presumption of Payment—Case at Bar.***—Upon a *scire facias* to revive a judgment which had been suspended by an injunction for forty-six years, issue was made up on the plea of payment; and upon the trial the court instructed the jury, that the pendency of said injunction cause repelled the legal presumption of payment which would have arisen from lapse of time if said injunction had not been pending. HELD: The instruction was proper; and it was not necessary to distinguish to the jury between the legal presumption, and the natural presumption arising from the lapse of time.

In 1804, Joseph Stover instituted an action of debt against Paulser Huber and Jacob Hutsonpiller in the County court of Greenbrier, upon a bond for one hundred and seventy-two pounds, executed in 1788. The sheriff returned the process executed
580 on Hutsonpiller, *and that Huber had kept him off by force of arms. Hutsonpiller appeared, and put in the plea of payment; but at the March term 1806, the plea was waived and "judgment by non sum informatus, for debt and costs, reserving equity."

On the same day Huber and Hutsonpiller obtained an injunction in the County court; and in January 1810, the injunction was perpetuated as to one hundred and fifty pounds. This decree was reversed upon appeal to the Chancery court at Staunton, on the grounds that the cause was not ready for a hearing; and the cause was sent back to the County court of Greenbrier, where, being revived in the name of Hutsonpiller's administrator, it lingered until November 1851; when, on the motion of Joseph S. Spangler, administrator of Stover, it was ordered that unless the plaintiffs should revive the suit against him by the next term, the injunction should stand dissolved as an act of the day the order was made. And at the February term 1852 of the court, the bill was dismissed.

In March 1852, Spangler sued out a scire facias to revive the judgment against Hutsonpiller's administrator, in which it was described as a judgment against Huber and Hutsonpiller. In June 1852, the administrator appeared, and filed several pleas of payment by Huber and himself to Stover, and to the administrator; on which issue was joined. He also filed a plea of the statute of limitations, that the scire facias had not issued within five years from his qualification as administrator. To this plea the plaintiff replied the pendency of the injunction; and the defendant demurred to the replication.

When the cause came on to be heard, the County court sustained the demurrer to the replication, and dismissed the scire facias; but upon appeal to the Circuit court, this judgment was reversed, and the demurrer was overruled: And by consent, the cause was retained in that court for trial.

581 *Upon the trial of the cause the plaintiff offered in evidence the original judgment, which was objected to on the ground of a variance between it and the scire facias; but the court overruled the objection; and the defendant excepted. The variance alleged was, that the scire facias recited a judgment against two, when it was in fact, as defendant insisted, a judgment only against one.

The plaintiff also offered in evidence the record of the chancery cause. And then upon his motion the court instructed the jury, "that the pendency of said injunction cause repelled the legal presumption of payment which would have arisen from lapse of time if said injunction had not been pending." To this instruction the defendant excepted; and there being a verdict and judgment for the plaintiff, the defendant applied to this court for a supersedeas, which was awarded.

William Smith and Price, for the appellant.

Reynolds and Dennis, for the appellee.

LEE, J. It is well settled that if one have judgment with a cesset executio for a given time, he may within a year and a day after the expiration of the agreed time, take out his execution without scire facias. 4 Com. Dig. 257, "Execution," I 4; Long v. Morton, 2 Marsh. R. 39; Underhill v. Devereux, 2 Wms. Saund. 72 c, n 4; Hiscocks v. Kemp, 3 Adol. & Ell. 676; United States v. Harford, 19 John. R. 172; Nicholson v. Howsley, 5 Litt. Sel. Cas. 300; Eppes v. Randolph, 2 Call 125, 186. So if the defendant bring error and thereby hinder the plaintiff from taking execution within the year, and the plaintiff in error be nonsuit or the judgment affirmed, the defendant in error may proceed to execution after the year without scire facias, because the writ of error is a supersede-
582 deas to the judgment, *and the plaintiff must acquiesce till he hears the judgment above. 3 Bac. Ab. (Wilson's ed.) "Execution," H, p. 724; 8 Ibid. "Scire facias," C, p. 601; Winter v. Lightbound, Stranger's R. 301.

The reason assigned for this is that the cesset executio being with the consent and for the benefit of the defendant, and the writ of error being his own act, he should not take advantage of them, nor could he be surprised by the delay because that delay was in fact referable to himself. And this reason

*Judgments—Pendency of Injunction—Presumption of Payment Repellable.—In Lightfoot v. Green, 91 Va. 514, 22 S. E. Rep. 242, it is said: "There is a recognized distinction between the statute of limitations and the presumption of payment from the lapse of time, the condition of the parties, their relations to each other, etc. In the one case the bar is absolute, in the other it is denominated natural presumption of payment, and may be rebutted. Perkins' Adm'r v. Hawkins' Adm'x, 9 Gratt. 656; *Hutsonpiller's Adm'r v. Stover's Adm'r, 12 Gratt. 588*; Updike's Adm'r v. Lane, 78 Va. 136; Booker v. Booker, 29 Gratt. 605; Hale v. Pack's Ex'ors, 10 W. Va. 145." See also, citing the principal case, Updike v. Lane, 78 Va. 136; Parker v. Clarkson, 39 W. Va. 195, 19 S. E. Rep. 435; Sadler v. Kennedy, 11 W. Va. 192; Pace v. Ficklin, 76 Va. 297; *foot-note* to Erskine v. North, 14 Gratt. 60.

applies with equal force where the defendant arrests the execution of the judgment by an injunction. Hence, the same rule should apply in the latter case. It is true in some of the earlier English cases it was held that where execution was stayed for a year or more by injunction, the plaintiff could not take execution upon its dissolution, but was put to his scire facias. Booth v. Booth, 1 Salk. R. 322; Winter v. Lightbound, Strange's R. 301. The reason given is that the court of chancery not being a court of record, its injunction is not a matter of which the court of law will take notice. But this doctrine has long since been exploded even in England, and courts of law will take notice of injunctions and other proceedings in chancery when properly brought to their consideration. And accordingly it is now held that where execution has been stayed by injunction, the plaintiff may sue out execution within one year after it shall have been dissolved, without scire facias. Michell v. Cue, 2 Burr. R. 660; Gibbes v. Mitchell, 2 Bay's R. 120; Noland v. Cromwell, 6 Munf. 185; United States v. Harford, 19 John. R. 172; Smith's adm'r v. Charlton's adm'r, 7 Gratt. 425. Indeed the reason on which the earlier English doctrine rested never did exist in Virginia; for the courts of chancery of this state have always been courts of record, the same as the courts of law.

It is clear, therefore, that where the
583 plaintiff is prevented *by injunction from proceeding to execution, he may at any time within the year after its dissolution, sue out execution without scire facias; and this, where the parties remain unchanged, whether the injunction have continued for more or less than ten years from the date of the judgment. A scire facias is no more necessary in the former case than in the latter, the reason for dispensing with it being exactly the same in both: Nor will the statute of limitations forbidding execution after the expiration of ten years from the date of the judgment apply, because notwithstanding the general terms employed, it must be understood to embrace only the cases in which the party may levy his execution if he will, and not those in which he is positively prohibited by legal process from so doing; and where the injunction continues for more than ten years, the plaintiff is equally restrained from levying his execution during the whole period as during the year after the date. But where a change of parties must be made in consequence of the death of the plaintiff or defendant, a scire facias for that cause is rendered necessary, and it is insisted that where the defendant is dead, the scire facias to revive against his personal representative must be sued out under the express terms of our statute, within five years after the qualification of such representative, notwithstanding the pendency of the injunction during the whole period. I do not think this can be correct. It is true in Richardson's adm'r v. Prince George Justices, and Poindexter's adm'r v. Same, 11 Gratt. 190, it was held that where either party to a judgment died pending an injunction, a scire facias might be sued out to revive the judgment without breach of the injunction. The reason is that as the plaintiff in the judgment is entitled upon the dissolution of the injunction to stand in the same situation in which he
stood when it was allowed, unless he or
584 his representative could revive *the judgment pending the injunction, he would not be able upon its dissolution to issue his execution, but would be compelled to wait until he had sued out his scire facias, and prosecuted the same to judgment. And so for his benefit it was held that the plaintiff or his representative might sue forth his scire facias and revive the judgment without a breach of the injunction. But it was not intimated nor intended to be intimated that he was under any necessity to do so in order to preserve his right to enforce the judgment upon the dissolution of the injunction. The plaintiff whose judgment is enjoined may sue forth his execution within the year, and renew the same from time to time, so that he take care the same be not placed in the hands of the sheriff for service; but he is not bound to do so. He may in the former case defer to issue his scire facias, and in the latter, to issue any execution until the dissolution of the injunction, and the statute of limitations is suspended until that period. Nor can the defendant be heard to complain, because it was his own act which interposed the obstacle to the enforcement of the judgment.

That this is the correct doctrine I think very clear, independently of the provision of the Code, ch. 186, § 13, p. 710. This section, after declaring that no execution shall issue nor any scire facias or action be brought on a judgment after the time prescribed by the previous section, provides that in computing the time, any time during which the right to sue out execution on the judgment is suspended by the terms thereof, or by legal process, shall be omitted. Now, clearly an injunction is legal process within the meaning of this provision, and of course every case coming within its operation, the whole period during the pendency of the injunction is to be omitted in computing the time within which the scire facias must be issued to avoid
the bar. Nor do I perceive any reason
585 why *this section should not be held to apply to the case of a judgment recovered previously and an injunction pending at the time the Code took effect. The 19th section of chapter 149, p. 594, provides, in regard to actions, suits, &c., pending the day before the commencement of the Code, that they should be subject to the same limitation as if that Code had not been enacted; and where not so pending, if the right to prosecute the same should exist on that day for a certain number of years prescribed by any statute, the same should be prosecuted within the same time as the same might have been if that chapter had not been enacted. The 13th section of chapter 186, p. 710, provides that the above named 19th section (with others) shall apply to the right to bring such action or scire facias (as therein mentioned) in like manner as to any

right, action or scire facias mentioned in said 19th section. The effect of the whole taken together would seem to be to preserve as to all actions and right to action existing when the Code took effect, the pre-existing periods of limitation, but prescribing as to all as well those just mentioned as those thereafter accruing, a mode by which in certain cases the time of limitation is to be computed, and which excludes from such computation the time during which (in the case of a judgment) the right to sue out execution should be suspended by the terms thereof or by legal process, thus giving to the rule deducible from the cases the sanction of statutory enactment.

In this case the judgment was rendered on the 26th of March 1806, and the injunction was obtained on the same day; and the cause appears to have remained pending in the County court, and afterwards in the District court of chancery at Staunton, and again in the County court, to which it had been remanded, until the November term 1851, when an order was made declaring the injunc-
586 tion to stand dissolved unless *revived by the next December court; and not having been so revived, at the February term 1852, the bill was dismissed. The death of the parties occurred pending the injunction, but the scire facias was sued out in March 1852. I think, therefore, the statute of limitations was no bar, and that the demurrer to the replication was properly overruled.

It is objected, however, that when this demurrer was overruled, an issue should have been made up upon the replication before the trial of the issues on the pleas of payment. But it was the fault of the plaintiff in error himself that it was not done. He neither offered to withdraw his demurrer nor tendered any rejoinder to the replication, and the court could only pass on to the trial of the issues which he chose to make.

Another objection is, that the Circuit court improperly permitted the judgment to go in evidence to the jury, it appearing that it was a judgment against Hutsonpiller alone, whilst the scire facias set out a judgment against him and one Patser Huber jointly. From the record sent up to this court it would appear that the judgment was against Hutsonpiller alone; but a doubt being suggested as to its correctness, the original record has been brought before us for examination, by consent of parties. From this it appears that the capias was returned "executed" as to Hutsonpiller, and "kept off by force of arms" as to Huber. At the next rules, a common order was entered, which was subsequently confirmed. At the March court following, Hutsonpiller appeared and pleaded payment, and at the March term 1806, this plea was waived and judgment by non sum informatus. By the law as it stood at that day (act of 28th January 1800) a party might proceed on the return "kept off by force of arms" as if the process were executed; hence the common order and its confirmation may well be
587 held *to apply to both defendants.

But the record being merely brief minutes of the clerk, it is difficult to determine whether the office judgment was set aside as to both defendants or Hutsonpiller only; and if the latter, then the judgment against Huber must have been at March court 1805 instead of 1806. But the question of variance does not in fact arise in the case. To raise it, the party should have pleaded nul tiel record, which would have put the plaintiff in the scire facias to the production of a record such as was alleged; or he should have craved oyer of the record, and demurred. Wood v. The Commonwealth, 4 Rand. 329. In this case he did neither, but pleaded payment, which was confession of the record, and an avoidance by new matter. The plaintiff was not therefore called on to produce the record; and any variance between the scire facias and that which he did produce was immaterial. It is not like an action of debt upon a bond, in which upon the plea of payment the plaintiff is required to produce the bond. Moore v. Fenwick, Gilm. 214. The reason is that inspection of the bond is necessary to ascertain the dates and amounts of any credits that may be endorsed, with a view to the calculation of the amount for which, under our statute, judgment is to be given. This reason has no application to the case of a record.

The remaining grounds of error assigned founded upon the instruction given to the jury, may be considered together.

The parties stood upon issues of payment in a court of law, and such a court possesses no discretionary power to refuse its aid to enforce a claim out of deference to any supposed public policy forbidding the assertion of stale demands. All that it could do was to instruct the jury as to the rules of law and evidence by which it was to be governed in considering the case. The court
588 must of course in every case take *care not to encroach upon the functions of the jury by withdrawing from it any question of fact proper for its determination: and if the instruction given in this case admitted of the construction which has been placed upon it, it might be obnoxious to the charge of improperly trenching upon the province of the jury. Such I think, however, is not its fair construction. Presumptions are said by a learned writer to be of two kinds, legal and artificial, and natural. The former derive from the law a technical or artificial operation and effect beyond their mere natural tendency to produce belief. The latter act merely by virtue of their own natural efficacy. 3 Stark. Ev. 1235. The writer then illustrates by the case of a bond which has been suffered to stand for twenty years or upwards without payment of interest or other acknowledgment of its existence. In such a case, satisfaction of the bond is a legal presumption. But if a shorter period, even a single day less than twenty years has elapsed, the presumption of satisfaction from mere lapse of time does not arise, though in the latter case it may be inferred, where other circumstances render it probable; but in this case the mere lapse of time possesses no artificial or arbitrary operation, but is left to its mere natural tendency to convince

the minds of the jury that the debt has been paid. This distinction is recognized by other writers. 2 Greenl. Ev. § 528; Best on Presumptions, § 16, p. 18, § 137, p. 187, § 38, p. 45. See also, Eldridge v. Knott, Cowp. R. 214; Hillary v. Waller, 12 Ves. R. 239, 266.

Now, in the case of a judgment upon which no proceedings have been had for twenty years or upwards, the legal presumption could only arise where the party was at liberty to enforce it if he would. Where, however, his hands are tied and he is expressly prohibited to take any measure for that purpose by an injunction obtained by the defendants
589 themselves, and the obstacle *thus interposed continues during the whole period, this arbitrary and artificial presumption would not arise from the mere lapse of time, however much that might weigh with the jury by its natural tendency, in connection with the other circumstances, to convince their minds that the debts had been satisfied. And it is to this distinction that the judge should be understood as alluding when he speaks of the effect of the pendency of the injunction upon the "legal presumption of payment," which would otherwise have arisen from the lapse of time. Thus construed, I do not perceive that the instruction is obnoxious to any well founded objection. Whether in any given case this legal, artificial presumption arises, is, I presume, matter of law on which the court may pass, and in a case in which the delay to proceed has grown out of the act of the defendants themselves, no such legal presumption can be raised in their favor. The effect of the injunction is, as we have seen, to take the case out of the operation of the express statutes of limitation; and it cannot be less potent to withdraw it from the operation of the artificial or legal presumption of payment during the same period.

But whilst the court thus instructed the jury that this legal presumption would not arise, it said nothing from which they should have inferred that they were not at liberty to look into the whole circumstances of the case in connection with the length of time which had been suffered to elapse, and from them to infer and find the fact of payment. It left the time elapsed to have its proper and natural tendency to lead them, in connection with the death of the parties, the failure to take measures sooner to have the injunction dissolved, the ability of the parties to pay, and all the other circumstances of the case, to that conclusion. It placed the case during the pendency of the injunction on the same footing as if there had been no
590 injunction, but *the lapse of time had been less than the exact period of twenty years; and in this it seems to me there was no error. If the party apprehended that the jury might mistake the true meaning of the instruction, and erroneously suppose they were restricted from passing on the question of payment upon a review of the whole circumstances of the case, it was his duty to apply to the court for a proper supplemental instruction, which would have guarded against any such misapprehension, and which we cannot suppose would have been refused.

I am of opinion to affirm the judgment.

MONCURE, J. I am of opinion that the Circuit court erred in instructing the jury "that the pendency of the injunction cause repelled the legal presumption of payment which would have arisen from lapse of time, if said injunction had not been pending." Under all the circumstances of the case, I think the jury ought to have presumed that the debt had been paid, and ought to have found a verdict for the defendant. Forty-six years elapsed between the date of the judgment and the scire facias; during which period both parties to the judgment died. For thirty-eight years the injunction case was on the sleeping docket of the County court, and not an order was taken in it; not even an order of continuance. Thirty-one years elapsed after the obligee's administrator qualified, and before he made a motion in the case. There was nothing to repel the presumption of satisfaction arising from this long lapse of time and this gross laches of the obligee and his representative but the bare pendency of the injunction case, if pendency it can be called. If that fact be sufficient to repel the presumption in this case, it would be so in any case; and no lapse of time, however long, no laches however gross, would be a sufficient foundation for the
591 *presumption of satisfaction of a judgment during the pendency of an injunction thereto. The pendency of the injunction in this case, so far from weakening, seems to me to strengthen the presumption of satisfaction of the judgment. If there had been no injunction, the law would have presumed such satisfaction from the mere lapse of time. Here the presumption seems to be strengthened by the additional facts that equity was expressly reserved on the face of the judgment; that on the very day on which it was rendered it was enjoined on the ground that it had been satisfied, and that no step was taken to have the injunction dissolved for so long a period after the cause was set for hearing. What other inference can be drawn from these facts than that the obligee and his representative did not move sooner in the matter because they believed that the injunction was well founded; or because the balance of the debt had been paid by the collection of the balance of the order mentioned in the bill of injunction, or otherwise? How unjust and contrary to public policy it would be, after so great laches on the part of the obligee and his representative, to require the representative of the obligor to prove actual payment of a debt of which he had probably no personal knowledge, and when the means of doing so had either ceased to exist or been greatly diminished by lapse of time.

But it is said that the court only instructed the jury that the legal presumption of payment arising from lapse of time was repelled by the pendency of the injunction; and that the jury were still at liberty to make an actual presumption of payment, from all the circumstances of the case, including lapse of time as one of them.

There can be no doubt, I think, but that the instruction of the court produced the verdict of the jury for the plaintiff. I think the
592 instruction was wrong in *itself; and even if right in itself, or in the abstract, it misled, and was calculated to mislead, the jury. I think it was wrong in itself. The pendency of the injunction for more than thirty-eight years, without any step being taken in the case, did not repel but rather strengthened the legal presumption of payment arising from lapse of time. At most, it could only have tended to repel the presumption, and should have been left to the jury as evidence to be weighed by them. And the court invaded their province in telling them that it repelled the presumption.

But at all events, it misled the jury, and was calculated to have that effect. They could not be expected to know the difference between legal presumptions and actual presumptions; and when told that the legal presumption of payment arising from lapse of time was repelled by the pendency of the injunction, they naturally inferred that unless there was some other evidence of payment, they must find a verdict for the plaintiff. If the court had been of opinion that while the legal presumption was repelled by the pendency of the injunction the jury might still presume payment from the mere lapse of time, notwithstanding the pendency of the injunction, it should so have told the jury; and would, I think, so have told them. It is obvious that the court is not of that opinion.

I incline also to think that the circuit court erred in reversing the judgment of the county court, and that the act of limitations was a bar to the scire facias. At least forty years elapsed between the death of the defendant in the judgment and the date of the scire facias to revive it against his administrator, who qualified soon after his death. There was nothing to prevent the suing out of the scire facias before. The pendency of the injunction did not prevent it, as has been decided by this court. Richardson v. Prince George Justices, 11 Gratt. 190. It seems to fol-
593 low as a *consequence, that the right to sue out the scire facias having accrued at the qualification of the administrator, and not having been suspended by the pendency of the injunction, is barred by the act of limitations. In Barker v. Millard, 18 Wend. R. 572, it was held that an injunction would not suspend the running of the statute, and that the proper course in such case is for the court of chancery to restrain the defendant from setting up the statute in an action at law. The case is now provided for by law in New York; but Barker v. Millard arose before that law took effect. So here the case is provided for by the Code, p. 710, § 13; but this case arose before the Code took effect, and seems to be governed by the same principle which governed Barker v. Millard. There might be some reason in holding that an injunction would suspend the running of the statute to a scire facias to revive a judgment after a year and a day by or against the same parties, but not to a scire facias to revive a judgment when there is a new party to the suit. In the former case, the only object of the scire facias is to have execution; which cannot be issued in consequence of the injunction. In the latter, the object is to revive the judgment in the name of a person who was not a party to it. As this must be done, when necessary, before an execution can be issued upon the judgment, there can be no impropriety in doing it pending an injunction, so that when it is dissolved, the plaintiff may be in a situation to sue out execution. A judgment against a decedent, which is enjoined, especially where nothing is done in the injunction suit during the period of limitation, seems to be both within the letter and spirit of the statute, 1 Rev. Code, p. 492, § 17, which declared that no action of debt shall be brought against an executor or administrator, &c., upon a judgment obtained against his testator or intestate, nor shall any scire facias be issued against
594 *any executor or administrator, &c., to revive such judgment after the expiration of five years from the qualification of his executor or administrator, &c.; and all such judgments, after the expiration of five years, upon which no proceedings shall have been had, shall be deemed to have been paid and discharged; saving, &c. But while this is the strong inclination of my mind, I do not mean to express a decided opinion upon the question.

In regard to the other questions arising in the cause, I concur in the opinion of Judge Lee.

ALLEN, P., and DANIEL and SAMUELS, Js., concurred in the opinion of Lee, J.

Judgment affirmed.

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595 *Baltimore & Ohio R. R. Co. v. McCullough & Co.

July Term, 1855, Lewisburg.

1. **Contracts—Dependent Stipulations—Case at Bar.***—The contract between a railroad company and one of the contractors on its line of improvement, provides that the contractor shall not receive the amount of the final estimate of his work until he shall release, under seal, all claims or demands upon the company arising out of the contract. The contractor cannot recover the amount of the final estimate until he has executed the release: And his attaching creditor at law has no greater rights against the company in respect to this final estimate than he has, and therefore cannot recover the amount unless the contractor has executed the release.

2. **Same—Same—Same.**—In such case, the common law court has no authority to make its judgment against the company operate as a release under seal by the contractor.

Patrick McCullough & Co. instituted an action of debt in the County court of Marion

*The principal case is cited in B. & O. R. R. Co. v. Polly, etc., Co., 14 Gratt. 467; B. & O. R. R. Co. v. Gallahue, 14 Gratt. 566; Metropolitan L. Ins. Co. v. Rutherford, 95 Va. 779, 30 S. E. Rep. 383.

against Patrick McDonough, William McDonough and B. McDonough, for the sum of five hundred and twenty-five dollars and twelve cents. On the same day on which the process was issued, an attachment was sued out by the plaintiffs to attach the effects of the defendants to satisfy the debt for which the action was brought. This attachment was served on the Baltimore and Ohio Railroad Company. There was a judgment for the plaintiffs against the defendants in the action.

The Baltimore and Ohio Railroad Company appeared in obedience to the attachment, and answered, that there was contract between them and William McDonough for the graduation and masonry of a certain section of its road in Marion county; and that said graduation and masonry were completed and accepted before the service of the attachment. That on the final estimate of this work, by the chief engineer of the company,
596 there was due to the said *McDonough six hundred and ninety dollars; that this work was done under a written contract, whereby it was among other things stipulated between the company and said McDonough, that during the progress of the work there should be monthly estimates, by the engineer, of the work done, four-fifths of the value of which should be paid by the company; and when the work was completed and accepted by the chief engineer, there should be a final estimate of the quantity, value and character of the work, by the said engineer; when the balance appearing to be due to the said McDonough should be paid to him upon his giving a release under seal to said company, from all claims or demands whatsoever growing in any manner out of said agreement. That the said six hundred and ninety dollars was money found to be due to said McDonough on the final estimate made by the said chief engineer, upon the work done by the said McDonough, under the contract aforesaid; that the said McDonough had never signed the release aforesaid; and that he had left the commonwealth and gone to parts unknown; that the company had always been ready to pay the money upon the execution of the release; but that they were not liable to pay the same until the said release was executed by the said McDonough.

The county court gave the plaintiffs a judgment against the Baltimore and Ohio Railroad Company for the amount of their debt with interest, that being less than the amount due from the company to McDonough. And it was further ordered and adjudged by the court, that their judgment should operate and be of the same force and effect as if the said McDonough had signed a release in accordance with the contract made with the said company. From this judgment the company obtained a supersedeas from the circuit court of Marion county, where it was af-
597 firmed. And the *company then applied to this court for a supersedeas, which was allowed.

Andrew Hunter, for the appellant.
A. F. Haymond, for the appellees.

LEE, J. Stipulations in a covenant or other contract are to be regarded as dependent or independent, according to the intention and meaning of the parties, and the good sense of the case. Hotham v. East India Company, 1 T. R. 638; Porter v. Shepperd, 6 T. R. 665; Campbell v. Jones, 6 T. R. 570; Morton v. Lamb, 7 T. R. 125. And where an act is to be done by one party by way of condition precedent to his right to claim performance on the part of the other, he cannot claim such performance without averring the doing of such act or his readiness and offer to do it. Thorpe v. Thorpe, Lord Raym. 662; Collins v. Gibbs, 2 Burr. R. 899; Brackenbrough v. Ward's adm'r, 4 Rand. 352. So where the reciprocal acts are concurrent, and to be done at the same time, neither party can maintain an action against the other without averring performance of his own part of the agreement, or that which is equivalent. Glazebrook v. Woodrow, 8 T. R. 366; Morton v. Lamb, 7 T. R. 125; Heard v. Wadham, 1 East's R. 619; Robertson v. Robertson, 3 Rand. 68; 1 Saund. 320 d; Roach v. Dickinsons, 9 Gratt. 154.

In this case it is plain the provisions in the agreement for the execution of the release, and the payment of the amount found due on the final estimate, must be regarded as mutual and dependent. This was only to be paid upon McDonough's executing a release under seal of all claims and demands whatever against the company in any manner growing out of the agreement. McDonough can maintain no action for the recovery of the amount of this final estimate without averring that he had executed and delivered or ten-
598 dered *the required release. The stipulation for the release is perfectly distinct and intelligible, and must have been regarded by the parties as material. In effect, they made it part of the consideration for the payment of the final estimate. The company insisted on the right to retain this until all litigation about previous estimates, the amount and kind of work done, amount of payments, &c., had ceased, or until the contractor should release all supposed causes of action that might arise out of the contract. It was deemed important thus to provide a means to compel the contractor to assert any claim he might think he had against the company in due time before by the covering up of the work or other causes it might be impossible to ascertain its proper class, amount and value, or to release such supposed claims if he would demand payment of the final estimate; and the contractor submits to such a provision. If parties will deliberately enter into such a stipulation, no reason is perceived why full effect must not be given to it in a court of law. However stringent it may be, it is neither immoral nor illegal nor tainted with any other vice which should forbid the aid of that court to its enforcement.

And as the contract could not thus compel payment of this final estimate without averring the delivery or tender of the required release, neither can the attaching creditor, without showing the same or its equivalent. The latter comes in under the former; can

claim only as he can claim; and must recover on the same terms. There is nothing in the attachment law which amplifies or extends the rights of a creditor seeking its aid in the subject attached beyond those of his debtor. To recover at law on his attachment he must do or have done what his debtor would be required to do to entitle him to recover. The attachment law remits no preliminary duty required of the debtor to perfect his demand, in favor of the attaching
599 *creditor. To do so would be not to enforce but to change the contracts of parties without their consent or default; and this it was neither the province nor the design of the act to do. The 12th section, which creates the lien, was intended to give to the attaching creditor a preference over all others acquiring rights to the subject after the levy of his attachment by transfer or otherwise from the party or by legal process. It was not designed to take from the garnishee any previous right which he had, nor to subject him to any recovery under the attachment from which by the terms of his contract he was exempt until performance by the other party of his part of the agreement. The case of Doe ex dem. Mitchinson v. Carter, 8 T. R. 57, and Ibid. 300, cited by the counsel, seems to have been decided purely on the question of the meaning of the covenant and the intention of the parties. It was there held that the levy of an execution upon a lease containing a covenant against letting, selling, assigning, &c., with a clause of re-entry in case of breach, created no forfeiture because not so intended; all the terms of the lease pointing to some act to be done by the tenant himself. It was not upon the notion that the rights of the creditor were in any wise amplified or enlarged. And all the judges were agreed that a covenant might be inserted in a lease which would prevent the term from passing under a commission of bankruptcy, or being levied on under an execution against the tenant. As said by Lord Kenyon, "a grant of an estate prima facie carries with it all legal incidents; but modus et conventio vincunt legem, and parties to a contract may model it in what manner they please." Ibid. 61. This latter remark applies with full force to the present case.

A judgment for the whole amount of the final estimate, even if fully paid, would not amount to such a release as would fill the terms of that required by the contract. It could serve as a bar pro tanto only: it
600 *would be no bar to an action for other alleged breaches of the contract. This would be true if the action were at the suit of the party himself; a fortiori the judgment on the attachment could only bar for so much. Beyond this the debtor in the attachment suit would clearly not be bound. It would be unjust he should be. The attaching creditor has no interest in the subject beyond his demand. If the garnishee admits funds to that amount or the jury finds them, he looks no further but takes his judgment accordingly. He is not concerned to contest whether his debtor have not further demands against the garnishee; and the judgment against the latter ascertains that there is so much at least in his hands, but not (as against the debtor) that there may not be more. But the party was entitled to a release not only for the final estimate, but for all other causes of action whatever arising out of the contract: and this certainly he would not gain by a judgment for a part of the final estimate only, as this judgment in fact is. And the release was to be under the seal of the party: ita scripta est, and although if a contract be by parol, it may before breach be waived by parol, yet after breach, a release to operate as such in a court of law must be by instrument under seal. Bul. N. P. 152; Chit. Cont. 778; Bender v. Sampson, 12 Mass. R. 44; Crawford v. Millspaugh, 13 John. R. 87.

Nor does the declaration appended to the judgment, that it is to have the force and effect of a release executed in accordance with the contract, give to it any different character or operation. The court had no power in this summary mode, to terminate and cancel the contract as to either of the parties. Whether the debtor had or had not other and further demands against the garnishee beyond the amount sequestered, was not in issue in the proceeding, and without ascertaining that he had not, no court could undertake to absolve the company
601 from its entire liability. But a *court of law possesses no such power to enlarge and extend the operation of its judgment, and of its own motion to assign to it a specific character and effect. Its judgment still has its regular and legal operation only, which is to bar the debtor of his action against the garnishee to the extent of the amount thereby recovered. Beyond this he is in no manner bound; and the attempt to make the judgment operate as a full release of all causes of action against the garnishee under the contract, to overcome the objection of the want of the release stipulated for in the contract, was a mere nullity.

That the lien of the attachment cannot be enforced without rendering a judgment against the garnishee, can be no reason why his legal rights should be invaded; nor can it give the court power to render a judgment against him, when according to the terms of his contract he was not liable to such judgment. That the debtor might improperly withhold the release for the purpose of baffling his creditors, or that he and the garnishee might collude to prevent them from reaching the effects in the hands of the latter, cannot authorize a court of law either to disregard the terms of the contract between the garnishee and the debtor, or to substitute a discharge by its judgment for the release under seal required as the condition of the payment of what may be due. From whatever motive the release be withheld, the remedy of the creditor must be sought in another forum.

I am of opinion to reverse the judgment, and discharge the attachment.

The other judges concurred in the opinion of Lee, J.

Judgment reversed.

602 *McGinnis v. The Washington Hall Association.

July Term, 1855, Lewisburg.

Depositions—Taking—Reasonable Notice.*—A notice, given at 8 P. M. to take a deposition between 8 and 9 A. M. of the next day, in the city where both parties and their counsel reside, would generally be reasonable notice. And such notice given directly the plaintiff learned the witness would leave for a distant state on the next evening by 3 o'clock, and would not return again, is sufficient, though a court was in session in the city at the time, and though the defendant, who is an attorney, and his counsel, had been occupied as counsel in a cause on the day of the notice, and were to be and were so occupied on the next day, so that they could not attend to the taking of the deposition.

This was an action on the case in the Circuit court of Ohio county, brought by Dorrance McGinnis against the Washington Hall Association, for injury done to the wall of plaintiff's house, by digging on the adjoining lot. On the trial the plaintiff offered to introduce in evidence the deposition of Michael Keafe, which had been taken de bene esse, which was objected to by the defendant on the ground of the insufficiency of the notice. The court sustained the objection, and excluded the deposition; and the plaintiff excepted. The notice was given to M. Nelson, the president of the Washington Hall Association, at 8 o'clock P. M. on the 18th of November 1852, that on the next day between the hours of 8 and 9 o'clock A. M. the deposition would be taken at the office of Sherrard Clemens in the city of Wheeling. At the hour of 8 o'clock A. M. the deposition was commenced, where Fitzhugh, one of the counsel for the defendants, who was then present, objected to it, on account of the insufficiency of the notice, and the inability of the defendant and defendant's counsel to attend; but the deposition was taken.

603 *It appeared on the hearing of the objection, that M. Nelson was a practicing lawyer in the courts of Ohio county, and was, on the morning of the 19th of November 1852, required to be in the court to attend to the business of his clients; but that the court did not meet until 9 o'clock A. M. And that Fitzhugh, who appeared for the defendant at the time and place of taking the deposition, informed the notary who took it, that the defendant's counsel were unable to attend to the taking at the time and place, on behalf of the defendant: And it was proved that the said counsel, including said M. Nelson, were on that day engaged in court in the trial of a case, and had been so engaged on the day previous.

On the other hand, it appeared that the witness Keafe was about to go to the state of Louisiana, and so informed the plaintiff's counsel; and that as soon as the counsel was informed of his intended removal, the notice was given. That he was absent at the time of the trial, and had been absent since the taking of the deposition; he having left Wheeling about 3 or 4 o'clock of the afternoon of the day it was taken, and having informed plaintiff's counsel that he had taken his passage on a boat, and would remain no longer.

There was a verdict and judgment for the defendant: whereupon McGinnis applied to this court for a supersedeas, which was awarded.

Jacob, for the appellant.
Russell, for the appellee.

MONCURE, J. The only question in this case is, whether the Circuit court erred in excluding the deposition of Michael Keafe, on the ground of insufficiency of the notice under which it was taken?

The law requires that "reasonable notice shall be given to the adverse party of
604 the time and place of *taking every deposition." Code, ch. 176, § 30, p. 666. What is reasonable notice, is no where defined in the law, and cannot well be defined, but must depend on the circumstances of each case.

A notice served at 8 o'clock P. M. of the taking of a deposition, between the hours of 8 o'clock and 9 o'clock A. M. of the succeeding day, at a certain place in the same city in which both the parties and their counsel resided (as in this case), would ordinarily be sufficient.

But the deposition in this case was taken during a term of one of the courts of Ohio county, whose session was in the city of Wheeling. And Mr. Nelson, president of the Washington hall association, on whom the notice was served, and who is a practicing attorney in the said courts, and was one of the counsel of the association in this case, and Mr. Fitzhugh, another of said counsel, were engaged in court on the day on which the deposition was taken, and had been so engaged on the previous day, in the trial of causes; though the court did not meet before 9 o'clock A. M. And the said Fitzhugh attended at the commencement of the taking of the deposition, which was at 8 o'clock A. M. and objected to the reading of it, "on account of the insufficiency of the notice, and the inability of the defendant and defendant's counsel to attend at the taking thereof." Under these circumstances, if there had been no other materially affecting the case, it would have been proper to have postponed the taking of the deposition to a more convenient period.

But there were other most material circumstances. The witness was about to remove to a far distant state, had taken his passage on a boat, and would remain no longer; left the city about 3 or 4 o'clock P. M. of the day on which his deposition was taken. As soon as the plaintiff's counsel was informed
by the witness of his intended removal,
605 the notice was given. And *about 8 o'clock A. M. of the next day, the plaintiff again notified the president of the

*See monographic *note* on "Depositions" appended to Field v. Brown, 24 Gratt. 74.

association that he was about to take, and would take, the deposition.

The plaintiff, upon being informed that the witness was about to remove from the state, had a right to take his deposition before his removal. Otherwise, he might have lost the benefit of the evidence altogether, by the death of the witness or his removal to parts unknown; or at least, might have been subjected to much trouble and expense in ascertaining the place of his future residence, and taking his deposition there. It was obviously for the benefit of both parties to take the deposition in the city in which they and their counsel all lived. The plaintiff gave the notice as soon as he was informed of the necessity of taking the deposition, and gave the longest notice which it was then in his power to give. He fixed upon a time and place for taking it, as convenient as possible to the defendant, and did every thing in his power to enable the defendant's counsel to attend. If they could not attend, the defendant ought to have employed other counsel for that purpose, rather than the plaintiff should be subjected to the risk of losing his evidence, or at least to the trouble and expense of taking the deposition in a distant state. Other counsel could no doubt have been readily retained in the city of Wheeling; and the defendant had ample time for that purpose after the notice was served.

But it was argued by the defendant's counsel in this court, that the notice was not reasonable, if the defendant did not know that the witness was about to remove from the state; that it does not appear that the defendant had such knowledge; and that it devolved on the plaintiff to have given the information.

It does not appear that the defendant or its officers or counsel had not this information; and the fair presumption, I think, is, that they had. It does not appear
606 *that the fact was concealed, or that there was any conceivable motive for concealing it. It might have been reasonably inferred from the facts that the witness was probably neither aged nor infirm, that the trial was not to take place for some time, and that there was no other apparent or plausible motive for taking the deposition. Can it be believed that Mr. Nelson did not enquire, when the notice was served on him, or when he was again notified the next day of the taking of the deposition, why it was taken at that time, or whether it could not be postponed? Can it be believed that Mr. Fitzhugh did not make such enquiries when attended at the commencement of the deposition? Can it be believed that, if made, they were not truly answered by the plaintiff, or his counsel, or the notary? Or if not truly answered, that the fact would not have been stated in the exception taken at the time, or in the bill or exceptions taken on the trial? Mr. F. did not ask for a postponement of the time for taking the deposition, as he would undoubtedly have done if he had not known that the witness was about to leave the state, and that such postponement was therefore impossible. He placed his objection on the broad ground that the notice was insufficient, notwithstanding the circumstances under which the deposition was taken: And on that ground only the objection was taken at the trial. The purport of the objection was, that under no circumstances could the deposition be taken upon so short a notice, and during the term of a court in which the defendant's counsel were professionally engaged. The plaintiff had a right so to regard the objection, and was not called upon to show that the defendant had knowledge of the intended removal of the witness. The defendant certainly knew at the time of the trial that the deposition had been taken on account of the intended removal of the witness; and if it was intended
607 *to object to the sufficiency of the notice upon the ground that the plaintiff did not inform the defendant of that fact, the ground should have been stated specifically in the bill of exceptions. And then he might have removed it by proof, whereas he would be taken by surprise if the ground could be taken for the first time in this court.

But the plaintiff was under no obligation to give such information, provided he was guilty of no fraudulent concealment, which is not pretended. He was bound only to give reasonable notice of the time and place of taking the deposition; which, under all the circumstances, I think he did. If it can be necessary to cite authorities in support of the views I have expressed, I think the cases in Vinal v. Burrill, 16 Pick 401, and Allen v. Perkins, 17 Id. 369, referred to by the counsel of the plaintiff, are sufficient for the purpose.

I am for reversing the judgment, setting aside the verdict, and remanding the cause for a new trial.

The other judges concurred in the opinion of Moncure, J.

Judgment reversed.

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608 *Armstrong's Heirs v. Walkup & als.

July Term, 1855, Lewisburg.

1. **Guardian and Ward†—How Guardianship Terminated*—Interest.**—Upon the coming of age or marriage of a ward, or the death of the guardian, the guardianship terminates; and from that time only simple interest is to be charged on any balance then in his hands, or which he afterwards received.

2. **Same†—Liability on Official Bond—Mode of Settlement after Termination of Relation.‡**—The estate of

*__Guardian and Ward—Termination of Guardianship—Interest.__—In McKay v. McKay, 33 W. Va. 737, 11 S. E. Rep. 218, the principal case is cited to the point that, where the trust of guardianship is terminated by the guardian's death, only simple interest should be charged from that event on any balance then in his hands.

†__Guardian and Ward.__—See monographic *note* on "Guardian and Ward" appended to Barnum v. Frost, 17 Gratt. 398.

‡__Same—Liability on Official Bond.__—To the point that where the estate of the ward has come into the possession of the guardian, his bond of office binds

the ward having come into the possession of the guardian, his bond of office binds him in his lifetime, and his estate after his death, for the interest, hires and profits received by him, whether received before or after the expiration of his authority as guardian. But from the termination of the guardianship, the same to be accounted for on the ordinary principles governing accounts between debtor and creditor.

3. **Same§—Liability of Guardian—Interest.**—A guardian is not to be charged interest upon the moneys received by him from the day it is received; but he is to be allowed six months in which to invest it.

4. **Same§—Allowance for Support of Ward—Services of Ward.**—A guardian retains his female wards in his family, and treats them as his children, but they are required to work as children might be; though the condition of his family did not require their services. The guardian is to be allowed a reasonable compensation for their board and clothing; and he is not to be charged for their services.

This is the sequel of the case of Armstrong's heirs v. Walkup & others, 9 Gratt. 372. When the cause went back to the Circuit court, that court made an order directing a commissioner to state and report an account between the parties in accordance with the decree of the Court of appeals.

The commissioner stated the accounts of the three wards separately. He allowed the guardian sixty dollars a year for the maintenance of each of them, but charged him for their labor after they were twelve years old, at seventeen dollars and fifty cents a year. The guardian's accounts are brought down to November 26th, 1846, the death of the guardian, and simple interest upon the amount then due is charged. These
609 *statements are made upon the evidence in the record when the case was before this court. According to this statement of the accounts, there was due to Sarah Jane Elliott, on the 26th of November 1846, nine hundred dollars and thirty-six cents, with interest from that date. There was due at the same date to Ann Eliza, the wife of the plaintiff Walkup, eight hundred and seventy-two dollars and twenty-two cents; and he being charged with the sum of one thousand two hundred and seventy-nine dollars and nine cents, paid to him by the administrators of Armstrong on the 9th of October 1847, the amount due this ward was then extinguished, and there remained a balance of three hundred and thirty-five dollars and twenty cents, to be applied as a credit upon the amount due Elizabeth M. Elliott, of whom Walkup had qualified as guardian, leaving the amount due to her at this last date, of five hundred and fifty-nine dollars and two cents.

After the cause went back, both the plaintiffs and the defendants took testimony in relation to the services rendered by the wards in their guardian's family. It was proved that the guardian and his wife were industrious people, and allowed no idlers about them; and that the girls worked in the family. Several witnesses estimated their services at a dollar a week, or fully equal to the expense of their maintenance after they were twelve years old. But it was also proved that Armstrong's white family, besides his wards, consisted only of himself and wife; and that he had a negro woman with three or four children, some of them females about the age of the wards, and able to work; and that the wards were treated with kindness and affection by Armstrong and his wife; indeed as if they had been their own children.

Upon this new evidence, the plaintiffs insisted that the commissioner should
610 make a statement of the accounts, *disallowing any compensation for the maintenance of the wards beyond their own services. This statement was made; and according to it, there was due to Sarah Jane Elliott, on the 26th of May 1847, one thousand five hundred and sixty-three dollars and forty-six cents, with interest thereon from that date. There was due at the same date to Ann Eliza, the wife of the plaintiff Walkup, one thousand three hundred and ninety dollars and thirty-one cents, leaving still due to her, after crediting the sum of one thousand two hundred and seventy-nine dollars and nine cents, the sum of one hundred and eleven dollars and twenty-two cents, with interest from that date; and there was due at the same date to Elizabeth M. Elliott, one thousand two hundred and forty-four dollars and twenty-eight cents, with like interest.

The commissioner also stated an account of the administration upon Armstrong's estate, in which he charged the administrators with the amount of two bonds which had been executed to Armstrong in his lifetime by William and Elijah May, for the purchase money of land; and which the administrators stated the obligors had refused to pay, because there was a controversy as to the title to the land; and he disallowed a credit for the amount of a bond which they had paid in 1851. The amount reported in the hands of the administrators on the 16th of October 1854, was one thousand one hundred and ninety dollars and forty-one cents of principal, and four hundred and forty-seven dollars and twenty-six cents of interest.

The plaintiffs excepted to the report of the commissioner, because commissions were allowed to the guardian; and to the first statement, because no allowance was made for the services rendered by the wards.

The heirs of Armstrong excepted to the second statement of the commissioner:
611 1st. Because it was *not authorized by the decree of the court of appeals. 2d. Because only fifty dollars a year was allowed for the support of the wards until they were twelve years old. And 3d. Because no

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him in his lifetime and his estate after his death, for the interest, hires and profits received by him, whether received before or after the expiration of his authority as guardian, see principal case cited and approved in Sage v. Hammonds, 27 Gratt. 661. See also, monographic *note* on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124.

§**Guardian and Ward.**—See monographic *note* on "Guardian and Ward" appended to Barnum v. Frost, 17 Gratt. 398.

allowance was made for their maintenance after the age of twelve.

The administrators excepted: 1st. Because they were not allowed a credit for the amount of the bond paid off by them in 1851. 2d. Because they were charged with the two bonds of the Mays.

The cause came on to be heard in October 1854, when the court overruled the exceptions of the defendants, and the first exception of the plaintiff; and sustaining the second exception of the plaintiff, adopted the second statement of the commissioner, and decreed in favor of the plaintiffs for the sums found due to them respectively by that statement. And unless the same should be paid within thirty days from the date of the decree, the sheriff of the county was appointed a commissioner to sell upon the terms stated in the decree, so much of the land of Armstrong in the bill and proceedings mentioned, as should be sufficient to pay off the debts, interest and costs decreed to the plaintiffs. And the exceptions taken by the administrators were overruled; the court being of opinion that the questions raised by these exceptions were concluded by the decree of the Court of appeals. From this decree the heirs of Armstrong applied to this court for an appeal, which was allowed.

Smith and McPherson, for the appellants.
Price, for the appellees.

SAMUELS, J., delivered the opinion of the court:

The court is of opinion, that the decree of this court, rendered in this cause when formerly here upon appeal, did not preclude the administrators of John
612 *Armstrong deceased from showing that a portion of the assets with which they were charged had become unavailable without default of the administrators, and therefore not proper credits for the estate; nor from showing any proper debits to the estate for money paid in discharge of debts due from their intestate, which had been omitted from the account, without default in the administrators; and that the Circuit court erred in holding the said administrators concluded by the decree of this court from asking relief against the errors alleged to exist in these particulars.

The court is further of opinion, that upon the arrival at full age or marriage of the wards respectively, or upon the death of John Armstrong, his authority as guardian ceased; and that from the termination of the guardianship, the account between the several wards and John Armstrong in his lifetime, or his estate after his death, should be taken, charging simple interest on any balance then in hand and on money thereafter received, on the ordinary principles governing accounts between debtor and creditor, as contradistinguished from the principles governing accounts between guardian and ward, during the guardianship.

The court is further of opinion, that as the money of the wards derived from the estate of their mother, their slaves and lands, came to the hands of John Armstrong as guardian, his bond of office bound him in his lifetime, and his estate after his death, for the interest, hires and rents respectively received by him, whether received before or after the expiration of his authority as guardian. So much thereof as was received whilst his office continued, to be accounted for as guardian up to the time he ceased to be guardian; and thereafter the balance then in hand, and any interest, hires or rents
613 thereafter received, to be *accounted for on the ordinary principles governing accounts between debtor and creditor.

The court is further of opinion, that the estate of John Armstrong should not be charged with interest on the several sums of money received as principal, interest, hires or rents from the day of the receipt thereof, but should be allowed six months in which to make investments.

The court is further of opinion, that the credit allowed to Armstrong's estate for the board and clothing of his several wards, is reasonable, and was properly allowed; and further, that no charge should be allowed to the several wards for services rendered to their guardian whilst living in his family; that the condition of the guardian's family did not require the services of these hired girls in its domestic affairs, so that those services were of but little value to him. The guardian being charged by law with the custody of the persons of his wards, they, being females, were properly retained by him in his own family, and should not have been hired or bound apprentices to strangers, unless necessity had required it. The labor performed by the wards had the effect of instructing them in arts and skill which will be useful to them through life; they should not be permitted to allege that the guardian, under the circumstances, should have hired them out, or bound them apprentices, and not having done so, be charged for services rendered. A due regard for the proper custody of their persons should not be overlooked for any pecuniary consideration whatever, much less for any value attached to their services.

Thus the court is of opinion that the decree of the Circuit court is erroneous. It is therefore adjudged, ordered and decreed, that the same be reversed and annulled, and that the appellees do pay to the appellants their costs in this court expended; and
614 that *the cause be remanded, with directions to have the accounts reformed upon the principles of this decree, upon the materials now in the record, and upon such further proof only as may be taken to show at what periods Armstrong's wards severally ceased to be under his control as guardian, by their arrival at full age or marriage, or by the death of Armstrong. Which is ordered to be certified, &c.

Decree reversed.

615 *Pryor v. Kuhn.

July Term, 1855, Lewisburg.

Cause Tried by Court—Exception to Judgment—Facts Certified—Rule of Decisions.*—In an action at law, the parties waive a trial by jury, and submit the whole matter of law and fact to the judgment of the court; under the act, Code, ch. 163, § 9, p. 629. An exception taken to the judgment of the court must state the facts proved, not the evidence: And it will be treated as governed by the principles applicable to exceptions taken to the opinion of a court overruling a motion for a new trial, on the ground that the verdict is contrary to the evidence.†

This was an action of detinue in the Circuit court of Brooke county, brought by Oliver Pryor against Adam Kuhn, to recover a quantity of glass ware. Both parties claimed under Metcalf, Miller & Co. who were manufacturers of glass. When the cause was called for trial, the parties waived a jury and submitted the case to the court; and the evidence being heard, the court gave a judgment in favor of the defendant. The plaintiff excepted to the judgment of the court, and spread all the evidence upon the record. The partners Metcalf and Miller, were examined as witnesses. It appeared that they owed the plaintiff Pryor about one thousand eight hundred dollars, and Miller called upon him and proposed to sell him glass to the amount of the debt. He agreed to take it, and went to their place of business and checked off in the margin of their invoice book articles of glass ware, the most of it in boxes, to the amount of one thousand eight hundred and sixty-six dollars. From Miller's
616 testimony, *it would appear that Pryor was to take all the ware so checked off; and that the items on the book so checked contained all the ware of the kind then owned by Metcalf, Miller & Co. Metcalf, however, stated that Pryor was only to take of the glass checked off enough to pay his debt. After a part of the glass had been sent to Pryor, some of the sureties of Metcalf, Miller & Co. objected to it, and they thereupon declined to send the balance; and executed a deed conveying their property, including the glass, to Kuhn, in trust to pay their debts.

Upon the application of Pryor, this court granted a supersedeas to the judgment.

Russell, for the appellant.
Jacob, for the appellee.

SAMUELS, J. This case is brought here by writ of error to a judgment of the Circuit court of Brooke county, in an action of detinue, wherein Pryor was plaintiff and Kuhn defendant. The specific property sought to be recovered was a large quantity of glass ware; both parties claimed to have acquired title to the ware from Metcalf, Miller & Co. the manufacturers. Pryor claimed under a purchase, which he alleged and attempted to prove was complete, so that nothing further remained to be done by the parties to the sale or either of them, to ascertain the goods bought, the price, or any other element of a complete sale; but that it only remained to deliver the goods in the mode agreed on between the parties. A portion of the goods alleged to have been purchased were retained by Metcalf, Miller & Co. and conveyed and delivered to Kuhn the defendant, as trustee in a deed of trust.

The parties acting under the statute, Code of Virginia, p. 629, § 9, waived a trial by jury, and submitted the case to the
617 court in lieu of a jury. The *court, after hearing the evidence, found the issue in favor of the defendant, and rendered judgment accordingly. The plaintiff moved the court to set aside its finding, and to find for the plaintiff; the motion was overruled, and an exception was taken to the opinion of the court. This exception

*Cause Tried by Court—Exception to Judgment—Certificate of Facts.—The question as to whether the *facts* or the *evidence* should be certified to the appellate court in a bill of exceptions to the judgment of the trial court where the jury is waived and the whole matter of law and fact is submitted to the court, seems to be one upon which there is conflict of opinion. The principal case holds that the facts should be certified, MONCURE, J., dissenting. In Wickham v. Lewis, Martin & Co., 13 Gratt. 431 (see also, *note*), SAMUELS and LEE, JJ., approve the principal case, but DANIEL, J., seems to follow the dissenting opinion of MONCURE, J. In Mitchell v. Baratta, 17 Gratt. 452, 463, the dissenting opinion in the principal case is followed, RIVES, J., at page 464, approving the opinion of MONCURE, P., in the same case. In Old Dominion Steamship Co. v. Burckhardt, 31 Gratt. 667, the principal case is cited and the conflicting opinions referred to.

In Western Telegraph Co. v. Powell, 94 Va. 275, 26 S. E. Rep. 828, BUCHANAN, J., cites the principal case among others showing conflict of opinion upon this question, and says, at page 276: "Since the Code of 1887 (sec. 3484), went into effect, whatever may have been the correct practice, prior to that time, we are of opinion that a case at law heard and determined by the court, as well as a case tried by jury, may be heard in the appellate court either upon a certificate of facts, or a certificate of evidence."

In B. & O. R. R. Co. v. Faulkner, 4 W. Va. 183, it is said: "The intervention of a jury was by consent dispensed with, and the cause submitted to the court, and the court having heard the evidence and argument of counsel, rendered a judgment for the plaintiff. The court occupied precisely the relation to the case that a jury would have done if the case had been tried by a jury. *Pryor v. Kuhn, 12 Gratt. 615;* Wickham and Goshorn v. Lewis, Martin & Co., 13 Gratt. 427."

See also, citing the principal case for the same proposition, Nutter v. Sydenstricker, 11 W. Va. 543; Griffie v. McCoy, 8 W. Va. 208; Ramsburg v. Erb, 16 W. Va. 783; Morgan v. Fleming, 24 W. Va. 193.

See monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

†The act provides, that "in any case, except a case of felony, in which a trial by jury would be otherwise proper, the parties or their counsel, by consent entered of record, may waive the right to have a jury, and thereupon the whole matter of law and fact may be heard and determined, and judgment given by the court.

sets out minutely the evidence of the witnesses on both sides. Looking to the evidence of the exceptor alone, it would be a question of some doubt whether the price of the goods in question had been agreed on by the parties, and whether it did not remain to make the selection of goods, or a part of them, from the stock on hand. Looking to the evidence of the defendant, it appears that the selection had not been made nor the price agreed upon. Thus, if we allow to the plaintiff's evidence all the weight ascribed to it in the argument here, and that it would show a complete sale, if uncontradicted, yet the evidence of the defendant, equally strong at least, if standing alone, would show that the sale was not complete. Thus the question is presented whether this court shall engage in weighing the conflicting evidence, in order to find the facts on which to declare the law.

No case in this court has gone so far as to hold that the court can or ought to notice a bill of exceptions to the opinion of a court overruling a motion for a new trial, setting out contradictory evidence, for the purpose of determining which side preponderates. In Bennett v. Hardaway, 6 Munf. 125, it was held that the facts of the case, as they appeared in proof, should be set forth in the exception as facts; and in that case the exception was disregarded, because it contained only the evidence, which was conflicting in itself.

In Carrington v. Bennett, 1 Leigh 340, the bill of exceptions set forth the facts, as facts, so far as they were directly proved upon the trial. Those facts, however, did not directly prove the gaming consid-
618 eration of the *bond, the question in issue between the parties; they afforded, however, strong circumstantial proof to show that the bond was given for such consideration; and there was no conflict in the evidence. This court decided that it would draw the inference which was plainly deducible from the facts: And having by this process ascertained that the bond was tainted with a gaming consideration, reversed the judgment of the court below, and awarded the defendant a new trial.

In Ewing v. Ewing, 2 Leigh 337, the bill of exceptions set out all the evidence on both sides in which there was no conflict. It appeared that if all the evidence of the exceptor should be excluded, and the truth of all the evidence on the other side be admitted, still the verdict would not be sustained by proof: And this court thus ascertaining the facts, awarded a new trial. A like rule was observed in the cases of Green v. Ashby, 6 Leigh 135; Rohr v. Davis, 9 Leigh 30; Pasley v. English, 5 Gratt. 141.

In Mays v. Callison, 6 Leigh 230, the question was whether the court below intended to certify the facts, or the evidence merely; and this court being of opinion that the facts had been certified, the exception was held to be well taken.

The rule in Bennett v. Hardaway was adhered to in the cases of Jackson's adm'x v. Henderson, 3 Leigh 196; Callaghan v. Kippers, 7 Leigh 608; Forkner v. Stuart, 6 Gratt. 197.

Thus, I conceive the rule declared in Bennett v. Hardaway must govern any case in which it would be required of this court to do more than to draw obvious inferences from proved facts; or in which the exceptor is not prepared to waive his own evidence and rely upon the insufficiency of that given on behalf of his adversary, admitting its truth, to sustain the verdict.

If the case before us be tried by
619 these tests, it will *fall within the rule established in Bennett v. Hardaway, because at best the exceptor's evidence somewhat vaguely proves a sale; whilst that of his adversary more distinctly proves that several elements of a complete sale did not exist.

It has been said, however, that the statute, Code, p. 629, § 9, giving the courts authority to try issues of fact, places them in the position of courts when trying facts in cases of probat, roads, mills and the like; and that an appellate court may review the decision of an inferior court in such cases upon a certificate of evidence only, even if contradictory; and that this case, like others of the class to which it is alleged to belong, may be reviewed here upon a certificate of contradictory evidence. If it be conceded that a difference is permitted in the form and substance of an exception taken in a case of the class above named, and one taken upon the trial of an issue in a suit, and that this case belongs to the class of probat, &c., yet the result of this case must be the same; for even in cases of that class, the decision of the court below, on conflicting evidence, would be followed by the appellate court, unless error should plainly appear; which cannot be said to exist in this case.

I am of opinion, however, that the legislature, when it authorized a court in place of a jury, to try issues of fact, did not intend to change the practice beyond that precise point, and especially did not intend to change the practice in the appellate courts. The terms of the statute do not require such change; no reason occurs to my mind why it should be made; on the contrary, I perceive very good reason why an inferior court trying issues of fact, should be held to greater strictness in certifying facts proved to its own satisfaction, than in case of a trial by jury. Such court knows with absolute certainty the
620 facts which *it regarded as proved, and may therefore certify them as such, however contradictory the evidence may be.

The judgment of a court of original jurisdiction, in any case, is pronounced upon a state of facts ascertained upon the trial of such case. It is the duty of an appellate court, in reviewing the judgment of the inferior court, to regard such judgment in reference to the facts upon which it was founded

in the opinion of the inferior court. If, however, the appellate court should be required to engage in a new investigation of the facts, it might arrive at a result different from that of the inferior court; and that a judgment of the inferior court, perfectly correct on the facts as they appeared to that court, might be reversed only because the appellate court found a different state of facts. Thus it would result that the appellate court must finally pass upon questions of fact, and this with means far inferior to those of the court which heard the witnesses, and which had other means of deciding which are denied to the appellate court. The legislature, I conceive, could not have intended to impose upon this court the duty of revising the action of the Circuit court in regard to questions which the Circuit court had better means of deciding correctly than those which are allowed to this court.

I am of opinion to affirm the judgment.

MONCURE, J. The certificate in this case is of the evidence introduced, and not of the facts proved on the trial; and would therefore be insufficient to enable this court to revise the judgment, if the case had been tried by a jury.

But the parties, by consent entered of record, having waived the right to have a jury; thereupon the whole matter of law and fact was heard and determined, and judgment given by the court, in pursuance of the Code, ch. 162, § 9, p. 629.

621 *The principle which requires a certificate of facts instead of evidence to enable an appellate court to revise a judgment of an inferior court upon a motion for a new trial of an issue tried by a jury, does not, I think, apply to the revision of a judgment of an inferior court upon the whole matter of law and fact, without the intervention of a jury.

In jury cases, the provinces of the court and jury are distinct. A line of separation is drawn between the law and fact; one side of which belongs to the court, and the other to the jury. Neither can cross the line and invade the province of the other. The jury must receive the law from the court, and the court must render judgment on the facts as found by the jury. The court, under certain limitations, may grant a new trial; but that is the utmost extent to which it can interfere with the verdict. It cannot render a different judgment on the facts, but must ultimately render judgment on the verdict of the jury upon them. An appellate court in this state, contrary to the practice which generally exists elsewhere, will revise the judgment of an inferior court on a motion for a new trial; but it must generally have the facts before it, and not the evidence only. It will not weigh evidence and ascertain facts; but will only apply the law to facts already ascertained. It therefore generally declines to act in such cases upon a mere certificate of evidence. To the judgment of a court in a jury case a writ of error lies only upon matter of law.

But to the judgment of a court which tries the whole case, including law and fact, a writ of error lies as well upon the fact as upon the law. All judgments of inferior courts, except when the matter in controversy is merely pecuniary and of small value, may be revised by an appellate court upon an appeal or writ of error. The appeal or writ of error is to the whole

622 *judgment, whether it involve matter of law only, or be compounded both of law and fact. Ordinarily a judgment in a civil case involves only matter at law. But whenever the decision of the whole case is referred by law to an inferior court, its judgment is compounded both of law and fact, and may be revised in respect to both by the appellate court. Chancery cases, controversies concerning the probat of a will or the appointment or qualification of a personal representative, guardian or committee, or concerning a mill, county road or ferry, and motions generally, in which the court decides the whole case without the intervention of a jury, belong to this class. In all these cases the evidence must, in some form, be before the appellate court to enable it to revise the judgment of the inferior court. Where an appeal is matter of right, and is from a County to a Circuit court, it may be heard in the latter on evidence viva voce. In chancery cases the evidence is generally in the form of depositions, and is necessarily a part of the record. In all but chancery cases, the evidence is generally made a part of the record by bill of exceptions to the judgment of the court, the evidence at large, and not the facts proved in the opinion of the inferior court, being set out in the bill. 1 Rob. Pr. 591; Mayor, &c., v. Hunter, 2 Munf. 228. Where the evidence in both courts is viva voce, documentary, or in the form of depositions, the appellate court has the same advantage in revising, that the inferior court has in rendering, judgment upon the facts. Where there is before the appellate court a mere certificate of parol testimony heard before the inferior court, the former has not the same advantages with the latter in the decision of the case; but still has a capacity to decide it. The appellate court may stand upon the same ground in regard to the bill of exceptions in such a case that it occupies

623 *in relation to a demurrer to evidence in common actions. 1 Rob. Pr. 591; Grays v. Turnpike Company, 4 Rand. 578. And if so, it will consider the case as if the appellant had admitted all that an reasonably be inferred from the evidence given by the other party, and waived all the evidence on his part which contradicts that offered by the other party, or the credit of which is impeached, and all inferences from his own evidence which do not necessarily flow from it. This is certainly the most favorable view which can be taken of the case for the appellee, and is perhaps more strongly in his favor than ought to be taken. The reason of the rule applied to a demurrer to evidence is that the de-

murrant, without the consent of his adversary, withdraws the decision of the facts from the jury, to whom it properly belongs. No such reason applies to a case in which the law refers the decision of the facts to the court. A more reasonable rule in all such cases would seem to be that which has been applied by this court to cases of probat, and which requires it, on a mere question of credibility of witnesses, always to presume that the inferior court, which saw and heard the witnesses examined, decided correctly. Dudleys v. Dudleys, 3 Leigh 436.

I presume there can be no doubt but that in ordinary cases, triable by the court both upon the law and facts, the judgment of the court may be revised by an appellate court upon a bill of exceptions setting out the evidence at large. The only question then, is, whether this case stands on the same footing in that respect with ordinary cases? I think it does. The only reason for a contrary opinion seems to be that by the provision in the Code, ch. 162, § 9, p. 629, under which this case arose, the whole matter of law and fact is referred to the court only in cases in which the parties or their counsel, by consent, entered of
624 record, *waive the right to have a jury; from which it is inferred that in such cases the parties are bound by the judgment, as by an award of an arbitrator of their own choosing; or else that by their consent the court is substituted to the place of a jury, and its judgment on the facts to the place of a verdict, so that there is the same necessity for a certificate of facts, instead of evidence, to enable an appellate court to revise the judgment as in the case of an ordinary verdict. I think this is a non sequitur; and that the only effect of the consent required in such cases is to waive the right to have a jury, to which the parties are entitled. But for such right, of course no such waiver would have been required; but the law would simply have provided that the whole matter of law and fact should be heard and determined, and judgment given by the court; and then the cases would have stood on the same footing, in every respect, with other cases of which the court has entire cognizance. The waiver of the right places these cases on the same footing as if the right had never existed. It would be strange if the fact that the right once existed should deprive parties of the advantage of having the judgment supervised, which they would have had if no such right had ever existed. The effect of such a construction would be, not only to deprive them altogether of the advantage of having the judgment on the facts supervised, but greatly to impair their right to have the judgment on the law supervised by an appellate tribunal. In jury trials, the mode of placing the judgment of the court upon a question of law arising in the course of the trial on the record for the supervision of an appellate tribunal, is by bill of exceptions to the opinion of the court upon that question. In court trials, except of chancery causes, the only mode is by bill of exceptions to the whole judgment. If the facts
625 *only must be set out in the bill to authorize the appellate court to supervise the judgment, it is obvious there must be many cases in which the judgment cannot be supervised either upon the law or upon the facts. There are many cases in which the court cannot, or will not, certify the facts; as where the evidence is conflicting, or complicated, or of doubtful credibility. The difficulty of setting out facts, instead of evidence, in the hurry and confusion of the business of the court, has given rise to our practice of setting out evidence instead of facts in demurrers to evidence. It is still generally necessary to set out facts, instead of evidence, in a bill of exceptions to an opinion of the court overruling a motion for a new trial. But this rule leaves unaffected the right of the parties to have all the opinions given by the court in the course of the trial, supervised; and affects only their right to have the judgment on the motion supervised. This latter is a limited right, existing in this state only where the inferior court will certify the facts, and generally not existing at all elsewhere. It may be said that a court which has to decide upon the facts must be able to certify them. But a court may be able to render judgment in a case without being able or willing to state in detail all the facts proved by a mass of complicated, doubtful or conflicting evidence.

I think the legislature designed to place these cases on the same footing with other cases in which the whole matter of law and fact is heard and determined by the court; and to subject the judgment of the court, both upon the law and fact, to the supervision of an appellate tribunal. This was certainly the design of the revisors, as will appear from a note to their report, p. 816; in which they refer to the case of a will offered for probat; and to all cases of motion in which the whole case of law
626 and fact may be, and generally *is, determined by the court; and in which they say, "The right of exception to the judgment of the court will be preserved; it will be merely to the judgment of the court, instead of being, when the trial is by jury, to the admissibility of evidence, or to instructions given or refused, or to the decision on a motion for a new trial. One great advantage, where the parties waive the trial by jury, will be that where the court above reverses the judgment of the court below, either for matter of law or fact, there will be no necessity to send the case back for a new trial." With this note before the legislature, they adopted literally, the provision reported by the revisors on the subject; and must, I think, be considered as having done so with the intention expressed in the note.

I have expressed my views of this case at length, because it is a case of first impression, and of great importance. In the re-

sult, I concur with the rest of the court. There is a conflict in the testimony. If so much of the plaintiff's evidence as is in conflict with that of the defendant be rejected, the plaintiff is not entitled to recover. The court below decided in favor of the defendant. And the judgment must, I think, be affirmed, upon any principle that can be applied to the case. If the rule which governs demurrers to evidence be applicable, then the testimony of the plaintiff which conflicts with the defendant's must be rejected. If the rule which governs this court in the revision of a case of probat be, as I think it is, applicable, then, there being a conflict of testimony, this court will presume that the court below, which saw and heard the witnesses examined, decided correctly. In either view, the judgment must be affirmed. That the conflict does not necessarily involve the veracity of the witnesses, but may proceed from defect of recollection, does not,
627 I think, affect the *case. The court below, which saw and heard the witnesses, must have had a better opportunity of deciding the case correctly than this court can have, whether the conflict proceeded from defect of veracity or of recollection.

The other judges concurred in the opinion of Samuels, J.

Judgment affirmed.

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628 *Gaw v. Huffman.

July Term, 1855, Lewisburg.

(Absent SAMUELS, J.*)

1 **Wills—Construction—Charging Debts on Realty.**†—Testator says, "It is my will and desire that my just debts be paid out of my estate by my executors hereafter mentioned." The debts are not thereby charged upon testator's real estate.

2. **Debts of Decedent—Payment by Executor—Reimbursement—Liability of Devisees.**‡—Executor having exhausted the personal estate in payment of debts and being largely in advance to the estate for payment of debts which bound the heirs, is entitled to stand in the place of the creditors whose debts he has paid, and charge the real estate. And the real estate in the hands of the devisees is liable in proportion to its value at the death of the testator.

3. **Same—Liability of Devise in Lieu of Dower.**—A life estate in lands having been given to the widow in lieu of dower, and being of less value then her dower would have been, her life estate is not to bear any part of the burden of paying the debts.

4. **Same—Liability of Devisees—Case at Bar.**—The remainder, after the death of the widow, in the land devised to her for life, having been given to some of the devisees, their proportion of the debts is according to the value of their interest at the death of the testator.

5. **Same—Same—Same.**—The shares of some of the devisees in said remainder, are charged with the payment of certain legacies. The present value of the legacies at the death of the testator is also to be abated from such present value of the remainder, and the proportion of the debts is according to the value of the remainder so ascertained.

6. **Same—Liability of Legatees—Case at Bar.**—The legacies charged upon the remainder in the land, are to bear a portion of the debts according to their value at the death of the testator.

7. **Legacies—Present Value—Rule of Computation.**—The sum which at compound interest will produce the amount of the legacy at the death of the widow, is the present value: And the widow being dead, the period of her death is the time for the payment of the legacy.

8. **Debts of Decedent—Liability of Advancements.**—Advancements made by the testator in his lifetime are not to be taken into the account in fixing the proportion of the debts which each devisee is to pay.

629 *9. **Same—Liability of Legatees—Mistake—Effect.**—Under a mutual mistake as to the proportion of the debts of the testator which a legatee was bound to pay to the executor, the legatee assigned the legacy to the executor for the payment of the amount for which she was supposed to be liable. The assignment will only be allowed to stand as a security for the true amount for which the legatee is liable.

10. **Same—Same—Case at Bar.**—The legacy not being payable until the termination of a life estate, and the legatee being very needy; on that ground, too, the assignment will be held only as a security for the amount due from the legatee to the executor.

Robert Gaw died in 1829, having first made his will, which was duly admitted to probat in the County court of Shenandoah. He was a merchant doing business in Woodstock; and owned several houses and lots in the town, and a farm adjoining, called the Brubaker farm.

By the first clause of his will he says: "It is my will and desire that all my just debts be paid out of my estate by my executors hereafter mentioned." After directing that his mercantile business shall be continued for three years, and stating what advancements he had made to certain of his children, with which they were to be charged, he gives to his son Jacob R. Gaw a house and lot and an out lot; to his daughter Rebecca H. Gaw, other houses and lots; to Catharine Smith, a girl who had been raised by him, a house and lot during her life. He gives to his wife Rebecca Gaw one-third of the Brubaker farm during her life; and he gives the other two-thirds of that farm to his daughter Eliza-

*He had been counsel in the cause.

†**Construction of Wills—Charging Debts on Realty.**—Several cases cite the principal case as authority for the proposition that, whether the will charges the real estate with the payment of the testator's debts is always a question of intention depending upon the construction of the whole will. See Allen v. Patton, 83 Va. 262, 263, 265, 2 S. E. Rep. 143; McGlaughlin v. McGlaughlin, 43 W. Va. 239, 27 S. E. Rep. 382; Thomas v. Rector, 23 W. Va. 28.

‡**Debts of Decedent—Payment by Executor—Reimbursement.**—See monographic *note* on "Executors and Administrators."

beth Crawford, and his sons John Gaw and Robert Gaw, jr. for the life of his wife; and at her death, he gives the whole farm to them, subject to the following charges, viz: That after the death of his wife, Elizabeth Crawford was to pay Mary Huffman, another daughter of the testator, five hundred dollars, and the like sum to Rebecca H. Gaw; and John Gaw was to pay the like sum to these two daughters; which sums the testator made chargeable on the land.

630 The *residue of his estate, including the remainder in the house and lot given to Catharine Smith, he gave to be equally divided among his children; and he appointed Jacob R. Gaw and Davis J. Crawford his executors.

Crawford, who was the acting executor, seems to have closed his administration prior to 1836. In that year his administration account was settled, and a balance of three thousand one hundred and seventy-one dollars and seventy-eight cents, as of the 5th of February of that year, was reported in his favor. In this account the commissioner allowed the executor's commissions, and Crawford seems to have shared them with his coexecutor.

It seems to have been supposed by the parties, that each of the children was bound to pay an equal part of the amount for which Crawford was in advance to the estate; and he having purchased of John Gaw his interest in the Brubaker farm, and thus become liable to pay the legacies left to Mary Huffman and Rebecca H. Gaw, an arrangement was made with them, whereby they conveyed to Crawford so much of their said legacies as would satisfy their proportion of the debt due to him, which was fixed at one-fifth for each of them, and also some debts due to Crawford from them on individual transactions. These arrangements were made whilst Mrs. Barbara Gaw was still alive; and she lived until June 1846.

In January 1848, Mary Huffman instituted a suit in equity againt the executors of Crawford and the heirs of himself and his wife, who had died in his lifetime, seeking to recover the legacy left to her by her father, and which had been made a charge upon the interest of Mrs. Crawford and John Gaw in the Brubaker farm. In this suit the other children of Robert Gaw were parties; and Rebecca H. Gaw filed a cross bill in the cause to recover her legacy.

The cause came on to be heard in

631 September 1849, *when the court held, that the will of Robert Gaw did not charge his real estate with the payment of his debts; that Crawford's representatives were entitled to charge the real estate for so much of the amount due to him as was in payment of debts binding the heirs. That the land of each of the devisees was to be charged with the debts in proportion to its value at the time of the testator's death; and the incumbrance of the widow's life estate in any part of it was to be taken into consideration in estimating its value. That the legacies to Mary Huffman and Rebecca H. Gaw were to abate in the proportion which said legacies bore to the value of the two-thirds of the Brubaker farm on which they were charged. And a commissioner was directed to settle the accounts of the executors of Robert Gaw, disallowing commissions, and ascertain the amount which Crawford had paid of debts binding the heirs, and to apportion the same among the devisees according to the principles of the decree. And the commissioner was further directed to state the account between Crawford and Mary Huffman and Rebecca H. Gaw; and the assignments made by them of their legacies to Crawford were to stand as a security for what they respectively owed to his estate. And by consent of the parties, the property devised to Catharine Smith was not to be charged with any portion of the debts, and the bill was dismissed as to her.

The commissioner made his report, from which it appeared that after excluding the credit for commissions, there was due to the executor Crawford on the 3d of June 1846, the date of Barbara Gaw's death, the sum of three thousand four hundred and thirty-five dollars and twenty-seven cents, of which two thousand and seventy-six dollars and sixty-one cents was principal. In ascertaining the present value of the interest in the Brubaker farm devised to the

632 testator's *three children, after the death of Barbara Gaw, the value of her life estate was estimated up to the time she actually lived after the death of the testator; and so also in estimating the present value of the legacies directed to be paid at the death of Barbara Gaw. And the sum which at the death of Robert Gaw put out at compound interest would in the first case produce the estimated value of the widow's one-third of the land, and in the other would bring the legacy of one thousand dollars, at the death of the widow, was taken as the present value of the widow's thirds, and the legacies. And deducting the value of the life estate of Mrs. Gaw from the whole value of the farm, the one-third of the balance was the amount of Robert P. Gaw's interest in the farm, and the further deduction of the present value of the legacies from the two-thirds of the farm devised to Mrs. Crawford and Jacob R. Gaw, gave the amount of their interest in it. And having thus ascertained the value of the estate and legacies given to the different children, the debt due to Crawford was ratably apportioned among them.

The commissioner also stated the account between the executor Crawford and the legatees, by which it appeared that there was due on the 3d of April 1850 to Mary Huffman, after charging her with her proportion of the debt due to the executor, the sum of six hundred and twenty-five dollars and eighteen cents, and to Rebecca H. Gaw, after the like charge, the sum of two hundred and sixty-five dollars and forty cents: That Jacob R. Gaw's proportion of the debt due to Crawford was, on the 3d of June 1846,

seven hundred and twenty-eight dollars and fifty-five cents, and of Robert P. Gaw, eight hundred and eighty-one dollars and fifty cents, on which there had been a payment, leaving but one hundred and thirty-one dollars and nineteen cents due in June 1846.

The commissioner's report was excepted to, because *of the mode in 633 which the present value of the legacies was ascertained; and because the advancements to the children were not taken into the estimate in fixing the amount of the debt to Crawford which each party was to pay.

In September 1850, the cause came on to be finally heard, when the court overruled the exceptions to the report, and made a decree in favor of the legatees against Crawford's representatives, and in favor of the said representatives against Jacob R. Gaw and Robert P. Gaw for the sums reported by the commissioner. From this decree Jacob R. Gaw applied to this court for an appeal, which was allowed.

Baldwin, for the appellant.
Patton and Stuart, for the appellee.

MONCURE, J. I think there is no error in the decree of the Circuit court.

The will of Robert Gaw does not charge his real estate with the payment of his debts. Whether such a charge is created by a will, is always a question of intention depending upon the construction of the whole will. It is so natural to suppose that a man in that solemn act intended to be just, that courts have taken very slight words in a will to imply a charge upon lands. Carr, J., in Downman v. Rust, 6 Rand. 587. "Courts of equity (said Lord Lyndhurst) have always been desirous of sustaining charges by implication for payment of debts, and the presumption in favor of them is not to be repelled by any thing short of clear and manifest evidence (from the will) of a contrary intention." Price v. North, 1 Philips' R. 85. It has therefore been established, as a general rule, that a direction by a testator that his debts shall be paid, charges them by implication on his real estate, either as against his heir 634 at law or devisee. Ram on *Assets, ch. 4, § 2, p. 57, 8 Law Libr. 39; Leading Cases in Equity 71, Id. 247. To this general rule there are exceptions; one of which is, where the debts are directed to be paid by the executors. "If the testator directs a particular person to pay, he is presumed, in the absence of all other circumstances, to intend him to pay out of the funds with which he is intrusted, and not out of other funds over which he has no control. If the executor is pointed out as the person to pay, that excludes the presumption that other persons not named are to pay." 2 Story's Equ. Jur. § 1247. When the executor is devisee of the real estate, a charge upon it will be generally implied by such a direction. But this will not be the case where the estate is specifically devised to a person who happens to be one of the executors. And even where the executors are also devisees, a mere general introductory direction to the executors will not operate as a charge if it is manifest from the whole will that it was not so intended. 2 Spence's Eq. Jur. 321, 322, 71 Law Libr. 249, and cases cited.

There is no difficulty in the application of these principles to the case before us. The first clause of the will which creates the charge, if any, is in these words: "1st. It is my will and desire that all my just debts be paid out of my estate by my executors hereafter mentioned." The words "out of my estate" are the only words in this clause which make it peculiar, or can afford any room for doubt. Strike out these words, and the clause is in a very common form, the construction and effect of which, standing by itself, is well settled. It would charge only the estate in the hands of the executors. I have found no case in which the will contained these words. But I do not think they alter the sense of the clause. They do not mean the whole estate, but that portion of it which would come to the hands of the executors as such; 635 *the funds with which they were intrusted, and not other funds over which they had no control. This, I think, would be the true construction of the clause, standing by itself and unaffected by the context. But looking to the context for aid in its construction, there can be no doubt about it. By the 12th clause of the will the testator directs all his personal estate, except merchandise, to be sold by his executors for the payment of his debts, and gives them full power to sell his slaves, if necessary, for that purpose. This was the estate to which the testator doubtless referred in the first clause of his will; and it afforded, in his estimation, an ample fund for the payment of his debts. He had no idea that it would be necessary to sell any part of his real estate for that purpose. If by the first clause of his will he had merely directed his debts to be paid, without more, the implication of a charge upon his whole estate would not have been repelled by the 12th clause. But having directed them to be paid out of his estate by the executors, important light is shed upon the meaning of these words by that clause.

The first clause then is to be construed as if it had been a mere direction that the debts should be paid by the executors; and in order to ascertain out of what part of the estate it was intended they should be paid, it is only necessary to enquire what part of the estate would come to the hands of the executors as such. The whole personal estate would come to their hands; and that of course was charged by the will, as it was by the law. But none of the real estate would come to their hands or under their control; unless, perhaps, the house and lot devised to Catharine Smith for life, which was directed after her death to be sold, and the money arising from the sale to be equally divided among the children of the testator named in the will. It would

636 be the duty of the executors *to make that sale, no other person being appointed by the will for the purpose. Whether the proceeds of that sale would be applicable to the payment of debts under the first clause of the will, is unnecessary to be determined in this case, as no question is raised in the subject. It does not appear what has been done with that property; though the presumption is that the life tenant yet lives and has it in her hands. By consent of parties, the property devised to her for life was not charged with any portion of the debts, and the suit was dismissed as to her. It will be time enough after her death to determine the proper disposition to be made of that property, or the proceeds of the sale thereof. All the other real estate of the testator was given directly to the devisees, without any interposition of the executors, express or implied. A portion of it, it is true, is given to the appellant, who is one of the executors; but is given to him in his own right, and not as executor. And we have seen that where an estate is specifically devised to a person who happens to be one of the executors, it will not be charged with the debts of the testator by a mere direction to the executors to pay them. But certainly the devisee in such case ought to be the last person to complain that the land devised to him was not held to be so chargeable.

It having been ascertained by the commissioner's report in the case, that, after exhausting the personal estate of the testator, there still remained due to his executor David Crawford, on account of debts of the estate paid by him, a balance of three thousand four hundred and thirty-five dollars and twenty-seven cents, including interest to the 3d of June 1846; and it having been ascertained, or conceded, that the said executor had paid more than that amount of specialty debts binding the heirs, he was entitled to stand in the place of the creditors whose debts he had paid,

637 and to charge *the said balance upon the real estate of the testator; which was liable therefor in the hands of the devisees, in proportion to the value, at the death of the testator, of the estate devised to each of the devisees respectively. The widow was not chargeable with any thing on account of the said balance in respect to the devise to her; which was in lieu of, and of less value than, her dower. The incumbrance of her life estate was properly taken into consideration in estimating the value of the real estate; and the value of the said life estate was properly ascertained, and deducted from the value of that part of the estate of the testator to which it was attached. Indeed, there was no exception to the report of the commissioner, and no complaint of the decree of the Circuit court in this respect.

I think that the legacies of one thousand dollars each to Mary Huffman and Rebecca H. Gaw, charged upon the two-thirds of the Brubaker farm devised to Elizabeth Crawford and John Gaw, were subject to be abated on account of the balance due to the executor Crawford, and chargeable on the real estate of the testator; and that the portion of that balance for which the said two-thirds were liable, was apportionable between the proprietors of the said legacies and of the said two-thirds, the rate of apportionment being the proportion which the value of said legacies at the death of the testator, bore to the residue of the value of said two-thirds at that period, after deducting therefrom the said value of the legacies. There was at least as much reason in laying the charge upon the said legacies as upon the residue of the said two-thirds of the Brubaker farm. The lagacies constituted a part of the subject of the said two-thirds, and were carved out of it. They were certainly not more specific in their nature than was the residue of the subject, and not more entitled to exemption from liability for the debts of the testator.

638 *I think the mode, adopted by the commissioner, of ascertaining the value of the said legacies at the death of the testator (by ascertaining what amount improved at compound, instead of simple interest, from that time until the death of the widow, when the legacies were payable, would be equal to the amount of the legacies), was correct. That mode, in its application to such cases, received the sanction of the judges of this court in Wilson v. Davisson, 2 Rob. R. 384.

But I do not see how the mode of ascertaining the value of the legacies at the death of the testator can affect the appellant; as its only object is to ascertain the rate of apportionment between the two legacies of one thousand dollars each, and the residue of the subject on which they are chargeable. The portion of the balance due to the executor Crawford, for which that subject is liable, cannot be increased or diminished by the mode of its apportionment among the different interests in the subject. The only persons affected are the proprietors of those interests; and they do not complain.

I think the advancements made by the testator in his lifetime to his children were properly not taken into consideration in the apportionment of the balance due to the executor Crawford; and that the said balance was chargeable only on the real estate left by the testator at his death. The only ground for contending that the advancements ought to be considered in the said apportionment is, that they are directed in the will to be accounted for with the executors in the settlement and division of the estate; from which it is inferred that the testator intended to make all his children equal in the distribution of his estate. It is obvious that this direction does not refer to the specific devises of property made to his children respectively, but only to the residue of his estate undisposed of, which, by the 14th clause of his will, he directs

639 to *be equally divided among his children; and perhaps also to the money arising from the sale of the house

and lot devised to Catharine Smith for life, which, by the 13th clause of his will, he also directs to be equally divided among his children. The executors would have to make the former, and perhaps the latter, of these two divisions; and in making them, he wished the advancements referred to in his will to be accounted for with them. But they would have nothing to do with the real estate specifically devised to some of his children, nor with the sums of money charged on a part of it in favor of his daughters Mary Huffman and Rebecca H. Gaw; and therefore the direction to account for the said advancements with the executors, in the settlement and division of the estate, cannot apply to the said real estate and sums of money, which would not come to the hands of the executor, and as to which no settlement or division would be made. The property advanced by the testator to his children in his lifetime was not a part of his estate at his death; and there is nothing in the will to affect the legal liability of the devisees, which is in proportion to the value of the property devised to them respectively.

In the assignments made by Mary Huffman and Rebecca H. Gaw respectively to David Crawford, they acknowledge themselves indebted to him, each in one-fifth of the balance due to him on his executorial account; and agree that their legacies shall be liable for the payment of the same respectively. Rebecca H. Gaw's due proportion of the said balance was in fact about one-fifth; but Mary Huffman's was much less than a fifth. I think the Circuit court properly regarded these parties as liable only for their due proportions of the balance, notwithstanding the assignments; and properly decreed the assignments to stand as security only for what they respectively owed to David Crawford's estate. The purpose both of the assignors and
640 *assignee was to secure only what was really due. They were mutually mistaken as to the proportion in which the devisees were bound to contribute to the payment of the debt, supposing them to be bound equally, instead of in proportion to the value of the estate devised to them respectively, and the assignments were executed under that mistake. They cannot be regarded as voluntary obligations, nor as admissions or compromises of asserted or disputed claims. They were without consideration, and therefore void, as to the excess of one-fifth of the said balance, over what was really due by the assignors respectively. See 1 Story's Equ. Jur. § 120–137, and notes; 2 Evans' Pothier, Appendix, No. xviii.

There are other considerations which render the assignments, and especially that of Mary Huffman (as to which only the question seems to be material), void to that extent. The parties were dealing with expectancies; with future, and not with present interests. Legatees, whose legacies were payable on a future and perhaps remote contingency, were dealing, in regard to them, with the person upon whom their payment would devolve. They were indebted to him, and to some extent must have been under his influence. One of them, at least, Mary Huffman, was in very indigent circumstances. In this state of things, the utmost extent to which the assignments should be permitted to operate, is to stand as security for what is justly due from the assignors to the assignee. 1 Story's Equ. Jur. § 337, 338, 344.

An objection is taken, in the petition of appeal, to the account, as stated by the commissioner, between the coexecutors David Crawford and Jacob R. Gaw. No exception was taken to that account in the court below; and the objection in the appellate court, therefore, comes too late. But I think it is not well founded. It appears to rest only on the ground that David
641 Crawford, *who was the acting executor, in a former settlement with his coexecutor gave him credit for five hundred and three dollars and thirty-one cents, one-half of the commission allowed by the County court commissioner, who settled the executorial account. The commissioner of the Circuit court having disallowed the commission of the executors in their settlement of the executorial account, properly disallowed the credit for one-half of the commissions in the resettlement of the account between the executors. It would have been to the last degree unjust that David Crawford should not only render all the services for nothing, but be compelled, out of his own pocket, to pay one-half of the usual commission to his coexecutor, who rendered no service at all.

I am for affirming the decree.

The other judges concurred in the opinion of Moncure, J.

Decree affirmed.

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642 *W. & C. Tarr v. Ravenscroft & als. Same v. Hendricks' Adm'r & als.

July Term, 1855, Lewisburg.

1. **Chancery Practice—Bill by Residuary Legatee—Parties—Case at Bar.**—Bill by a residuary legatee against an administrator with the will annexed and his sureties T and H; the administrator being insolvent. C the son of T has received assignments of a number of the legacies, and claims them as his own; but H insists they belong to T, and were purchased at a large discount, the benefit of which he is entitled to share. H insists further that C should not be paid these legacies until T or T and C should file a cross-bill against him, and thus give him an opportunity to contest C's right. If C is not entitled to the legacies he is entitled to compensation for purchasing them up. HELD: C is a proper party defendant to the original bill to have his right to the legacies settled. And H and C having filed a cross-bill against T setting up C's right to the legacies, that T could not object to it at the hearing after having insisted on it. And if C held not entitled to the legacies, he should be allowed compensation for purchasing them.

2. Sureties—Contribution—Case at Bar.*—One of two sureties of an insolvent administrator purchases up legacies for which the sureties are bound, at a discount. He shall only charge his cosurety for his proportion of what he paid for the legacies and of the expenses of purchasing them.

Barbara McGuire died about the end of the year 1835, having made her will, which was duly admitted to record in the County court of Brooke; and James and Robert Marshel qualified as administrators with the will annexed, with William Tarr and John Hendricks as their sureties. They also qualified as administrators of Francis McGuire with the same sureties. By her will, after some small legacies, she directed the proceeds of the residue of her estate, both real and personal, to be divided into seven parts, one of which she gave to each of her living sisters, and to the families of her brothers and sister who were dead.

643 *In 1842, there was a settlement of the administration account under the order of the court of probat; and according to that settlement the residuum of the estate amounted, on the 31st of May 1842, to eleven thousand one hundred and ninety-nine dollars of principal, and three thousand and seventy-one dollars and sixty-eight cents of interest. About this time the administrators and their two brothers, who were doing business in partnership, failed in business; and in June 1842, they executed a deed by which they conveyed all their property in trust to secure their debts as well social as individual.

The administrators having become insolvent, three judgments were recovered against the sureties for some of the specific legacies left by Mrs. McGuire; which judgments were paid by Tarr; and in December 1843, Hendricks executed a deed by which he conveyed to Tarr a tract of land to secure him for Hendricks' moiety of the money he had paid or might be compelled to pay as surety of the administrators, after deducting from said moiety one-half of the dividend which he might receive on account of said debts for the trust fund created by the Marshels for the payment of their debts.

In 1847, Rebecca Ravenscroft, the sister of the testatrix Barbara McGuire, and entitled under her will to one-seventh of the residuum of the estate, filed a bill in the Circuit court of Brooke county, on behalf of herself and the other residuary legatees of Mrs. McGuire, against James Marshel, the surviving administrator, Hendricks and Tarr the sureties, and the specific legatees, setting out the will, and the settlement of the account under the order of the court of probat, and the insolvency of the administrators, and asking for an account, and that the sureties might be compelled to pay what might be found to be due to her.

The record states that William Tarr
644 filed his answer, *but it does not appear in the record. In May 1847, the cause came on to be heard upon the bill taken for confessed as to all the parties except William Tarr, and upon his answer, when a decree was made, directing a commissioner to take an account of the administration of James Marshel on the estate of Barbara McGuire, and also of the specific and residuary legacies, and who were the residuary legatees and others interested in the estate: And these legatees and others interested, were allowed to appear before the master, and prove their rights or interest in said estate.

In September 1847, the commissioner returned his report. He did not state the administration account, the parties being satisfied with that returned to the court of probat; but taking the residuum of the estate as amounting on the 31st of May 1842 to the sum of thirteen thousand two hundred and seventy-eight dollars and twenty-four cents, he apportioned that sum among the residuary legatees. He gave a list of these legatees, numbering forty-six, and some of these were dead leaving children; and he stated an account with each of them, except the seven children of one sister, showing the payments which had been made to them, and from what fund made. The children of that sister it appeared had been paid in full by the administrator and his sureties. Of the persons claiming this residuum Campbell Tarr, the son of William Tarr, was reported as the assignee of thirty-nine; and he was the assignee of the only specific legatee who had not been paid: The plaintiff and four others of the residuary legatees still held their claims to their legacies.

After the commissioner's report had been returned, the administrators with the will

*__Sureties—Contribution.__—The doctrine of contribution among sureties is founded rather on principles of equity and natural justice than upon any notion of mutual contract, express or implied. Strother v. Mitchell, 80 Va. 157, quoting from the principal case.

Sureties are not only entitled to contribution as between themselves personally for moneys paid out in discharge of the common debt, but they may claim the benefit of all securities which any of their number may have taken for his indemnity. And if a surety who seeks contribution has been reimbursed part of what he has paid by the debtor himself, or through a counter security, or from any source, *he must give credit* for the amount reimbursed, and can only claim contribution for the balance. Boughner v. Hall, 24 W. Va. 262, quoting from the principal case.

Same—Subrogation.—In Combs v. Candler, 95 Va. 8, 27 S. E. Rep. 815, it is said: "The doctrine is well settled that before a surety is entitled to be subrogated to the rights of the creditors against the principal debtor he must have actually paid or satisfied the debt, but it is not necessary that he should have paid it in money—but if the creditor receives either property, negotiable paper, or other securities from him in full satisfaction of the demand, it is generally sufficient to entitle him to be subrogated to the rights of the creditors against the party for whom he has thus made payment. Brandt on Suretyship, etc., secs. 249, 250, 261; Sheldon on Subrogation, secs. 127 to 129; Gatewood v. Gatewood, 75 Va. 407; *Tarr v. Ravenscroft, 12 Gratt. 642.*"

On the subject of the right of sureties to subrogation, see cases collected in *foot-note* to Buchanan v. Clark, 10 Gratt. 164.

annexed of John Hendricks answered the bill. They do not question the liability of Hendricks as surety of the administrators; but say that the judgments to secure
645 which their testator *executed the mortgage to William Tarr, had not then been paid off by Tarr; and that they had been since paid in great part, from the proceeds of the property conveyed in trust by the Marshels. They say further, that the legacies assigned to Campbell Tarr were in fact the property of William Tarr, paid for by money furnished by him to his son Campbell Tarr, who acted as his agent in the purchases, and who was a young man without means of his own to purchase them; and that having been purchased at a considerable discount, they could only be charged by William Tarr against their testator Hendricks, at the amount paid for them: And they charge that William Tarr, to induce Hendricks to execute the mortgage aforesaid, proposed and agreed that he would purchase in as many of said legacies for which the sureties were liable, as he could obtain, and that Hendricks should participate equally in any profit which might result therefrom.

They insisted further, that if Campbell Tarr was to be considered as the true holder of said claims by assignment, he ought not to be allowed to recover any thing in respect thereof, nor should William Tarr be allowed to recover any thing on account of payments made to Campbell Tarr as such assignee, without first filing his or their bill against Hendricks' representatives, real and personal, alleging and proving said purchase and assignments, and giving said representatives an opportunity to contest said claims.

Upon the filing of the foregoing answer, on the motion of Campbell Tarr, he was admitted a party defendant in the suit, and filed his answer. He denied in express terms that he acted as the agent of William Tarr in the purchase of the legacies, or that William Tarr had any interest in said purchases. He said that at the time the purchases were made, Hendricks and William Tarr were the sureties of the
646 administrators, *and they were liable as such sureties, as was then supposed, for near twenty thousand dollars; the various claimants to which were widely dispersed through several states of this Union. That at that time his father and himself were doing business as partners and merchants, and that in consequence of these heavy liabilities their credit was subject to suspicion, and William Tarr was liable to be called upon at any time to pay a large amount when he was least prepared to pay it. That in consideration of these things, and believing that the claims could be purchased upon terms that would indemnify the purchaser for the labor, exposure and expense of hunting them up and buying the said claims, he proposed to William Tarr that if he would loan respondent so much of the money necessary to purchase these claims as respondent had not of his own, that respondent would hunt up the claimants and purchase the claims. That William Tarr agreed to loan him such money as he could conveniently spare from his business; and thereupon the respondent undertook for himself to hunt up and purchase the claims, and succeeded partly with his own money and partly with money borrowed from William Tarr, in purchasing, at immense labor, exposure, trouble and expense, divers of said claims. That in so far as he purchased said claims for himself, he took the assignments to himself. And he refers to the report of the commissioner made in the cause, as showing which of the legacies had been assigned to him.

In September 1850, the report of the commissioner was recommitted by consent, and he returned a report in which several accounts were stated as between the sureties William Tarr and John Hendricks. The fourth statement showed their indebtedness to Campbell Tarr as assignee of the legacies, if they belonged to him, to be six thousand seven hundred and sixty-eight dollars and forty-nine cents. And the
647 fifth statement showed *the indebtedness of Hendricks to William Tarr, if the legacies were purchased for him, to be one thousand eight hundred and seventy-six dollars and sixty-seven cents.

Upon the question, who was the owner of the legacies purchased by Campbell Tarr, this court was of opinion that the evidence showed a purchase for William Tarr. Campbell Tarr was examined by the commissioner as to the prices given for the legacies purchased by him. He gave a detailed statement, from which it appeared that the legacies purchased by him amounted to twelve thousand four hundred and eleven dollars and forty-three cents, for which he gave nine thousand five hundred and ninety-eight dollars and eighty-three cents. And he gave a statement of the time, labor and expense employed in the purchases, and estimated the amount which would be due to him, if acting for another, at eight hundred and eighty-five dollars. The amounts reported by the commissioner were so reduced by payments out of the trust property of the Marshels.

In 1852, William and Campbell Tarr filed a cross bill in the cause against the administrators with the will annexed and devisees of Hendricks. The object of this bill was to have the mortgage given by Hendricks to William Tarr, for the purpose of repayment to William Tarr of the money he had paid for Hendricks, foreclosed, and payment to Campbell Tarr of the amount he claimed as assignee of the legacies aforesaid. They state that the personal estate of Hendricks did not amount to five hundred dollars, and that he had no real estate at his death but that embraced in the mortgage deed. The administrators answered, relying upon the grounds of defense taken in their answer to the original bill. It appears that the personal estate of Hendricks was less than five hundred dollars,
648 and that was given *specifically to

two of his children: As to his real estate, he directed that one of his sons should keep possession of it until the final settlement of the administration of Mrs. McGuire's estate. That if upon that settlement these sureties had nothing to pay, his real estate should be sold and divided among his children; but if the sureties had to pay any thing, his proportion of the amount should be paid out of the proceeds of the sale of his estate, and the balance of these proceeds divided in the same proportion among his children.

Both causes came on to be heard on the 2d day of September 1853, when the court dismissed the original bill as to Campbell Tarr, and recommitted all the reports made in the cause, as to a commissioner, with directions to state various accounts. First. An account with each legatee, showing how much was due from the administrators, and how much was paid by them. Second. An account of all moneys paid to the legatees by William Tarr, including therein such money as was paid by or through Campbell Tarr, and claimed by him in his own right; and when paid. Fifth. An account of all moneys due from Hendricks to William Tarr on account of their joint suretyship for the administrators. And sixth. An account of the reasonable expenses of William Tarr and Campbell Tarr incurred by them in making the purchases of all the claims by them or either of them. And the court holding that Campbell Tarr had no interest in the cross suit, the bill in that case was dismissed as to both plaintiffs, with costs to the defendants. Whereupon William and Campbell Tarr applied to this court for an appeal, which was allowed.

Fry, for the appellants.

There was no counsel for the appellees.

649 *LEE, J. Whether Campbell Tarr is to be regarded as having purchased the interests of the legatees of Barbara McGuire, now claimed by him, on his own account and for his own benefit, or as agent of his father William Tarr, and for the use and benefit of the latter, it was not improper he should be made a party in the case of Rebecca Ravenscroft, the object of which was to obtain a settlement of the estate of Barbara McGuire, and a decree for payment of the various legacies left by her will. Campbell Tarr had taken the assignments of the different legacies purchased in by him to himself in his own name, and was claiming them for his own use; and it appears that in making these purchases he had spent some time and labor, and had incurred various charges and expenses. It was right, therefore, that his claim to the legacies should be adjudicated, and that he should be bound by the decision; and if it should be held that the purchases were in fact for the benefit of his father, and that he held the assignments as trustee merely, still he could not be required to surrender them for the benefit of other persons except upon being reimbursed for his time, labor and expenses. It was therefore proper that he should be a party in this cause, so that the whole matter might be finally adjudicated, and the bill should not have been dismissed as to him when the case was heard and the reference directed.

It is clear that it was proper for William Tarr to convene the representatives of the personal and real estate of John Hendricks, by cross bill before the court, for the purpose of charging upon the real estate the amount for which it was properly responsible by reason of the cosuretyship of Hendricks with William Tarr in the administration bonds given by James and Robert Marshel as administrators of Francis McGuire and Barbara McGuire. Hendricks, by the mortgage of the 18th of December 1843, had charged his land *with
650 reimbursement to William Tarr of one-half of all he might have paid as such surety; and by his will he had in effect charged all his estate with the payment of his proportion of any deficiency that might be made to appear upon the settlement of the administration accounts. This provision of course enured to the benefit of William Tarr, and his right therefore to come with his cross bill is beyond all doubt. Nor was there any impropriety in Campbell Tarr's being joined with him as a complainant. Campbell Tarr had purchased the legacies and taken the assignments to himself in his own name. He claimed to have purchased them for his own use and benefit. This claim was recognized and acknowledged by William Tarr. Thus Campbell Tarr was apparently concerned in the proper disposition of the proceeds of the real estate of John Hendricks; and if others were interested to show that the purchases were in fact for the use and benefit of William Tarr, still Campbell Tarr might claim indemnity for his services and expenses in obtaining the assignments as the condition of his surrendering them for the benefit of those entitled. And having thus an interest in the subject, it was proper he should be a party. Story's Eq. Plead. § 72, § 153, and n. 3, § 154; 1 Dan. Ch. Pr. 284, 291. The same reason therefore which forbade the dismissal of the original bill as to Campbell Tarr, applied also to the case of the cross bill of William and Campbell Tarr; but there was still another reason which rendered the dismissal of the latter, for the cause assigned, improper at the hearing. The administrators of Hendricks had in their answer to the original bill insisted that Campbell Tarr should not be allowed to recover any thing by reason of the supposed assignments of the legacies to him, nor William Tarr to recover any thing by reason of any payments to Campbell Tarr as such assignee, without first filing their
651 bill against the representatives *of John Hendricks, and alleging and proving the assignments and giving the administrators an opportunity to contest them; and when the cross bill was afterwards filed, setting up the assignments,

neither they nor any other of the representatives of John Hendricks made any objection for such supposed misjoinder by demurrer, plea or otherwise. The administrators of Hendricks answered, and the cause came on for final hearing on the merits. The objection not having been made in due time and in the proper form, should at this stage have been disregarded. 1 Dan. Ch. Pr. 399, 401; Story's Eq. Plead. § 544. Raffity v. King, 1 Keen's R. 601; Trustees of Watertown v. Cowen, 4 Paige's R. 510; Dickenson v. Davis, 2 Leigh 401.

Upon the merits, I think there is as little room for doubt or difficulty.

Campbell Tarr was the son of William Tarr, and in his employment or engaged with him in business as a junior partner. He was, so far as appears, without means, except such as he derived from his father. The money with which the purchases of the legacies were made was supplied by his father, and the enterprise of hunting up the legatees and obtaining their assignments was undertaken at his suggestion. The idea that the money used by Campbell Tarr in making the purchases was loaned him by his father, is not supported by any competent testimony, but is repelled by the circumstances disclosed. In making the purchases Campbell Tarr appears to have had constant reference to his father, and speaks of it as his father's business. He also speaks of the hardship of the case upon both of the securities, and states his object in making the purchases to be to save them as far as possible; and he uses this as an argument with the legatees why they should consent to an abatement of the amount due them; and the argument appears to have been successful. Looking to all the
652 circumstances in proof, *the concert of purpose between William Tarr and Campbell Tarr is plainly apparent. That the latter was the mere agent of the former in making the purchases is, I think, beyond any reasonable doubt or question, and as such, for all the purposes of these causes, he must be regarded. The assignments being in his name, he is to be regarded as holding them in trust for his father, and for those, if any, who may be entitled to participate with him in the benefits of them, subject only to the right to demand a reasonable compensation for his services, and reimbursement of his expenses incurred in obtaining the assignments.

Regarding the purchases of these legacies as in fact made for William Tarr, the claim of the representatives of Hendricks to participate in the benefit of them cannot be successfully resisted. The doctrine of contribution among sureties is founded rather on principles of equity and natural justice than upon any notion of mutual contract, express or implied. Dering v. Earl of Winchelsea, 1 Cox R. 318; Craythorne v. Swinburne, 14 Ves. R. 160; per Lord Redesdale in Stirling v. Forrester, 3 Bligh's R. 575, 590. It is true it may be enforced at law, although no positive contract between the sureties can be shown, but the principle and the measure of relief afforded in the court of equity are different from those of the law courts. Thus, if one of several sureties be insolvent, and another pays the debt, he can at law recover from the other solvent sureties only their original quotas without regard to the share of the insolvent surety. Cowell v. Edwards, 2 Bos. & Pul. 268; Brown v. Lee, 6 Barn. & Cress. 697; S. C. 9 Dow. & Ryl. 700. But in equity the share of the insolvent surety will be apportioned amongst those who are solvent. Hale v. Harrison, 1 Cas. in Ch. 246; Dering v. Earl of Winchelsea, 1 Cox R. 318; Peter v. Rich, 1 Ch. Rep. 34. So if one surety die, the remedy at law lay only
653 *against the survivors; but a court of equity would compel contribution from the estate of the deceased surety. Primrose v. Bromley, 1 Atk. R. 89.

Sureties are not only entitled to contribution as between themselves personally, for moneys paid in discharge of the common debt, but they may also claim the benefit of all securities which any one of their number may have taken for his indemnity: And if a surety who seeks contribution has been reimbursed part of what he has paid, either by the debtor himself, or through a counter security, or from any source, he must give credit for the amount reimbursed, and can only claim contribution for the balance. Knight v. Hughes, 3 Carr & Payne 467; Swain v. Wall, 1 Ch. Rep. 80; 1 Story's Eq. Jur. § 499; Theobald on Prin. and Sur. ch. 11, § 283, p. 267.

From these principles it follows, I think, as a necessary corollary, that if one surety purchases in the common debt for less than its nominal amount, he can only claim contribution of a cosurety for the amount actually paid by him. If it be unjust that one surety should bear the whole burden of a demand to which another, in common with him, has made himself equally liable, and from the payment of which he has derived an equal benefit, so it would be unjust to compel the latter to sustain more than his just and equal share of the necessary loss. The object of the whole doctrine is equity, and equality of burdens is equity.

In Blow v. Maynard, 2 Leigh 29, it was held that where a surety for a guardian compromised with the ward for a less sum than was actually due on a settlement of the guardian's account, he could only demand indemnity from the guardian's estate in equity, for the money actually paid to the ward in satisfaction of her claim. A fortiori, it should seem he could not demand contribution of a cosurety except for the amount thus actually paid. If the
654 principal be only liable for *the amount actually paid by a surety in discharge of the debt, then he could only be liable to any other surety for his quota of that amount; and if the latter could be called on for contribution according to the nominal amount of the debt, he would thus be liable to his cosurety for a greater amount than he could recover of the common principal.

I think, therefore, the estate of Hen-

dricks was only liable to reimburse one moiety of the amount actually paid by William Tarr for the legacies purchased in by him or by Campbell Tarr for him, and one-half of what would be a just compensation to Campbell Tarr for his time and services and necessary expenses in looking up the legatees and obtaining their assignments.

I am of opinion to reverse the decree, and remand the causes for further proceedings.

The other judges concurred in the opinion of Lee, J.

Decree reversed.

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655 *Balt. & Ohio R. R. Co. v. Gallahue's Adm'rs.

July Term, 1855, Lewisburg.

1. **Domestic Corporations—Principal Office Outside of State—Effect.***—The Baltimore and Ohio railroad company is a corporation of the state of Virginia; and although its principal office is in Maryland, and its principal officer resides there, it may be sued in Virginia on contracts made here.†
2. **Same—Garnishment.**‡—A corporation may be summoned and proceeded against as a garnishee, upon proceedings under the Code, ch. 151, § 2, p. 600.†
3. **Same—Term "Person" as Applied to.**§—When the word person is used in a statute, corporations as well as natural persons, are included, for civil purposes.†
4. **Same—Garnishment—Answer.**‖—When a corporation is proceeded against as a garnishee, its answer is to be received in the only mode in which a corporation can answer, under its corporate seal.
5. **Same—Attachment—To What Debts Applicable.**¶—It seems that the statute in relation to attach-

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***Corporation Rechartered or Licensed to Do Business in More Than One State—Effect.**—For the proposition that under a statute authorizing a foreign railroad company to construct its road across the territory of Virginia, such road is to be regarded as a Virginia corporation, and liable to suit on contracts made in the state, the principal case is cited and approved in Hall v. Bank of Va., 14 W. Va. 624; Goshorn v. Supervisors, 1 W. Va. 324, 325; Hart v. B. & O. Ry. Co., 6 W. Va. 356, 359; Baltimore & Ohio R. R. Co. v. Supervisors, 3 W. Va. 323, 324; Baltimore & Ohio R. R. Co. v. P. W. & K. R. Co., 17 W. Va. 872, 876; Baltimore & Ohio R. R. Co. v. Wightman, 29 Gratt. 435, and *note*. See principal case cited in *foot-note*, to B. & O. Ry. Co. v. Noell, 32 Gratt. 394. See, in accord, Henen v. B. & O. Ry. Co., 17 W. Va. 881; Quarrier v. B. & O. Ry. Co., 20 W. Va. 424. In the five last-named cases it was held that since such foreign corporation becomes, when authorized to operate in this state, either by license or charter, a domestic corporation, it cannot remove the cause, when sued, to the federal courts on the ground of diverse citizenship. But in Gerling v. B. & O. R. R. Co., 14 Sup. Ct. Rep. 537 (151 U. S. 673), where the principal case is cited, it is held that a railroad corporation chartered by one state and acting under a *license* in another state may remove the cause to the federal courts when sued in the latter state by a citizen of that state. In Baltimore & Ohio R. R. Co. v. Koontz, 104 U. S. 12, where the principal case is cited, the cases B. & O. R. R. Co. v. Wightman and Same v. Noell, as to removal to the federal courts, are overruled. See monographic *note* on "Corporations (Private)" appended to Slaughter v. Com., 13 Gratt. 767.

†See the opinion of JUDGE ALLEN for the provisions of the statutes.

‡**Corporations—Garnishment.**—For the proposition that a corporation may be summoned and proceeded against as a garnishee, the principal case is cited and approved in C. & O. R. R. Co. v. Paine, 29 Gratt. 508, and *note*; Portsmouth Gas Co. v. Sanford, 97 Va. 125, 33 S. E. Rep. 516; Brown v. Gates, 15 W. Va. 155; Mahany v. Kephart, 15 W. Va. 623, 625.

§**Same—Term "Person" as Applied to.**—When the word person is used in a statute, corporations as well as natural persons, are included, for civil purposes. For the above proposition the principal case is cited and approved in Western Union Tel. Co. v. Richmond, 26 Gratt. 20; City of Lynchburg v. N. & W. R. R. Co., 80 Va. 247; Crafford v. Supervisors, 87 Va. 116, 12 S. E. Rep. 147; Portsmouth Gas Co. v. Sanford, 97 Va. 125, 33 S. E. Rep. 516; Quesenberry v. People's Building, etc., Ass'n, 44 W. Va. 515, 30 S. E. Rep. 74. See monographic *note* on "Corporations (Private)" appended to Slaughter v. Com., 13 Gratt. 767.

‖**Same—Action against—Answer.**—In Teter v. W. Va., etc., R. Co., 35 W. Va. 435, 14 S. E. Rep. 147, it is said: "The answer of a corporation should be signed by the president, with the seal of the corporation affixed; neither is it necessary that the answer should be sworn to. 'A corporation cannot be sworn, and, therefore, must put its answer under its common seal only.' If the plaintiff desires to have a sworn answer under the provisions of section 38, c. 125, Code, or otherwise, he should make some officers, members, or agents of the corporation, within whose knowledge the facts are supposed to be, codefendants in his bill, and require from them a discovery under oath. *Railroad Co. v. Gallahue's Adm'r, 12 Gratt. 655;* Railroad Co. v. Wheeling, 13 Gratt. 62; Story, Eq. Pl. § 235; 1 Bart. Ch. Pr. 389; Quarrier v. Insurance Co., 10 W. Va. 507."

¶**Same—Garnishment—To What Debts Applicable.**—In Ringold v. Suiter, 35 W. Va. 192, 13 S. E. Rep. 48, it is said: "In *Railroad Co. v. Gallahue, 12 Gratt. 655*, it is said under the Virginia statute, similar to our own as to this point, that 'it seems that the statute in relation to attachments at law refers to debts due from the garnishee to the defendant at the time of the service of the process upon the garnishee.' The opinion by JUDGE ALLEN will show how undecided his mind was on the point, and is unsatisfactory as to this. We think under our statute that the attachment covers debts or effects down to the answer of garnishee. This interrogatory asked the jury to inquire as to indebtedness of the garnishee after the answer. This it could not do, as the attachment did not reach beyond the answer."

Evidence—Statements of Servant—When Binding on Master.—In Fisher v. W. Va. & P. R. Co., 42 W. Va. 188, 24 S. E. Rep. 572, the court, quoting from Greenleaf on Evidence, § 113, says: "The party's own admissions, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency in regard to a transaction then depending *et dum fervet opus*. It is because it is a verbal act, and part of the *res gestæ*, that it is admissible at all. See *Railroad Co. v. Gallahue's Adm'rs, 12 Gratt. 655* (eighth point of syllabus)."

ments at law refers to debts due from the garnishee to the defendant at the time of the service of the process upon the garnishee.†

6. **Same—Same—Debts Not Payable—Quære.**—Whether the statute operates at law upon debts, which, though due at the service of the attachment upon the garnishee, are not then payable?

7. **Same—Garnishment—Answer—Verdict—Case at Bar.**—The answer of a garnishee speaks of debts due from him to the defendant at the date of the service of the attachment; the jury impaneled to try the question whether the garnishee had disclosed all the debts due from him to the defendant, render their verdict, that the garnishee did not state all the debts which he owed to the defendant at a subsequent specified day and afterwards; but that at such subsequent specified day and afterwards he owed the defendant enough to pay the plaintiff's debt. The verdict is no reply to the answer, and should be set aside.

8. **Evidence—Statements of Servant Not Dum Fervet Opus—Case at Bar.**—A railroad company having been summoned as a garnishee, and a jury having been impaneled to try whether it has made a full disclosure of its indebtedness to the defendant in the action, the statements of a division engineer to a third person in relation to the indebtedness of the company to the defendant, are not competent evidence; it not appearing that said engineer was the agent of the company having any authority on this subject, or that at the time of making the statements he was engaged as agent about the business referred to, so as make his statements part of the transaction, and explaining the nature thereof.

656 *On the 14th of January 1852, the intestate of the defendants in error instituted an action of assumpsit against Patrick and F. C. Crowley, in the Circuit court of Marion county; and on the same day they sued out an attachment against the estate of the debtors under the provisions of the Code, ch. 151, § 2, p. 600, with an endorsement directing the sheriff to summon the Baltimore and Ohio railroad company as garnishee. On the same day the sheriff returned that he had summoned the plaintiff in error, by delivering a copy of the attachment to James L. Randolph, agent of said company, and a resident of said county, at the company's office in the town of Fairmont, Marion county; there being no president, director or other chief officer within his county on whom he could serve the same.

On the 18th of May 1852, the defendants in the court below appeared by their counsel, and confessed a judgment for one thousand and sixty-six dollars and seventy-nine cents, with interest from the 14th of January 1852 until paid. The company also appeared by its attorney, and waived publication; and the cause was continued as to it.

At the October term 1852, a motion was made by the company to discharge it from answering to said summons as garnishee, upon the ground that a corporation is not liable as garnishee under the attachment laws of the state of Virginia in the form of proceedings in this cause; which motion the court overruled, and decided that the corporation was bound to answer.

At the May term 1853, the company filed its answer as garnishee, by which it was averred that there are in its hands a certain sum that will be due to Patrick Crowley on his signing a certain release according to the requirements of a contract filed with the answer; that said money is a final estimate for the work done on said contract. That it owed Frederick C. Crowley nothing subject to said attachment;

657 nor was there *any other moneys in the hands of the company at the time of the service of said attachment, only as above stated.

The plaintiff in the court below thereupon suggested that the garnishee had not fully disclosed the debts due by it to, or effects in its hands of, the defendants; and the court ordered a jury to be impaneled to enquire as to such debts and effects.

At a subsequent term a jury was impaneled, and found that the company as garnishee has not fully disclosed the debts due by it to, or effects in its hands of, the said P. and F. C. Crowley; and that there was a sufficient amount due from said company on the 18th day of May 1852, and also afterwards, to the said P. and F. C. Crowley to satisfy the plaintiff's judgment rendered on the 18th day of May 1852, against them in this cause. And the court upon this finding rendered judgment against the company.

During the trial the company excepted to a decision of the court permitting the statements set forth in the bill of exceptions, made by James L. Randolph, a division engineer of the company, to go in evidence to the jury. This statement was, that there was enough in the hands of the company to pay the Gallahue debt, and they would have to pay it in consequence of the attachment. This was stated in reply to an enquiry made by the witness as to the prospect of securing another debt due by the Crowleys to another person.

After the verdict, the company moved for a new trial, which was refused; and the company again excepted; and applied to this court for a supersedeas, which was allowed.

A. Hunter, for the appellant.

There was no counsel for the appellees.

658 *ALLEN, P., after stating the case, proceeded:

The first question arising upon the foregoing statement is, whether a corporation is liable as a garnishee under the attachment law. In the argument here, however, the counsel of the company contended, that no suit whatever could be maintained against this corporation in the courts of Virginia: First, because it is a foreign corporation, and therefore not liable to be sued without the jurisdiction of the state which created it; and second, because no mode is provided by our law for the service of process upon it.

†See the opinion of JUDGE ALLEN for the provisions of the statutes.

The first ground it seems to me is settled by the act of March 8th, 1827, entitled an act to confirm a law passed at the present session of the general assembly of Maryland, entitled an act to incorporate the Baltimore and Ohio railroad company. The preamble recites that whereas an act has passed the legislature of Maryland, entitled an act to incorporate the Baltimore and Ohio railroad company, in the following words and figures, viz: The act of incorporation is then set out, conferring a corporate name, with all the powers, rights and privileges which other corporate bodies may lawfully do for the purposes mentioned in the said act, and providing that by that name it should be capable of purchasing, holding, selling and conveying property; and may sue and be sued. And after thus reciting the Maryland act of incorporation, the Virginia law proceeds to enact, "that the same rights and privileges shall be and are hereby granted to the aforesaid company within the territory of Virginia, as are granted to them within the territory of Maryland; the said company shall be subject to the same pains, penalties and obligations as are imposed by said act, and the same rights, privileges and immunities which are reserved to the state of Maryland or to the citizens thereof, are hereby reserved to the state of Virginia and her citizens."

659 *The company under this law is a Virginia corporation, and its powers within the territory of Virginia are derived from the grant contained in the Virginia law. The act of Maryland incorporated the subscribers to the capital stock, their successors and assigns, by the name designated; and the Virginia act in effect re-enacts the Maryland law in all essential particulars; thereby erecting the company into a Virginia corporation within her territory. If liable to be sued in Maryland, the same liability attaches to it in Virginia. It is judicially known to the court that the road traverses the territory of Virginia to a greater extent than it does through the state of Maryland. Throughout its whole course vast expenditures would be necessary in the construction, preservation and working of the road, innumerable contracts would be entered into, controversies would necessarily arise out of the contracts, acts and omissions of the company and its agents; and it would be a startling proposition if in all such cases citizens of Virginia and others, should be denied all remedy in her courts for causes of action arising under contracts and acts entered into or done within her territory; and should be turned over to the courts and laws of a sister state to seek for redress. Such a construction would give the company almost entire immunity for its contracts and acts over most of the road, and would exempt its property in the territory of Virginia from all liability to its creditors: For process of execution from the courts of Maryland could not avail in Virginia.

The subsequent legislation of the state shows that the legislature has uniformly treated it as a Virginia corporation, exercising the same controlling power over it as over other corporations deriving their existence from the laws of Virginia. By the act of March 1847, Sess. Acts, p. 86, the company was authorized to complete the road through the territory of Vir-

660 ginia *over a route thereby prescribed; and by the 6th section of this law it was subjected to the provisions of the general railroad law of the 11th March 1837, with respect to that portion of the road constructed within this commonwealth, so far as the same were properly applicable; and the company was required to accept the provisions of this act within six months, as a condition upon which the powers and privileges of the said act were granted.

Under this act, as it appears from the preamble of the act of 21st of March 1850, Sess. Acts, p. 49, the company has proceeded to complete its road: Thus, with respect to that portion of the road constructed in Virginia, submitting itself to the provisions of the general law regulating railroad companies incorporated by this commonwealth.

Regarding it as a corporation of Virginia with respect to that portion of the road constructed within the commonwealth, it is unnecessary to consider what would be the effect of our legislation upon this question, even if it were still to be treated as a foreign corporation, to which certain franchises and immunities within the state were granted and liabilities imposed upon it. It has been supposed that a foreign corporation cannot be sued, because by the common law, process against it must be served upon its head within the jurisdiction where this artificial body exists. The difficulty is rather technical than substantial; and this court held in the case of the Bank of U. S. v. The Merchants Bank of Baltimore, 1 Rob. R. 573, that under our law directing the method of proceeding against absent debtors in courts of equity, a suit might be maintained even against a foreign corporation where it has lands or tenements within the commonwealth; the proceeding being by publication instead of actual service of process.

It is further argued, that even if the

661 corporation is *to be regarded as a Virginia corporation, its principal office is in Maryland, and its chief officer resides there; and that by the Code, ch. 169, § 1, it is provided that a suit may be brought in any county or corporation wherein, if a corporation be a defendant, its principal office is, or its chief officer resides; another paragraph provides that if the suit be to recover land or subject it to a debt, the suit may be brought in the county or corporation wherein such land, estate or debts, or any part thereof, may be; and the second section authorizes a suit to be brought in any county or corporation wherein the cause of action or any part thereof arose, although none of the defendants may reside therein.

Corporations are in law, for civil purposes, deemed persons. They have power

to plead, be impleaded, grant or receive by their corporate names, and to do all other acts within the purview of their corporate power, which natural persons could do. Holding land in different counties, if so empowered by its charter, it may be sued in the county wherein such land may be, though its principal office is, or its chief officer resides, elsewhere. The cause of action growing out of its contracts, acts, negligences or omissions, may arise in a different county or corporation, and suit may be brought where the cause of action arose, without reference to the residence of the defendant. The Code, p. 643, § 7, prescribes the mode of serving process against or giving notice to a corporation. It shall be sufficient to serve process against it, on the chief officer; or in his absence from the county or corporation in which he resides, or in which is the principal office of the corporation, provision is made for service on other officers of the corporation in cases of cities, towns, &c.,&c.; and then follows this general provision: "If the case be against some other corporation than a bank, and there be not in the county or corporation wherein it is commenced,
662 any other person *on whom there can be service as aforesaid, service on an agent of the corporation against which the case is, with publication, in the mode directed, shall together be sufficient." As jurisdiction is not confined to the county or corporation wherein its principal office is, or chief officer resides, so service on an agent of the corporation within the county where the suit was properly commenced, with publication in the prescribed mode, is sufficient service; there being no president, director or other chief officer of said company within the county on whom process could be served. I think, therefore, that this corporation may in a proper case be sued in the courts of this commonwealth, and that a mode is provided by law for the service of process upon it.

The next error assigned is, that the court erred in overruling the motion to discharge the attachment, the plaintiff in error insisting that a corporation is not liable as a garnishee, under the attachment laws. The objection is general; applicable to all corporations aggregate, without reference to the jurisdiction of the court over the parties or controversy. The Code, ch. 151, § 2, p. 601, authorizes the plaintiff in an action at law, on proper affidavit at the time of or after the institution of the suit, to obtain from the clerk an attachment, if the suit be to recover money for a claim or damage for a wrong, against the defendant's estate. The 7th section of the act provides that every such attachment may be levied on any estate, real or personal, of the defendant; and that it shall be sufficiently levied by the service of a copy thereof on such persons as may be in possession of effects of or known to be indebted to the defendant. By the 9th section, such persons are to be summoned to appear as garnishees. The 12th section gives a lien from the time of service upon the personal property, choses in action and other securities of the defendant, in the
663 *hands of or due from any such garnishee. The 17th section provides that when any garnishee appears he shall be examined on oath. If it appear on such examination, that he was indebted, the court may order him to pay the amount so due by him; or with the leave of the court he may give bond to pay the amount due by him at such time and place as the court may thereafter direct. The 18th section authorizes the court, if he fails to appear, to compel him to appear, or the court may hear proof of any debt due by him to the defendant, and make the proper order thereupon. And the 19th section authorizes a jury to be impaneled when it is suggested that the garnishee has not fully disclosed the debts due by him to, or effects in his hands of, the defendant in such attachment; and provides for a judgment on the finding of the jury.

From this review of the material provisions of the statute bearing upon this question, there would seem to be nothing in the condition of a corporation to exempt it from being summoned as a garnishee. When the word person is used in a statute, corporations as well as natural persons are included for civil purposes. This was the rule at common law. 2 Inst. 697, 703, 736. They are to be deemed and taken as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in such statutes. Beaston v. Farmers Bank of Delaware, 12 Peters' R. 102, 134-5; U. S. Bank v. Merchants Bank of Baltimore, 1 Rob. R. 573; and the Code, ch. 16, § 17, p. 101, clause 13, provides that the word person may extend and be applied to bodies politic and corporate as well as individuals. The general words, as to what effects, debts or estate of the defendant may be attached, would seem to embrace his whole estate, without respect to the character of the person, natural or artifi-
664 cial, in whose *hands the effects were, or by whom the debt was due. The corporation stands in precisely the same position in regard to such effects or debts, as a natural person. If it owes the debt or holds the effects of another, it, like an individual, is liable to be sued by its creditor or the owner of the property: and the statute merely substitutes the plaintiff in the attachment to the rights of the creditor or owner as against the garnishee. No change is made in its contract, or additional obligation imposed on it, by being proceeded against as garnishee. The only particular in which there is any departure from a literal compliance with the statute, is in regard to that provision of the 17th section which declares that when any garnishee shall appear, he shall be examined on oath. This clause was for the benefit of the plaintiff in the attachment. In the case of a corporation, he must receive an answer in the only mode by which the corporation can answer, under its corporate

seal. In chancery, where, as a general rule, all answers must be verified by oath or affirmation, a corporation must answer in the same way, though where a discovery is wanted, a practice has prevailed of making some of the officers defendants. The same result could be arrived at under the attachment law, by examining the officers as witnesses, if the plaintiff suggests that a full disclosure has not been made. This is an inconvenience to which he is subjected, growing out of the character of the garnishee, but furnishes no reason for exempting the corporation from being so proceeded against when all the other words of the statute are sufficiently comprehensive to embrace artificial as well as natural persons. The mischief intended to be remedied applies as well to debts due by them, as by individuals; and the circumstances in which they are placed are the same as those of others embraced in the statute.

I think a fair construction of the
665 statute authorizes *the proceeding against the corporation in a proper case; and no objection being urged to the proceeding here, except the general one, that a corporation could not be summoned as a garnishee on such an attachment, the motion to discharge the attachment was properly overruled.

I think, however, the verdict is defective in not responding to the issue really raised upon the answer of the garnishee. That answer, taking it all together, must, it seems to me, be construed as referring to the time of the service of the attachment. It declares in express terms, that there was no other money at the time of the service of said attachment, subject to the plaintiff's attachment, only as above stated. Some confusion has arisen out of the provisions in the statute referring to proceedings in law and at equity under the 2d and under the 11th sections. In attachment under the 2d section may be served, by the provisions of the 7th section, on such persons as may be in possession of effects of, or indebted to, the defendant. By the 9th section, the officer is to return with the attachment, the names of the persons having effects of or owing debts to the defendant. And the 12th section gives the plaintiff a lien from the time of service, upon the personal property, choses in action and other securities of the defendant in the hands of, or due from, the garnishee on whom it is served.

All these provisions seem to look to the time of the service of the attachment, as the period at which there should be an existing debt from the garnishee to the defendant, whether then actually payable or to be paid at a future day, it is not necessary now to enquire.

The 11th section regulating attachments in equity, authorizes the attachment upon debts due or to become due to the defendant by the other defendants. As the lien given by the 12th section extends to both classes of attachment, possibly the phrase
666 debts to become due, *may be satisfied by limiting the expression to debts then existing, payable at a future day. This construction would render the provision of the 11th section consistent with the 12th section giving the lien. The 17th section applies to both courts, and provides, if on such examination (referring to the examination of the garnishee on oath when the proceeding is under the 2d section at law), or by his answer to a bill in equity, it appear at or after the service of the attachment he was indebted to the defendant, &c.

Unless the attachment at law is to be extended so as to embrace existing debts payable in future, and the attachment in equity restricted to debts of the same character, there would be some difficulty in applying these general words to both classes of attachments, and it might be necessary to read them distributively, making the attachment at law apply to debts owing at the service, and in equity at or after the service of the attachment. However this may be, as the answer of the garnishee referred to the time of the service of the attachment the verdict finding that the company was indebted on the 18th of May 1852, and afterwards, is no reply to the answer. The answer or examination may have been true, and contained a full disclosure, and yet be consistent with the verdict. There may have been no other debt to the 14th January 1852, the time of service, and so nothing for the attachment to operate upon; but between that and the 18th of May 1852 and afterwards there may have been new contracts out of which new claims may have arisen. I think the verdict was too defective to enable the court to pronounce any judgment thereon.

I am also of opinion that the court erred in permitting evidence of the statements of James L. Randolph, the division engineer, made to the witness A. F. Haymond, to be given in evidence to the jury. There is nothing in the facts certified in the
667 bill of exceptions, *showing that Randolph was acting within the scope of his authority in making such admissions. The conversation was with a third person not in the presence of the defendants, the said Crowleys; and the agent was not engaged in any transaction with the alleged creditors of the company, rendering it necessary to advert to the state of accounts between them; so that the declarations cannot be treated as part of the res gestæ, determining the quality of the act which they accompanied. They amount to no more than statements in reference to a state of accounts, growing out of past transactions, without its being shown that he ever was the agent to settle such accounts, and determine the state of indebtedness on the part of the company to these contractors; or that he knew how much had been paid to them by the company; or that at that time he was the agent to settle with and pay them. His statements were nothing more than a declaration made in relation to business, concerning a portion of which he was employed as agent; and during the

course of such employment acquired a knowledge of the monthly estimates of work done. These declarations do not amount to proof against the company. The fact should have been proved by the agent. The bill of exceptions shows he was examined and declared he did not know how much money had been paid to the Crowleys at that time. I think there was no error in overruling the motion to discharge the attachment upon the ground that the company was not liable to be proceeded against as garnishee. But that there was error in proceeding to render judgment on the verdict of the jury, the same being defective; and in permitting the statements of the said J. L. Randolph to the witness, as set forth in the bill of exceptions, to be given in evidence to the jury: And I am therefore for reversing and remanding for a new trial, with instructions to exclude the evidence of the

668 *statements of said J. L. Randolph, if again offered under the same state of facts disclosed in said bill of exceptions.

The other judges concurred in the opinion of Allen, P.

The judgment was as follows:

It seems to the court here, that the plaintiff in error is liable to be sued in the courts of this commonwealth; and that it could be proceeded against as a garnishee under the second section of the Code, ch. 151, p. 601. It is therefore considered by the court, that the Circuit court properly overruled the motion of the plaintiff in error to discharge it from answering to said summons as garnishee.

It further seems to the court here, that the issue made up by the answer of the plaintiff in error and the suggestion of the defendant in error that the said garnishee had not fully disclosed the debts due by it to, or effects in its hands of, the defendant, referred to the time of the service of the attachment on the garnishee; and the verdict should have responded thereto, but entirely fails to do so. Instead of ascertaining whether there were any such debts or effects due by or in the hand of the garnishee at the time of such service, it is found by the jury that the plaintiff in error has not fully disclosed the debts due by it to, or effects in its hands of, said Crowleys; and that there was a sufficient amount due to them by the plaintiffs in error on the 18th of May 1852, and also afterwards, to satisfy the plaintiff's judgment. This verdict may consist with the answer: There may have been no more due at the time of service than the amount disclosed by the answer; and yet other debts may have been created under contracts entered into after the service of said attachment. To

669 sanction such a finding *would be unjust to the garnishee; for although he may show he has made a full disclosure of the debts due by him to, or effects in his hands of, the defendant at the time of such service, he may be surprised by evidence of transactions which occurred after such service. It seems, therefore, to this court, that said verdict was defective, and should have been set aside, and a new trial awarded.

And it further seems to the court here, that upon the facts set forth in the bill of exceptions taken by the plaintiff in error, that the court erred in permitting the declarations of James L. Randolph, made to the witness A. F. Haymond, and set out in the bill of exceptions, to be given in evidence to the jury; it not appearing that said Randolph was the agent of the plaintiff in error having any authority over this subject, or that at the time of making the declarations he was engaged as agent about the business referred to, so as to make his declarations part of the transaction, explaining the nature thereof.

It is therefore considered by the court, that said judgment is erroneous. It is therefore reversed with costs, the verdict set aside, and the cause remanded, with instructions to impanel another jury to enquire as to the debts due by the plaintiff in error to, or effects in its hands of, the said Crowleys at the time of the service of the attachment; and upon such enquiry and trial the declarations of the said Randolph, as set out in the bill of exceptions, if again offered in connection with the facts disposed in the bill of exceptions, and no other proof, are not to be permitted to go in evidence to the jury if again objected to by the plaintiff in error.

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670 *Caruthers & al. v. Eldridge's Ex'or & als.

July Term, 1855, Lewisburg.

1. **Evidence—Ancient Deed—Admissibility.***—An ancient deed may be introduced as evidence without proof of its execution, though possession may not have been held for thirty years in accordance

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***Evidence—Ancient Deeds—Admissibility—Thirty Years' Possession Unnecessary.**—It is not indispensable to show thirty years' quiet and continued possession of the land under a deed in order to dispense with proof of the execution of the deed itself. If the party relies alone upon the possession as proof of the authority of the instrument, such possession must, as a general rule, have continued not less than thirty years along with the deed. But, in the absence of such possession, other circumstances are admissible in order to raise a presumption in favor of the genuineness of the instrument. Nowlin v. Burwell, 75 Va. 553. See principal case cited in accord, in Applegate v. Lexington, etc., Co., 117 U. S. 255, 6 Sup. Ct. Rep. 745; Fulkerson v. Holmes, 117 U. S. 389, 6 Sup. Ct. Rep. 783.

Mr. Wigmore, in Greenl. Ev. (16th Ed.), page 721, *note*, cites the principal case as the leading one in support of the view that possession is merely one circumstance corroborating the genuineness of an ancient deed or will of land, and that its place may equally well be taken by other corroborative circumstances. Mr. Wigmore says this is the sound view and the one now generally accepted.

See monographic *note* on "Deeds" appended to Fiott v. Com., 12 Gratt. 564.

therewith, if such account be given of the deed as may be reasonably expected under all the circumstances of the case, and will afford the presumption that it is genuine.

2. **Caveat—Revival—Irregularity—Effect of Verdict.**—A *caveat* is revived in the name of the executor of the caveator, who is directed to sell the land, and the devisees of the proceeds of sale; and no objection is taken thereto until after the verdict. The executor being the proper party, the irregularity of joining the others with him will then be disregarded.

This was a caveat in the Circuit court of Marion county, filed in January 1849, by William Eldridge, to prevent the issue of a patent to William Caruthers and David Morgan for seven hundred and ninety acres of land, of which they had made an entry, and had a survey made. After the proceeding had been commenced the caveator died, and it was revived in the name of his executor and the devisees of the proceeds of the land which was directed by the will to be sold.

On the trial the caveators introduced a patent bearing date the 6th of November 1797, to Daniel Eldridge, for one thousand acres of land in the county of Monongalia. They also offered in evidence a deed from Daniel Eldridge and wife to William Eldridge, both of the city of Philadelphia, bearing date the 7th day of August 1815, for the one thousand acres of land embraced in the patent to Daniel Eldridge. To this deed there was a certificate under seal of the same date with the deed, by which William Tilghman, describing himself as chief justice of the Supreme court of Pennsylvania, certified the
671 acknowledgment *of the deed by Daniel Eldridge and the privy examination of his wife; and there was a certificate of the clerk that upon this certificate the deed had been admitted to record in the clerk's office of Monongalia County court on the 21st of August 1815. The execution of this deed was not proved, but it was proved that from the date of the patent until 1815, inclusive, the land had been charged on the commissioner's books of Monongalia county to Daniel Eldridge; that from 1816, inclusive, to 1846, it was charged on said books to William Eldridge; that in 1847 to 1851, both inclusive, it was charged on the commissioner's books of Marion county to said William Eldridge. That though the land was returned delinquent for taxes for the years 1799 to 1810, and for 1812, 1813 and 1818, these taxes had all been paid into the auditor's office, except for the last named year; and they had been released.

It was further proved that Daniel Eldridge had, prior to 1815, visited the land, claiming it under his patent; but that since the day on which the deed purports to bear date, he had not visited it, or set up any claim to it, so far as was known to a witness who lived near the land, and who before 1815 had acted as his agent.

It was further proved, that about the year 1815 William Eldridge, who then lived in Philadelphia, came to the county of Monongalia, and had the land entered on the commissioner's books in his name, and charged with taxes; and went upon and claimed it as his own under a purchase from Daniel Eldridge; and appointed an agent living in the neighborhood to look after the land and make leases thereof. That he in 1815 leased a part of it to Patrick Murphy for seven years, and put him in possession, with liberty to clear as much of the land as he might see proper, and to hold the same for seven years as
672 a compensation for clearing *and fencing the same; which were the customary terms of the country at that time. This contract was by parol, and under it Murphy cleared some ten acres, and erected a cabin thereon, in which he lived; that after the seven years expired, it was left unoccupied, and grew up in woods again. That the agent of Eldridge rented another portion of the land to one Terrell for seven years, who entered upon and occupied it for about four years, when he sold his lease to a third person, and left the land. That prior to 1838, Thomas P. Ray, who was the clerk of the county of Monongalia, had been the agent of William Eldridge, for said land, and had possession of his title papers, including the said deed, and in that year surrendered his agency with the papers and some money put into his hands by Eldridge to pay the taxes, to James Evans, another agent appointed by Eldridge.

It was further proved, that in the year 1838 Hezekiah Moran was in possession of a part of the land, holding and claiming the same under a patent to Joshua Knight, under whom Moran then claimed; and that in the year 1838, Moran being so possessed, rented of William Eldridge the land then held by him, stipulating to pay rent therefor; and that he has ever since continued to hold the same as tenant of Eldridge. And that in 1838 Eldridge rented another part of said land to Amos Browner, who has continued to hold as his tenant. And a witness stated that he had seen the deed from Daniel to William Eldridge recorded in the clerk's office of Monongalia county in one of the old deed books, corresponding, as he supposed, in age and date with the date of the certificate of the clerk endorsed on said deed; and had copied the courses and description from it.

It was further proved that William Eldridge continued to reside in Pennsylvania until about the year when he removed
673 to the county of Marion, in *which said land was then situate, and settled upon a portion of it, claiming the entire tract as his own; and continued to reside upon it until his death.

The foregoing being all the evidence offered by the caveators to render said deed admissible in evidence, and not proving the same in any other manner, but it appearing fair upon its face and free from alteration and change, the caveatees objected to its introduction; but the court overruled the objection, and admitted the deed; and the caveatees excepted.

The caveators then introduced the will of William Eldridge, by which he directed his executor to sell all his lands, and after the payment of his debts, he gave the proceeds

thereof, and all the rest of his estate, to be divided among certain persons who were, with the executor, the parties in this case; and he authorized his executor to convey his lands.

After the jury had rendered their verdict, the caveatees moved the court to set it aside and dismiss the caveat, on the ground that improper parties were before the court: But the court overruled the motion; and rendered a judgment for the caveators, that no grant should issue for the caveatees in pursuance of their survey. The caveatees thereupon applied to this court for a supersedeas, which was allowed.

Haymond, for the appellants.
Fry, for the appellees.

DANIEL, J. The paper dated the 7th day of August 1815, purporting to be a deed from Daniel Eldridge to William Eldridge, was not legally recorded. There was no law in force at the era of its date, which allowed of its being recorded on the force of an acknowledgment before the chief justice of the Supreme court of Pennsylvania. And it is, I think, obvious from the statement of
674 the judge of the Circuit Court *in the bill of exceptions, that the ground on which he permitted said paper to go to the jury as evidence of a conveyance, was that of its being an ancient deed. The counsel for the caveatees insisted that this ground for the action of the court is not tenable, and that the judge has misconceived the rule of law regulating the admission of ancient deeds without proof of execution. And he contends that in no case can proof of the execution be properly dispensed with, until it is first shown that thirty years' quiet and continued possession of the land has been held under the deed. And in support of his view of the law, he cites Gilbert's Evidence, p. 89; Coke Litt. 6 b; 2 Bacon Abr. Evidence 648; 2 W. Black. R. 1228; 3 John. R. 292; 6 Binn. R. 439; 9 John. R. 169; 1 Har. & John. 174; Dishazer v. Maitland, 12 Leigh 524.

The question is one on which there is some conflict of decision, rendering it necessary in my opinion, in order to arrive at a correct conclusion as to the state of the law on the subject, to review the opposing authorities. In the performance of the task I shall examine briefly each of the authorities relied on by the counsel of the caveatees.

Gilbert in his "Law of Evidence," after stating generally the rules essential to the admission of deeds, at p. 88, 89, says, "But to this rule there are several exceptions. First. If the deed be forty years old, that deed may be given in evidence without any proof of the execution of it; for the witnesses cannot be supposed to live above forty years; and forty years is proof sufficient of a presumption; for the age of a man is no more than sixty years, and a man is supposed to be twenty years before he is of age sufficient to understand the nature of right and wrong, and the general forms of contracting; so that forty years the witness must be supposed to be dead; and since no person living can be supposed to be coeval with
675 *such deeds, therefore they may be offered in evidence without proof. But (he proceeds) it had been ruled that if a deed be forty years old and possession hath not gone along with the deed, they ought to give some account of the deed; because the presumption fails that was established in behalf of such deeds, where there is no possession; for it is no more than old parchment if they give no account of its execution." The last paragraph, which is no doubt the one relied on as showing that, according to Gilbert, it is necessary there should be continual possession for thirty years, does not in terms assert such a proposition; and is not, I think, susceptible of such a construction. It says, it is true, it had been ruled that possession should go along with the deed; but I do not understand him as saying that the ruling of the court to which he refers, requires that it should have continued for the forty years. Again, at the commencement of the same chapter, p. 83, after saying that the deed must be regularly proved by one witness at least, he says, "This is now to be understood when the deed is of a late date, for if the deed be of thirty years' standing, which now makes an ancient deed, and the person to whom the deed was made, or those deriving under him, have been in possession under the deed, such ancient deed shall be read without proof, though the witness to it be alive; and this Baron Gilbert declared to be the rule of evidence at nisi prius; and if the person to whom the deed was made hath been in possession of the lands contained in the deed, such possession shall be presumed to be under the ancient deed unless the contrary be proved."

The passage in Coke, relied upon by the counsel of the caveatees, is as follows: "And many times juries, together with other matter, are much induced by presumptions; whereof there be three sorts, viz: violent, probable, and light or temerary.
676 Violenta presumptio *is many times plena probatio: as if one be run through the body with a sword in a house, whereof he instantly dieth, and a man is seen to come out of that house with a bloody sword, and no other man was at that time in the house. So it is in the case of a charter of feoffment, if all the witnesses to the deed be dead (as no man can keep his witnesses alive, and time weareth out all men), then violent presumption, which stands for proof, is continual and quiet possession." It will be seen that Coke is here treating of presumptions, and he cites the presumption founded on possession under an ancient deed as an instance of the violenta presumptio or full proof, as he does that also founded on a man's being seen to come from a house in which murder has been committed, with a drawn sword in his hand. He is not engaged in the task of pointing out all the cases in which a deed may be presumed to be genuine without proof of its execution; and it seems to me that it would be just as fair to conclude from this passage that he intended to give the only instance in which a murder might be presumed from circumstances, as that he in-

tended to say that quiet and continual possession furnished the only evidence from which to infer the genuineness of an ancient deed.

In Bacon's Abridgment, Evidence, H, 7th edition, p. 318 (where I suppose is to be found the authority to which the counsel of the caveatees refers), the only passage having immediate bearing on the rule under consideration is, "In case of a feoffment if all the witnesses to the deed are dead, then a continual and quiet possession for any length of time, will make a strong or violent presumption which stands for proof." It is very obvious that this citation does not sustain the proposition that there must be possession under the deed for thirty years.

The case of Earl v. Baxter, cited
677 from 2 W. Black. *R. 1228, is very short and I quote it entire. "Ejectment at last Norwich assizes for the residue of a term of one thousand years granted the 5 Eliz. The lessor of the plaintiff produced the original lease and proved possession in himself, and those under whom he claimed, ever since the 6th Anne, and also showed one mesne assignment in 16 Jac. 1. Sergeant Foster, who tried the case, then thought it incumbent on the plaintiff to prove all the mesne assignments; for want of which, the plaintiff was nonsuited: but he since changed this opinion, and so reported it to the court. The court were clear that the sergeant's opinion was right, and that it should have been left to the jury, with a recommendation to presume all the mesne assignments: And in consequence nonsuit set aside without costs." There is nothing here to infer what would have been the fate of the case had there been a failure of proof as to the long continued possession which was shown in the lessor of the plaintiff, and those under whom he claimed.

It must be conceded that in the case of Jackson v. Blanshan, 3 John. R. 292, there was a direct ruling in favor of the proposition contended for by the counsel of the caveatees. In that case possession was proved under the will of a testator from the time of his death, which had occurred some twenty-six or twenty-seven years before the trial; and though the will bore date more than thirty years back, it was held that some proof of its execution was necessary; it being proved that one of the three subscribing witnesses was yet alive. Kent, chief justice, in delivering his opinion, said, "It is not proper to compute the will from its date, but only from the time that possession took place under it. It is the accompanying possession alone which establishes the presumption of authenticity in an ancient deed." And he proceeded to
argue that when the possession fails,
678 the presumption must fail *also; that the length of the date would not help the deed, for if that were sufficient, a knave would have nothing to do but to forge an ancient deed. And he concluded that as the death of the testator had occurred only twenty-six or twenty-seven years before the commencement of the suit, the will in that case ought not to be read as evidence, inasmuch as the time of possession under it fell short of the lowest period which, according to his view of the authorities, had been required to establish an ancient deed. The opinion of this learned judge on any question of law is entitled to much respect; but it is to be observed that the decision in the case never had any force as authority even in New York, inasmuch as it was made by only two judges, a minority of the court. Van Ness, J., concurred with Kent, Ch. J.; Spencer dissented, and Thompson and Yates did not hear the argument in the cause, and gave no opinion.

Of the case from 9 John. R. 169, Doe v. Phelps, it is not necessary to say more than that it affirms a well settled doctrine, about which no question has been made here. In that case possession had been enjoined for more than fifty years under a deed which purported to be made in pursuance of a power of attorney. The court said that an ancient deed, with possession corresponding with it, proved itself; and that a power of attorney, contained in such deed and necessary to give it validity and effect, ought equally to be embraced by the presumption. No intimation of opinion was given by the court that in the absence of such corresponding possession other circumstantial proofs might not be received, on which to predicate the presumption.

The like remark will justly apply to the case from 6 Binn. R. 439. The possession had been enjoyed under a will for more than thirty years, and the case did not necessarily call for any thing more than the application
to an ancient will of the rule which had
679 been *announced, in the case just above cited, in respect to the ancient deeds. Tilgham, Ch. J., however, in delivering his opinion, took occasion to approve the doctrine held by Kent, Ch. J., in Jackson v. Blanshan, 3 John. R. 292, and said, that "although the antiquity of the writing affords some evidence in its favor, yet the main ingredient is possession. Both however are necessary to raise that presumption which will justify the court in departing from the usual rule which requires the production of the subscribing witnesses, or proof of their handwriting, after accounting for their absence." This opinion may perhaps be fairly regarded as one in favor of the doctrine contended for; but I do not regard the authority of the case as going further than to affirm that where there has been more than thirty years' possession under a paper set up as an ancient will, the genuineness of the paper may be presumed.

The case of Carroll v. Norwood, 1 Har. 8 John. 167, 174, may I think be fairly considered as deciding that an ancient deed is not evidence without proof of the execution, unless it is found that the possession has gone and been held according to the deed.

The last of the cases cited by the counsel of the caveatees are those of Deshazer v. Maitland, and Same v. Same, 12 Leigh 524.

In the first case, which was an action of quare clausum fregit, a paper purporting to convey the land in question, was dated the 1st of September 1789. It appears that it had

been proved by one of four subscribing witnesses in the County court of Charlotte, in December after its date, and continued for further proof; and that it was found in a bundle of proved deeds in the clerk's office. Maitland proved that he had paid the taxes on the land from 1790 to 1815, both inclusive, and again from 1816 to 1827, both inclusive; but no proof was offered that Mait-
680 land or the *grantees in the deed under whom he claimed, had ever been in actual possession under the deed.

In the second case, which was an action of ejectment, the proofs in respect to the deed were very much the same, with the addition that Maitland, the plaintiff in the action below, proved that he had made diligent enquiry after the subscribing witnesses, and could get no account of them, except that they had all died many years ago, and that he could find no one acquainted with their handwriting. It further appears that neither Downman the grantor, or any one claiming under him, ever set up any claim to the land in opposition to the deed; but it also appears that no one lived on, or was in actual possession of, the land until the defendant in the action Deshazer, took possession thereof some four or five years before the commencement of the suit.

The Circuit court admitted the evidence in each case, and this court reversed both judgments, holding that the deed had been improperly permitted to go to the jury. Judge Allen, in delivering his opinion, which was concurred in by the other judges, relied mainly on the passages from Coke, Bacon and Gilbert, and the cases from 3 Johnson and 6 Binney, already referred to.

I will now proceed to examine briefly some of the authorities maintaining the opposite doctrine.

In the case of The King v. Inhab. of Farringdon, 2 T. R. 466, it was held that an allowance of a certificate of a settlement, as having been duly executed, written in the margin of the certificate and signed by two justices, was alone sufficient proof of the certificate where such certificate was thirty years old; notwithstanding the certificate did not certify the affidavit of one of the witnesses to the due execution and attestation of the certificate according to the 3 George 2, c. 29. The certificate had been acted on
681 for more *than thirty years. Ashhurst, Judge, said, "The certificate having been granted above thirty years, it is not necessary to substantiate it by the mode of proof prescribed by the act; for it having been recognized and acted under for so long a period, it was not necessary to have recourse to the act at all. Therefore, on the ground of the length of time which had elapsed since the certificate was granted, I think it is binding." Buller and Gross. Js., however, made no reference to the fact that the certificate had been acted upon, but expressed the opinion, without any such qualification, that the certificate might be read under "the established rule which holds in the case of every deed, that if it be above thirty years' standing, it proves itself."

In the case of The King v. Inhab. of Ryton, 5 T. R. 259, the same doctrine was held in respect to a certificate, more than thirty years old.

So in the case of Oldham v. Wolley, 15 Eng. C. L. R. 150, a will more than thirty years old was allowed to be read in evidence, although the testator had died within thirty years, and some of the subscribing witnesses were proved to be still living. And in Doe v. Passingham, 12 Eng. C. L. R. 209, a will more than thirty years old was received without any proof of possession under it. See also Lord Eldon's opinion in the matter of Sir T. Parkyns' will, 6 Dow 202, and 12 Viner's Abr. 84, Evidence.

In 7 Comyn's Dig. 429, Testmoigne, b. 2, it is said that "an ancient deed dated forty years past, shall be read without further proof." So Roscoe, in his Treatise on Evidence, 14, Presumptive Evidence, announces the doctrine "that a deed thirty years old or upwards is presumed to have been duly executed, provided some account be given of the deed, where found," &c.

Best also in his Treatise on Presumptions, 47 Law Lib. 65, lays it down as an
682 established rule, "that *deeds, wills and other attested documents, which are more than thirty years old, and are produced from an unsuspected repository, prove themselves, and the testimony of the subscribing witnesses may be dispensed with; although it is of course competent to the opposite party to call them to disprove the regularity of their execution."

Philips, in stating the exceptions to the general rule in respect to Proof of Writings, vol. 2, p. 203, says, "It is a rule that if an instrument is thirty years old, it may be admitted in evidence without any proof of its execution; such instrument is said to prove itself. The danger arising from such a relaxation of general principles is, in some measure, diminished by the operation of the rule which requires documents to be produced from their proper place of custody; and in many instances the circumstances of the instruments having been acted upon, and of the enjoyment of property being consistent with and referable to it or otherwise, affords a criterion of its genuineness. The exception applies generally to deeds concerning lands, &c., and all other ancient writing; and the execution or writing of them need not to be proved, provided they have been so acted upon, or brought from such a place as to afford a reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty."

In Mathews on Presumptive Evidence 270, the rule is stated in the same way. "The general probability of the due execution of instruments which were meant to have a legal operation, is by many degrees increased by lapse of time; which, as it affords opportunity to those whose interest it was to dispute their efficiency, shows at once the acquiescence of such persons, and also a conviction on their part that all proper steps were taken to render the assurance in question valid.

On this principle, supported by a con-

683 sideration of the *difficulty if not the impossibility of obtaining living testimony, deeds of thirty years' standing, by a very ancient rule of law, are admitted in evidence without proof of their execution; and when the witnesses are dead, deeds of even a less age, provided the enjoyment of the property to which they relate has corresponded with the limitations, are received as genuine and authentic."

Starkie, in vol. 1, p. 65, says, "Presumptions are frequently founded upon, or at least confirmed by, ancient deeds, muniments found in their proper, legitimate repositories, although, from lapse of time, no direct evidence can be given of their execution, or of their having been acted upon. It seems, however, that in order to the reception of such evidence, or at least to warrant a court in giving any weight to it, a foundation should be first laid for its admission, by proof of acts, possession or enjoyment, of which the document may be considered explanatory. So it has been said that in the case of a charter of feoffment, if all the witnesses to the deed are dead, then a continual and quiet possession for any length of time will make a strong or violent presumption, which stands for proof."

This review of English authorities, whilst it does not clearly show the establishment of a precise and well ascertained rule on the subject, does, I think, serve to show that the weight of authority in England is opposed to the doctrine that thirty years' quiet and continual possession under an ancient deed is indispensable to the presumption of its genuineness. And I think that the weight of authority in this country is the same way.

In the case of Jackson v. Larroway, 3 John. Cas. 283, a will executed in 1723, and which had been proved by the witnesses in 1733 and 1744, and recorded, but not in a manner authorized by law, was allowed to be read in evidence on the trial of an action of ejectment in 1801, on the footing of an an-

684 cient *deed; though actual possession did not follow and accompany the will.

Radcliff, J., in delivering his opinion, after adverting to the fact that the premises in dispute were in a wild and uncultivated state, and for a long time actually in possession of no one, said, "The general rule on this subject I take to be, that a deed appearing to be of the age of thirty years, may be given in evidence without proof of its execution, if the possession be shown to have accompanied it, or where no possession had accompanied it, if such account be given of the deed as may be reasonably expected under all the circumstances of the case, and will afford the presumption that it is genuine. This rule is founded on the necessity of admitting other proof as a substitute for the production of witnesses who cannot be supposed any longer to exist. A correspondent possession is always high evidence in support of such a deed; but when no such possession appears, other circumstances are admitted to account for it and raise a legal presumption in its favor." Kent, J., dissented, in an opinion holding very much the same views afterwards expressed by him in the case of Barham v. Blanhan, 3 John. R. before referred to. A majority of the court, however, concurred in opinion with Radcliff, J.

In Jackson v. Laquere, 5 Cow. R. 221, Woodworth, in delivering the opinion of the whole court, whilst he said that he did not think that mere efflux of time was sufficient to admit a will to be read without proof, expressed a full concurrence in the rule laid down in Jackson v. Larroway, and said that the law of that case had never been overruled, and ought to govern in the one then under consideration.

And again, in Hewlett v. Cock, 7 Wend. R. 371, a lease more than thirty years old was received in evidence without proof of its execution. It was found among the title papers of the estate affected by it, and the facts and circumstances in reference to the

685 *property specified in it, were such as, in the opinion of the court, afforded sufficient presumption of its genuineness, although there was no direct proof of possession accompanying it. Nelson, J., who delivered the opinion of the whole court, said, "There was some confusion and contradiction in the cases in England and in New York as to the preliminary proof necessary to authorize an ancient deed to be read in evidence. Possession (he said) accompanying the deed was always sufficient without other proof, but it was not indispensable. He approved the decision in Jackson v. Larroway, which, he said, had been recognized as law in Jackson v. Laquere, and had undoubtedly in its favor the weight of English authority."

It must be conceded, however, that by recent decisions of the Supreme court of New York, the law on the subject is there left in a very unsettled state. See Troup v. Hurlbut, 10 Barb. R. 354; and Ridgeley v. Johnson, 11 Barb. R. 528.

The doctrine of Jackson v. Larroway, is fully recognized by the Supreme court of the United States in the case of Barr v. Gratz, 4 Wheat. R. 213; and by the Court of appeals of South Carolina in the case of Robinson v. Craig, 1 Hill's S. C. R. 389. The subject is very fully examined by Greenleaf, in his Law of Evidence. In the 21st section of the work, speaking of ancient deeds and wills, he says, "when these instruments are more than thirty years old, and are unblemished by any alteration, they are said to prove themselves; the bare production thereof is sufficient, the subscribing witnesses being presumed to be dead. This presumption, so far as this rule of evidence is concerned, is not affected by proof that the witnesses are living. But it must appear that the instrument comes from such custody as to afford a reasonable presumption in favor of its genuineness; and that it is otherwise free from just grounds of suspicion. Whether, if the deed be a

686 conveyance of real estate, the *party is bound to show some acts of possession under it, is a point not perfectly clear upon the authorities; but the weight of opinion seems in the negative. See again

his views in section 144, and in a note thereto, in which he collates the cases on the subject, and comes to the conclusion that the weight of authority is clearly against the doctrine that the absence of proof of possession may not be supplied by other satisfactory corroborative evidence, and says that it is now agreed that where proof of possession cannot be had, the deed may be read, if its genuineness is satisfactorily established by other circumstances.

And, in Cowen & Hill's notes to Philips, vol. 4, p. 366, there is a very able and elaborate review of the decisions, from which is deduced the result that a deed thirty years old or upwards, purporting to be a conveyance of property, real or personal, is sufficiently corroborated to be read without further assurance of authenticity, by showing that possession of the thing it assumes to convey has gone along and been held in accordance with its provisions: That when the length of possession is the circumstance solely relied on, the weight of authority favors thirty years as the shortest period: But that this doctrine with respect to the length of possession is to be understood with the qualification that possession is the only circumstance relied on by way of showing the authenticity of the instrument. And that a full corresponding possession is not the only corroboration which will allow the instrument to be read without proof of its execution.

Upon the best examination I have been able to make of the subject, I have come to the conclusion that the authorities do not furnish satisfactory evidence of the existence here or in England of any well established rule, which, in the absence of proof of execution, makes a continual possession for thirty years, under an ancient deed, the sole sufficient test of its authenticity. And when I look to the foundations on
687 which the rule *is supposed to rest, I must confess my inability to discover that solid and substantial reasoning on which it might be expected that a rule, of such vast importance in its consequences, would be placed.

On the other hand, a rule which would allow the paper to prove itself, or which, in other words, would declare the antiquity of its date alone a sufficient proof of its genuineness, is justly obnoxious to the objection of Judge Kent, that "then a knave would have nothing to do but to forge a deed with a very ancient date." Such objection is, however, wholly without weight when urged against the adoption of the general rule announced in Jackson v. Larroway.

When the deed is of recent date, the party who offers it in evidence is required to produce the witnesses to its execution, if any, or proof of their handwriting, in case they are dead; and if there be no subscribing witnesses, he must prove the handwriting of the maker. But when the deed is of an ancient date, the production of such proof is no longer in the power, or is supposed to be no longer in the power, of the party. A resort to presumptive proof is then allowed. What is there in the nature of the enquiry which renders it proper to declare that a corresponding possession shall be the only sufficient evidence of the fact to be presumed, viz: the genuineness of the deed? A presumption may be the result of a single circumstance or of many circumstances. Why say that, in the case of an ancient deed, there must be a departure from the general rule in respect to presumptions, and that its authenticity may be presumed from the single circumstance of possession, but may not be presumed from other circumstances, the existence of which is equally inconsistent with any other hypothesis than that of the genuineness of the instrument? The direct evidences, the positive proofs by which the execution of the deed is established, being no longer attainable, and the rule, which re-
688 quires their production, *being dispensed with, it seems to me wholly at war with the spirit of the law, which, under such exigency, allows a resort to circumstantial or presumptive evidence, to hold that a corresponding possession shall be the only evidence from which the authenticity of the deed may be presumed. Such possession does indeed furnish a violent presumption, but if in its absence there are other evidences (not intrinsically objectionable) equally capable of producing the same degree of belief, I cannot see the good to be attained, or the evil to be avoided, by rejecting them.

I deem it unnecessary to comment on the facts produced before the court as the groundwork for the introduction of the deed. A reference to the statement of the case will suffice to show that they were such as to exclude all doubt of the authenticity of the deed. And I think the court did right in permitting it to go to the jury.

The second cause of error assigned cannot be sustained.

In Archer, adm'x, v. Saddler, 2 Hen. & Munf. 370, this court held that an administrator with the will annexed being in possession of lands therein directed to be sold, might maintain a caveat to prevent any other person from obtaining a patent for the same, as waste and unappropriated. Allen, the executor of Eldridge, was then a proper party; and the proceeding being one in the nature of an injunction, I do not think that the irregularity (if any there was) in permitting the suit to be revived and proceeded in in the names of the executor and the devisees, can avail now to defeat the proceedings, especially as no objection in respect to parties was made till after verdict.

MONCURE and SAMUELS, Js., concurred.

LEE and ALLEN, P., dissented.

Judgment affirmed.

689 *Dilworth v. The Commonwealth.

January Term, 1855, Richmond.

[65 Am. Dec. 264.]

1. **Jurors—Competency—Member of Grand Jury Finding Indictment.**—On a trial for a felony a member of the grand jury which found the indictment against the prisoner, is not a competent juror to try him.

2. **Same—Same—Same—When Objection May Be Made.***—If the prisoner does not know, or might not with due diligence have known, that one of the jury was a member of the grand jury which found the indictment against him, until after the jury is impaneled and sworn, he may make the objection to the juror, if made before any of the evidence is introduced.

3. **Same—Same—Same—Same.**—QUÆRE: If he may not make the objection at any time before the verdict is rendered? And it seems he may.

4. **Same—Same—Same.**—QUÆRE: If upon such objection being made to a juror, it is proper to examine him upon his *voir dire* as to the circumstances, and the state of his mind and feelings towards the prisoner?

5. **Same—Challenge—Statute—To What it Relates.**†—The act, Code, ch. 162, § 4, p. 628, only relates to those disabilities created by our statutes; and does not refer to other causes of challenge which exist at common law, and as to which the statutes are silent.

John Dilworth was indicted in the Circuit court of Harrison county, for the murder of Addison Bumbgardner. When the trial came on, William Flanagan was called as a juror, and was sworn and tried on his voir dire; and stated that he had not made up or expressed any opinion as to the guilt or innocence of the prisoner, and proved himself free from exceptions; and was thereupon placed upon the panel of twenty-four. The first day was consumed in obtaining a jury, and directly it was impaneled and sworn, and before any testimony was introduced, the court adjourned until the next day.

On the next day, before any testimony was introduced, the prisoner filed his own
690 affidavit and also the *affidavit of John R. Dawson, the jailor, and moved the court to discharge William Flanagan, one of the jurors, and substitute another in his stead.

The prisoner in his affidavit, stated that after the jury had been impaneled and sworn and the court had adjourned, he was informed that Flanagan, one of the jurors, had been one of the grand jury which found the indictment upon which the prisoner was then about to be tried. That when Flanagan was impaneled and sworn, the prisoner did not know that he had been a member of the grand jury, or he would have struck his name from the panel. The jailor stated that he had informed the prisoner of the fact that Flanagan had been a member of the grand jury that found the indictment against him, after the adjournment of the court on the previous evening. The court thereupon caused Flanagan to be sworn. He stated that he was a member of the grand jury which found the indictment against the prisoner. That they heard the evidence of one witness, and part of the evidence of another; that then the foreman announced that he had heard the evidence in the case before, and that it was not necessary to hear further testimony; and thereupon the indictment was found, the said Flanagan among others, voting for it.

He further stated that he paid very little attention to the testimony, and did not then and had not since formed any opinion of the prisoner's guilt or innocence; and that he had no prejudice or bias for or against the prisoner; that he was wholly indifferent, and had no doubt that he could give the prisoner a fair and impartial trial according to the law and the evidence; that he was governed by what the jurors said as well as what was testified to by the witnesses; that the grand jury had a press of business on hand, and was anxious to dispose of it. And he stated that he had told Dawson that he did not suppose he could be summoned as he was on the grand jury.

691 *When the juror had been examined, the court enquired of the prisoner's counsel how the place of said Flanagan should be supplied, or if he was discharged from the jury, what should or could be done;

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*Objections to Jurors—When They Should Be Made.—See principal case cited in Bristow v. Com., 15 Gratt. 646; *foot-note* to Poindexter v. Com., 33 Gratt. 766. See also, *foot-note* to Bristow v. Com., 15 Gratt. 646. See monographic *note* on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

Incompetency of Jurors—When Ground for New Trial.—In State v. Greer, 22 W. Va. 824, it is said: "In Virginia and this State it has been repeatedly held, that a new trial will not be granted in a criminal case for matter that is a principal cause of challenge to a juror, which existed before he was elected and sworn as such juror, but which was unknown to the prisoner until after the verdict, and which could not have been discovered before the juror was so sworn by the exercise of ordinary diligence; unless it appears that the prisoner suffered injustice from the fact that such juror served upon the case. Smith's Case, 2 Va. Cas. 6; Poore's Case, *Id.* 474; Kennedy's Case, *Id.* 510; Brown's Case, *Id.* 516; Hughes' Case, 5 Rand. 655; Jones's Case, 1 Leigh 598; Heath's Case, 1 Rob. R. 735; Hailstock's Case, 2 Gratt. 564; Curran's Case, 7 Gratt. 619; *Dilworth's Case, 12 Gratt. 689;* Bristow's Case, 15 Gratt. 634; McDonald's Case, 9 W. Va. 456. The same doctrine is held in civil cases. Sweeney v. Baker, 13 W. Va. 228; Flesher v. Hale, 22 W. Va. 50." See, in accord, the principal case cited among others in *foot-note* to Bristow's Case, 15 Gratt. 634; State v. McDonald, 9 W. Va. 465; Sweeney v. Baker, 13 W. Va. 228; Flesher v. Hale, 22 W. Va. 50.

See monographic *note* on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

†**Jurors—Statutory Disqualifications.**—No enumeration was ever attempted of what causes might be alleged as grounds of challenges to the favor. It would be impossible to specify all that should be allowed in advance by a statute, for they depend upon each particular case, and the circumstances and parties to it. All concede that statutory disqualifications are not the only ones. Thompson v. Douglass, 35 W. Va. 337, 13 S. E. Rep. 1016, citing the principal case.

to which the prisoner's counsel remarked that the commonwealth had had a grand jury, and now had her petit jury, and must remove the difficulty. The court thereupon overruled the motion. And the prisoner excepted.

The jury found the prisoner guilty of murder in the second degree; and fixed the term of his imprisonment in the penitentiary at eight years. And he thereupon filed a plea in arrest of the judgment, on the ground that Flanagan, who was one of the jurors who rendered the verdict, had been one of the grand jury which found the indictment a true bill. The court overruled the plea; and also overruled a motion by the prisoner for a new trial, made on the same ground: And the prisoner again excepted; and applied to this court for a writ of error, which was awarded.

The case was argued by Patton, for the prisoner, and the Attorney General, for the commonwealth. The propositions and authorities relied upon by them, are referred to in the opinion of Judge Daniel.

DANIEL, J. It is well settled that it is a principal cause of challenge to one called as a juror on a trial for felony, that he was of the grand jury who found the indictment against the prisoner. 21 Vin. Abr. Trial, 253; Coke Lit. 156 b; Herndon v. Bradshaw, 4 Bibb's R. 45; Barlow v. The State, 2 Black. R. 114; Hunter v. Matthews, 12 Leigh 228.

The juror Flanagan is in that predicament; and it is urged on behalf of the prisoner, that sentence has been pronounced against him without his ever having
692 *enjoyed the right to a trial by a jury free from exception; whilst on behalf of the prosecution it is argued, that the prisoner has not only waived his right of challenge, but that his exception to the juror has also been in fact satisfactorily answered; and that he has no good reason for arraigning the justice of the sentence by which he stands condemned.

The 4th section of ch. 162 of the Code of 1849 provides that no exception shall be allowed against any juror after he is sworn upon the jury, on account of his estate, age or other legal disability, It was, however, conceded in the argument, that this section is designed for the regulation of exceptions founded on the disabilities created by our statutes only; and has no reference to other causes of challenge which exist at common law, but as to which the statutes are silent.

The latter, it is admitted, are still governed by the principles and rules of practice of the common law.

It is insisted, however, by the attorney general, that these principles and rules require all challenges for whatever cause, to be made before the jurors are sworn; and that nothing occurred on the trial of this case of which the prisoner can now be heard to complain: and in support of his position, he has cited Hawkins' Pleas of the Crown; Archbold's Criminal Practice; the cases of State v. Quarrell, and State v. O'Driscoll, 2 Bay's R. 151, 153; Barlow v. The State, 2 Black. R. 114; and also the cases of Jones, Heth, Curran, and others of a like character, decided by our General court.

Hawkins and Archbold, and other text writers on criminal law, do state it as a general rule, that no juror can be challenged, by either side, without consent, after he has been sworn, unless it be for some cause which happened since he was sworn; and I believe the practice which most usually prevails is to require the challenges to be made
693 as the jurors come *to the book, to be sworn in chief. And such was the practice previous to the revision of the criminal laws in 1848.

It is true, that in the first of these cases (State v. Quarrell), a motion to set aside a verdict on the ground that one of the jurors was an alien, was denied; and that in the cases of State v. O'Driscoll and Barlow v. The State, like motions founded on the fact that some of the petit jurors were on the grand juries that found the bills, met with a similar fate. The same decision was made in the case of Gillespie and others v. The State, 8 Yerg. R. 507; and a like decision was also made in a case of an analogous character by the Supreme court of Connecticut. Quinebaug Bank v. Leavens, 2 Conn. R. 87.

In the two first cited cases it does not appear that there was any affidavit even by the prisoners to show that they were ignorant of the causes of challenge to the jurors, at the time they were sworn; and in the absence of such evidence, the court, I think, very properly held that the prisoners had waived their privilege.

In the case of Gillespie & others v. The State, there was an affidavit of the prisoner of his want of knowledge; but I infer, from some remarks of the judge who delivered the opinion of the court, that it was not supported by other evidence, and that little or no credit was given to it. And in the case of Barlow v. The State, the evidence, instead of showing that the prisoner was ignorant of the fact that two of the jurors had been on the grand jury who found the bill, proved that he had previously known it. The court said, "The defendant does not deny the previous knowledge, but states in his affidavit that he did not recollect the circumstance when the petit jury was impaneled, nor did it occur to him until after the verdict had been returned.
694 The counsel of the defendant *knew nothing of the fact until after the verdict had been given."—"The defendant had once known that these men were on the grand jury. The statement of his not recollecting it is insufficient: An affidavit to that effect could never be disproved. This part of the case then presents the question whether the objection, known to the defendant at the time of impaneling the jury, but not made till after the verdict, was good on a motion for a new trial. We think it was not. It was a good cause of challenge; but being known to the party and not mentioned at the proper time, the right was waived."

This case is, I think, no authority for the proposition that a motion for a new trial may be refused when founded on proof that there

was good cause of challenge to a juror which was unknown to the prisoner before the trial. On the contrary, the inference to be drawn from the opinion is strong, that if the court had been satisfied that the prisoner did not know of the fact that two of the jury had been of the grand jury who found the bill, until after the verdict, they would have set it aside.

And in the case of the Quinebaug Bank v. Leavens, in which the motion was founded on the fact that the father of a stockholder in the bank was one of the jurors, the report of the case does not show that there was any proof or affidavit as to the want of knowledge of the defendant. The court recognized the propriety of the general rule forbidding a new trial for extrinsic causes, if the ground of the petition existed at the time of the trial, and was either then known to the petitioner or might have been known by him by using due diligence. They said that the cause of objection to the juror furnished legal ground of principal challenge, if it had been made in due time; but it was of such a nature that parties might well waive it.

"But it does not appear by any aver-
695 ment in this motion, that *the defendant used any diligence, or made even the ordinary enquiries of the jurors themselves or otherwise, as to their qualifications; although from the fact that a banking corporation was the plaintiff, consisting of numerous stockholders, they might well suspect either that some stockholder, or one or more of their many relatives, might be found upon the jury." And after commenting further on the negligence of the defendant, the court come to the conclusion that it would under the circumstances be wrong to permit the defendant to take the risk of a verdict as he had done, and then to look about for objections; and that he ought to be held to have waived his objections. They say, however, "If an enquiry had been made of the jurors, and this relationship had not been disclosed, or other reasonable pains had been taken, our opinion would have been different."

The concluding remarks are in accordance with the views of the court in the case of Vennum v. Harwood, 1 Gilm. R. 659. In that case the verdict was set aside on the ground that a juror had formed and expressed a decided opinion on the merits of the case adverse to the defendant, which fact was not known to the defendant or his counsel, and the juror having been asked before he was sworn, whether he had formed and expressed an opinion. The court, in concluding their opinion, observed, "The juror, when called, was asked if he had formed or expressed an opinion, and declared emphatically that he had not. The defendant had a right to conclude from this declaration, that the juror was free from bias, and would try the case impartially. He could not challenge him for cause, and there was no apparent reason for a peremptory challenge. It is insisted, however, that he should have examined the juror on his voir dire touching his qualification. This practice is allowable, but is seldom resorted to in civil cases. We are not
696 prepared to say that a party is to *be charged with negligence who fails to pursue this course in order to ascertain the competency of a juror."

In the case before us, the bill of exceptions states that the juror Flanagan was sworn and tried on his voir dire, and stated that he had not made up or expressed any opinion as to the guilt or innocence of the prisoner, and proved himself free from exceptions; and was thereupon placed upon the panel of twenty-four. It is to be observed also, that the practice here in reference to inserting the names of the grand jurors in the caption of the indictment, is different from that which formerly prevailed, and probably still prevails, in England. There it has been usual to insert the names of twelve of the grand jurors at the least in the caption: And at one time it was held to be essential, as otherwise it might be that the presentment was by a less number than twelve; in which case it would not be good. In later cases, however, it has been decided that the insertion of their names is not necessary. Wharton's Am. Cr. Law 102, 103. According to our practice, and as is the case with the indictment before us, the names of none of the grand jurors are mentioned in the indictment: And there is, therefore, nothing apparent on the indictment to show who the jurors are, except the foreman, who writes on the back of it a true bill, and subscribes his name. There was, therefore, nothing to point to any cause of exception to the juror; nothing to awaken the suspicion of the prisoner that there was any ground of challenge against him. On the contrary, he had resorted to the precaution of examining the juror on his voir dire, and the examination had resulted in showing that he was free from exception. If he had failed to use this precaution, and had consented to the juror's being placed on the panel of twenty-four without instituting any enquiry into his qualifications, there might be some ground for imputing to him a want of
697 *diligence. But in the case as it stands, what ground is there for saying that the prisoner was not acting in good faith? Where are the evidences of that gross neglect on which the law is to build the presumption of a waiver of his rights? There is an entire absence of any proof to lead us to believe or even suspect that the prisoner in fact knew of the exception to the juror before he was sworn; and the prompt manner in which he brought it to the notice of the court after he was informed of it by the jailor, is not only a strong circumstance in aid of the statement in his affidavit that he did not know it when the jury was sworn and impaneled, but serves, together with the other evidence apparent on the face of the transaction, to dispel any belief or suspicion that the object of the motion was to create difficulties or throw obstacles in the way of the proceedings.

If, therefore, the first cases cited by the attorney general, stood alone and unexplained, I should still feel great hesitation in recognizing them as authority for a ruling

adverse to the prisoner in a state of facts such as we have here. But such is not the case. On the contrary, precedents are not wanting of new trials granted for like exceptions under circumstances certainly not more favorable to the petitioner than those disclosed here. Thus, in the case of Herndon v. Bradshaw, 4 Bibb's R. 45, a new trial was granted on the ground that one of the jury who rendered the verdict had served on a former trial of the cause. The grounds of their judgment are thus briefly stated by the court: "There is no doubt but what the juror was incompetent, and might have been challenged before he was sworn; and as that cause was not known to the attorney of Herndon until after the finding of the verdict, (Herndon himself not being present,) it furnished a good cause for a new trial. The court,
698 *therefore, upon the affidavit of the attorney proving the discovery, should have awarded a new trial."

So in the case of Page v. The Contoocook Valley Railroad, 1 Foster's R. 438, a new trial was granted on the ground that one of the jury was discovered after the verdict to be a stockholder in another railroad, which by a contract with the Valley railroad, was interested in the revenues of the latter. The court, after setting out the facts, conclude by saying, "As this objection was not known to the appellant until after the verdict was returned, it was not waived by proceeding to trial without challenge."

The cases of Commonwealth v. Jones, 1 Leigh 598; Heath v. Same, 1 Rob. R. 735; Commonwealth v. Hailstock, 2 Gratt. 564, and Curran v. Same, 7 Gratt. 619, cited by the attorney general, decide nothing, I think, in conflict with the claims of the prisoner.

In all of these cases, the applications for new trials, were founded upon the alleged discovery, after verdict, of improper bias in the jurors, which the prisoners endeavored to show existed, but was unknown to them, before the trial. In all of them it is true the applications were unsuccessful. But in none of them do the General court concede the coexistence of the two elements of improper bias in the juror and blameless ignorance of it on the part of the prisoner.

The doctrine to be gathered from those decisions and others of the same class, preceding them, I think substantially is, that when the prisoner excepts to a juror for cause before he is sworn, it is a matter of right to be adjudged by the court; when he excepts after trial for cause existing before the juror was elected and sworn, it is a matter addressed to the discretion of the court; and that in the exercise of this discretion the court ought to consider the whole case, and be satisfied that justice has been done; and that where there is conflict of testi-
699 mony as to the language *and conduct of the jurors, on which the exception to the jurors is founded, it properly belongs to the judge who presided at the trial to weigh and to decide upon the credibility of the opposing statements of the witnesses and jurors, and to decide, upon all the circumstances of the case, whether there is such proof of perjury and corruption on the part of the jurors as to make it proper to grant a new trial.

But there is certainly nothing in these decisions, nor as I understand their opinions, in the reasoning of the judges, going to the extent of holding that a new trial ought to be refused when the court is fully satisfied that the juror is incompetent from having prejudged the case, that the cause of challenge was unknown to the prisoner, and that he was guilty of no laches in failing to discover it and make it known before the trial, merely because the judge who sat at the trial was satisfied that the verdict was in conformity with the evidence. So to decide would be to attach to a faultless ignorance of the facts on which his right depended, all the consequences of a conscious and deliberate waiver by the prisoner of such right, and to allow to the finding of incompetent, prejudiced, and even corrupt jurors, all the virtue and efficacy which belong to the verdict of men, true, lawful and above all exception. Such a doctrine would, it seems to me, be at war with the merciful spirit which governs the administration of criminal law, and is in direct conflict with the whole current of decisions in this country. McKinley v. Smith, Hardin's R. 167; Jeffries v. Randall, 14 Mass. R. 205; United States v. Fries, 3 Dall. R. 515; State v. Hopkins, 1 Bay's S. Car. R. 373; Hardy v. Sprowle, 32 Maine R. 310; Briggs v. Georgia, 15 Verm. R. 61; Commonwealth v. Flannagan, 7 Watts & Serg. 68; Sellers v. The People, 3 Scamm. R. 412; Cody v. State, 3 How. R. 27; Lisle v. The State, 6 Mis-
700 souri R. 426; Tenney v. Evans, 13 *New Hamp. R. 462; Troxdale v. The State, 9 Humph. R. 411; Monroe v. The State, 5 Georgia R. 142.

In the case last cited, the decisions are very fully reviewed, and the doctrine thoroughly and ably discussed; and the result announced is, that where the objection to the juror would be good cause of challange for favor if discovered in time, it will be ground for a new trial if not found out till after verdict. It is obvious, however, that the application of the prisoner is presented under circumstances far more favorable to him than it would have been if his exceptions to the juror had been taken for the first time, after the verdict. Any degree of negligence may, with very slight aid from other circumstances, be sufficient to ripen and confirm into a judicial belief, that suspicion of unfairness which naturally and justly attaches itself to the conduct of one who, having taken the chances of a trial, seeks to rid himself of an adverse verdict, on the score of objections to his triers existing before they were chosen and sworn. It is difficult, however, to find any foundation in justice for a rule which would impart to the mere swearing of the jury the effect of destroying all those presumptions of innocence which, hitherto, the law allowed to the situation of the prisoner; which, thenceforth, before any evidence of guilt is exhibited, before a witness in the cause is examined, would subject his statements, motives and conduct to all the distrust incident to the posi-

tion of one against whom a verdict of guilty has been rendered; and which would treat his exceptions to jurors, founded on allegations of recently discovered incompetency, as the suggestions of conscious guilt, bad faith and corrupt scheming.

We shall, I think, find accordingly, that the principles to be deduced from the modern decisons justify an indulgence to motions to set aside jurors after they are sworn and be-
701 fore they have rendered a verdict, *which would not be allowed to applications for new trials founded on exceptions to jurors, taken after verdict.

With the exception of some early cases, which will be noticed presently, I have been able to find but two cases in England in which questions of the like character with the one under consideration have arisen. The Queen v. Wardle, 41 Eng. C. L. R. 351, and The Same v. Sullivan and others, 35 Eng. C. L. R. 539. In the former, which was a trial for felony, after the jury were sworn without any challenge or objection of any kind, and after one witness had been examined, the foreman of the jury brought to the notice of the court the fact that the prisoner had a relation on the jury; whereupon, it was moved by the prosecution that the jury should be discharged without giving any verdict, and a new jury called and sworn. Mr. Justice Erskine, before whom the trial was conducted, having conferred with Tindal, Ch. J., briefly said—"I have conferred with the lord chief justice, and we are of opinion that I have no power to discharge the jury, and that the case must proceed."

In the latter case, which was an indictment for conspiracy, tried before Lord Denman, Ch. J., after the jury were sworn and the case partly opened, the foreman of the jury stated that he had been on the grand jury which found the bill; and thereupon the counsel for the prosecution offered to consent to withdraw the juror and let the trial proceed with eleven; but the defendants not consenting, the case went on before the jury as at first composed, and the defendants were convicted: And they then moved for a new trial. In the course of the argument, the chief justice said that he was not disposed to say "whether the challenge if taken would have been available or not: but at any rate, the objection should have been stated at the proper
702 time. If it had been mentioned *before the trial, all of us probably would have agreed to exclude the juryman." After a consultation, he delivered a brief opinion, in which he observed, "We think that the objection should have been taken by way of challenge. The defendants here did not challenge; and when the objection was pointed out, and it was proposed that the juror should withdraw, they declined assenting to that course, and preferred to stand upon the strict law:" And the rule to set aside the verdict on the ground of a mistrial was denied. As the comments upon the earlier cases, before alluded to, contained in an opinion to be cited hereafter, apply also in some respects to these two cases, it is more convenient to defer any remark upon them till that opinion is cited.

In this country we have also but few opinions on this subject.

In Ward v. The State, 1 Humph. R. 253, decided by the Supreme court of Tennessee, after the jury were sworn and impaneled, but before any witnesses were examined, it was discovered that several of the jury were not freeholders; and on the motion of the attorney general, he was permitted to challenge the jurors on account of their disability. They were set aside against the consent of the prisoner, and others were substituted in their place, and the prisoner convicted: And it was held that the prisoner was thereby discharged. The court said that after the jury were sworn, it was too late to challenge any of its members propter defectum; that a jury could not be discharged after they were sworn and charged; that the word "charged" did not mean after the jury were sworn and had heard the testimony, or a part of it, but after the prisoner had been placed in the hands of the jury for trial; and that the discharge of the jury after they were sworn and so charged, against the consent of the prisoner, operated his discharge.

703 *In the case of The People v. Damon, 13 Wend. R. 351, on a trial for murder, after the fourth juror had been sworn in chief and taken his seat, the district attorney enquired of him whether he had conscientious scruples against finding a verdict of guilty for an offence punishable with death. The counsel for the prisoner objected, that the enquiry was too late; that after the juror was sworn in chief, he could not be objected to. The court overruled the objection, and on the juror's stating that he belonged to a religious denomination who had scruples of conscience against finding a verdict of guilty in a case punishable with death, and that he had such scruples, he was set aside by the court.

In the course of a very able opinion delivered by Chief Justice Savage, in which the whole court concurred, he observed, "The regular practice is, to challenge jurors as they come to the book to be sworn and before they are sworn; but I apprehend this is a matter of practice, and may be departed from in the discretion of the court. The object is to give the prisoner a fair trial; and if it be made to appear, even after a juror is sworn, that he is wholly incompetent by reason of having prejudged the case, it is not then too late to set him aside and call another. It is indeed laid down in the old books that it cannot be done. Hawkins says a juror cannot be challenged after he has been sworn, unless for some cause which happened after he was sworn, (according to the greater number of authorities,) and cites the year books." 4 Hawkins 387, ch. 43. In Tyndal's Case, Cro. Car. 291, the prisoner challenged the foreman of the jury, but he was sworn by the clerk before the challenge was heard by the court; and therefore, without the assent of the attorney general, then present, they would not alter the record; and because the attorney general would not consent to alter the record, the
704 challenge *was disallowed. In Whar-

ton's Case, Yelv. R. 24, upon the arraignment of the prisoner for murder, on the first day eleven jurors appeared and were sworn; one was challenged, and for that time the trial was stayed. Upon a tales taken at another day, when the jury appeared, one of the jurors who had been sworn was challenged for cause which existed before he was sworn. Upon a doubt arising among the judges of the King's bench, Yelverton went into the Common pleas to know their opinion. The opinion was that the queen could not have the challenge after the juror had been sworn. Another matter of doubt was whether those already sworn should not be sworn over again; and the court held that they must be sworn again. The jury acquitted the prisoner. "Wherefore, (says the reporter) Popham, Gawly and Fenner fuerunt valde irati; and all the jurors were committed and fined and bound to their good behavior." In the first of these cases, the reason given for the decision of the court is not one calculated to give us very elevated notions of the criminal justice in the reign of Charles I. Because the attorney general would not consent to alter the record, by striking out the name of one juror and inserting another, therefore an incompetent juror must serve. In the second, an incompetent juror was permitted to sit, because the attorney general was not aware, until sworn, of his relation to one of the prisoners; and this, although they admitted that the oath administered was of no effect, by directing him to be sworn a second time. The verdict was such as should have been expected, and, it would seem, ought not to have called down on the whole jury the signal vengeance of the court. It must have been a clear case of guilt; and because the court would not exercise a proper discretion in setting aside an incompetent juror, before the jury was completed or the trial was com-
705 menced, they found themselves *called upon to punish the whole jury, who probably were led astray by the improper person who was permitted to be one of their number. Hawkins intimates there are authorities the other way; but I apprehend no authority can be necessary to sustain the proposition, "that the court may and should in its discretion set aside all persons who are incompetent jurors at any time before evidence is given."

On the trial of the celebrated Titus Oates, a state of things occurred during the swearing and impaneling of the jury, very similar to that which existed in Tyndal's case. After some of the jury were sworn, the prisoner challenged one of them because he had been on the grand jury, and stated that he intended to have challenged him before he was sworn, but that the clerk had proceeded with such haste as to prevent his doing so. The court replied that he was too late, as the juror was sworn; but the attorney general seeing the palpable unfairness of the proceeding, waived the difficulty, and permitted the juror to be set aside. 10 St. Trials 108.

The objections to the ruling in the cases of Tyndal and Wharton, presented in the opinion of the Supreme court of New York just cited, seem to me to be very just and proper; and I can see no good reason for denying, in this state, the right and duty of the court to set aside jurors on the score of exceptions propter affectum, taken either by the prosecution or the prisoner at any time before the examination of the witnesses has commenced. For in Martin's Case, 2 Leigh 745, the General court held, (citing Coke, Foster and Blackstone,) that the separation or discharge of a jury after the swearing and impaneling but before the examining of witnesses, is no ground of objection to a verdict; thus denying the authority of Ward v. The State. The same doctrine was reasserted by the court in Tooel's Case, 11 Leigh 714.
706 And such I *understand is still the rule in England. Roscoe's Cr. Evi. 222.

In this state of the law, the denial by the court in the case of The Queen v. Wardle, of its power to set aside the juror, it will be perceived can have no application in this case, inasmuch as in this case the motion was made by the prisoner and before any witness had been called, aud in that it was made by the prosecutor and after a part of the evidence had been given in. And I think it obvious from the remarks which fell from Chief Justice Denman, during the argument of the motion in the case of The Queen v. Sullivan, as well as from the grounds set forth in the opinion of the court, in rendering judgment on the motion, that if the prisoners there, instead of objecting to, had concurred in, the motion of the attorney general to set the juror aside, or had themselves asked that the juror should be set aside on his disclosing the fact that he was of the grand jury that found the bill, the court would have found no difficulty in setting aside the juror. In that case it will be recollected no witnesses had been examined.

So that, it seems to me, a review of the English precedents furnishes no ground for supposing that, in the existing state of the law in England, with respect to the discharge of juries, English judges would now deny their power to set aside a juror at the instance of a prisoner, at any time before the examination of the witnesses had commenced.

And indeed I can see no reasons, other than those suggested by convenience, which would deny to the court the right to set aside a juror, on the motion or by the consent of the prisoner, at any time before the verdict is rendered. It is true that at one time it was held, on the authority of a decision reported in a note to the case of Chedwick v. Hughes, Carth. R. 465, that in criminal cases a juror cannot be withdrawn but
707 by *consent; and in capital cases, not even with consent. This doctrine, if it ever had any general prevalence, has been long since exploded; and I presume there can be no doubt now, that a motion of a prisoner to set aside a verdict or to be discharged, on the ground of a discharge of the jury, brought about by his motion or with his consent, would be promptly denied. Waterman's Archbold 172, and notes.

And in Illinois, where they have a statute

giving to the court the power, when a juror, after being sworn, is for any reasonable cause dismissed or discharged, to cause another to be sworn in his stead, the practice prevails of setting aside jurors on the motion of the commonwealth and against the consent of the prisoner, even after witnesses have been examined. Stone v. The People, 2 Scamm. R. 326. In that case, it was discovered, after the jury had been sworn and impaneled and a part of the witnesses examined, that one of the jury was an alien. And he was, on the motion of the prosecutor and against the consent of the prisoner, discharged, and a new juror was sworn in his place; and it was held that there was no cause for setting aside the verdict. And in the case of Thomas v. Leonard, 4 Scamm. R. 556, the same rule is applied to civil cases, and the broad doctrine announced, that in all cases a court has a discretion, whenever it comes to its knowledge that a juror has been inadvertently sworn who cannot render a legal verdict, to discharge him.

We have a statute somewhat similar in its provisions to the Illinois statute. The 12th section of chapter 208 of the Code provides that if a juror, after he is sworn, be unable from any cause to perform his duty, the court may, in its discretion, cause another qualified juror to be sworn in his place. And in any criminal case the court may discharge the jury when it appears they cannot agree in a verdict, or that there is a mani-
708 fest *necessity for such discharge. Whether the incompetency of a juror, from having prejudged the case, discovered before verdict, would be regarded by our courts as an inability to perform his duty, and as presenting a necessity for his discharge, in the contemplation of the statute, it is not necessary to consider. Whatever may be the proper interpretation of the statute in this regard, it is obvious that it does not expressly or by implication narrow the powers of the court, or in any wise abridge any discretion before existing, to set aside jurors. Nor do I think that the power of the court in this regard is affected by the provision of the 10th section of chapter 108 of the Code, requiring the twelve selected by lot to constitute the jury.

Without entering, therefore, into a consideration of the circumstances under which the discharge of a jury at the instance of the prosecution and without the consent of the prisoner would or would not result in a discharge of the prisoner, I have come to the conclusion that with us the courts have the right, in their discretion, to set aside jurors, on the score of incompetency, propter affectum, discovered after they are sworn, on the motion or with the consent of the prisoner, at any time before verdict rendered; and at the instance of the commonwealth, for like cause at any time, when the discharge of the jury without the consent of the prisoner would not result in a discharge of the latter.

It remains to be considered whether the court ought, in the exercise of its discretion, to have set aside the juror Flanagan under the circumstances disclosed in the prisoner's first bill of exceptions.

I have already expressed the opinion that there was nothing in the conduct of the prisoner from which to infer a waiver of his rights; nothing in his own statements, or in those of his witness, to justify doubt as
709 *to their truth. He acted promptly on the information communicated to him by Dawson, and pursued exactly that course which is recommended to persons in his situation, by the court in the case of McCorkle v. Binns, 5 Binn. R. 340. That was an application for a new trial, founded on the discovery of objection to a juror after the trial had commenced, but before the verdict. The court said that the defendant, in order to entitle himself to the benefit of the objection, should have disclosed the information promptly to the court. He ought not to have taken the chance of a verdict in his favor, and kept his motion for a new trial in reserve, because the plaintiff and defendant were then placed on an unequal footing. "I mention this (said the judge) for the direction of those who may happen to be in like circumstances in future." The inference is irresistible, that had the defendant acted there as the prisoner has here, he would have obtained relief.

The only circumstance calculated to excite suspicion that the prisoner contemplated some object other than that which was the ostensible one of his motion, is to be found in the answer given by his counsel to the enquiry of the court, how the place of Flanagan should be supplied, or if he was discharged from the jury, what should or could be done; the answer which was given being that the commonwealth had had a grand jury, and now a petit jury, and must remove the difficulty. It certainly would have been more courteous to the judge; it would have stripped the application of the slightest appearance of any wish on the part of the prisoner or his counsel to embarrass the proceedings, if the counsel, instead of replying as he did, had proceeded to point out the mode by which the difficulty suggested by the question of the court might be obviated. But it is difficult to conceive on what principle the prisoner's rights could be compromited by such a conversation. Having brought to the
710 notice of *the court the facts upon which he supposed his rights to depend, and having founded a motion on those facts, I cannot see that it was the duty of the prisoner or his counsel to do any thing more, or how we should be justified in imputing to a failure to do more the motive to gain some ulterior and unfair advantage. The answer, fairly interpreted, is, "I have submitted my rights to the court; it is for the court and not for me to pronounce the judgment of the law upon them, and to consider what may be the legal consequences flowing from such judgment." But even if we infer, from the course of the prisoner's counsel, that he entertained some hope or expectation that the granting of his own motion by the court might result in something to his advantage besides simply procuring the substitution of

another juror in the place of Flanagan, still his declining to point out a mode of obviating any supposed difficulty could not have the effect of withdrawing or altering the nature of his motion, which was plain and unambiguous. If his motion had been simply to set aside the juror, the question might have arisen whether granting it as asked might not result in the necessity of going anew through the process of forming an entire jury; and in such case, and in order to obviate the inconvenience and delay consequent on granting the motion, it might have been proper in the court, as eleven of the jury remained free from exception, to have placed the prisoner on the terms of consenting that another qualified juror should be sworn, and that he with the eleven others should proceed to try the case. But the motion, as has been seen, was not simply to set aside Flanagan, but also to do exactly what we have just supposed the court might have required the prisoner to consent to, to wit, to substitute another juror in the place of the one to be set aside. Such being the motion, the case of Tooel, already cited, furnished a prec-
711 edent *for the course to be pursued by the court. The swearing of another qualified juror in the place of Flanagan could not have been made a ground either for a discharge of the prisoner or a new trial.

There remains yet another enquiry, and that is, whether the objection to the juror was removed by his statements made on his second examination on the voir dire.

I think it questionable at the least, whether the juror ought to have been subjected to such a test. Where the objection to the juror is founded on the proofs of favor deduced from statements alleged to have been made by him, his denial or explanation of such statements may and often does serve to satisfy the mind of the court of his indifferency. But when, as here, the law attaches a presumption of bias or favor to the fact of the juror's having been on a former jury, it is difficult to conceive of any statement by which that presumption can be wholly removed. For if the juror on his examination should state the only fact that could well wholly disprove the formation of opinions or impressions unfavorable to the prisoner, from the evidence given before the grand jury, to wit, that the indictment was found and returned by twelve of the grand jury, against his opinion and consent, he would at once show himself liable to exception on the part of the prosecution, having already adjudged the prisoner not guilty on the ex parte showing of the prosecution, and without any aid from the prisoner's testimony. And even upon the concession that it was allowable to examine the juror on trying the exception to him, I should doubt whether his statements, of having paid little attention to the testimony, and of being governed by what the jurors said as well as what was testified to by the witnesses, accompanied by the disclaimer of having formed or expressed any opinion as to the guilt or innocence of the accused,
712 *were such as ought in any case to be received as a sufficient answer to the presumption which the law attaches to his position. For of so serious a character is the exception to a petit juror, on the ground of his having been one of the grand jury who found the bill, that according to Lord Hale, it is an offense punishable by fine for a man who was one of the indictors, and who was returned as one of the petit jury, not to challenge himself. 2 Hale Pl. C. 309. And when I look to the whole conduct of the juror, it seems to me that there are peculiar circumstances in his case rendering him not only liable to the challenge of the prisoner, but also exposes him to the just censure of the court.

On his second examination he discloses the fact that before he was summoned as a petit juror he had in a conversation with Dawson told him that the sheriff had informed him (the juror) that he anticipated difficulty in getting a jury, who had not made up or expressed an opinion; and that he had also said to Dawson that he did not expect to be summoned, as he was on the grand jury. It appears that he served on the grand jury on the 19th of September; and yet on the 26th of the same month, only one week thereafter, when called as a petit juror in the case, notwithstanding his recent conversation with Dawson and the brief interval which had elapsed since he acted as a grand juror in the case, he failed upon his voir dire to disclose the fact that he had been on the grand jury, and proved himself free from exception. And upon his second examination he still failed to assign any reason or give any explanation why he had not made known the fact of his being one of the grand jurors; but opposes to the inference of his having prejudged the case which the law deduces from the capacity in which he had acted, a denial of having formed any opinion, and places his free-
dom from such opinion to the account
713 *of his having discharged his duties as a grand juror in a loose, imperfect and careless manner. I cannot, in this state of things, say that the legal presumptions against his fitness and competency have been removed. Whatever may have been his motive, I cannot say that he appears free from all exception. I hold with the learned judge who delivered the opinion of the court in Clarke v. Goode, 6 J. J. Marsh. R. 37, that "It is not only important that justice should be impartially administered, but where it can be effected without the violation of any rule of propriety, that it should flow through channels as clear from suspicion as possible." I cannot recognize the justice or propriety of a rule which would force a prisoner against his consent to enter upon the hazard of a trial by a juror, standing in the predicament in which the juror Flanagan is presented by the record of this case. And I think the prisoner is entitled to a new trial.

ALLEN, P., and SAMUELS, J., concurred in the opinion of Daniel, J.

MONCURE and LEE, Js., dissented.

Judgment reversed, and new trial awarded.

714 *Johnson v. The Commonwealth.

Three Cases.

Gary v. The Same.

Pankey v. The Same.

April Term, 1855, Richmond.

Statute—Sale of Liquor to Slave—General Written Consent.*—A master may give a general written consent to the purchase by his slave of ardent spirits of a particular person; which will be valid to protect the seller from incurring the penalties prescribed in the Code, ch. 104, § 1, p. 459.†

These were indictments in the Circuit court of Appomattox county, for selling ardent spirits to slaves without the written permission of their master. The facts are stated by Judge Allen in his opinion. Judgments having been rendered against the parties, they applied for writs of error, which were allowed.

August & Randolph, for the appellants.

The Attorney General, for the commonwealth.

ALLEN, P. These five cases present substantially the same question, and were argued and may be considered together. They were presentments found against the several plaintiffs in error for selling ardent spirits to different slaves of John H. Johnson, without the written consent of the master. The parties having appeared and pleaded not guilty, the court proceeded to hear and determine the cases without a jury, and rendered judgment in each case for twenty dollars,
715 *the fine imposed by law, and the costs of prosecution. From the certificate of facts in each case, it appeared that the commonwealth proved the sale of the ardent spirits, as charged in the presentment; and thereupon the plaintiffs in error in their defense produced a writing, proved to have been executed and delivered to them by the owner of the slaves, authorizing them to sell to his slaves, or any of them, merchandise or liquor, upon the responsibility of the slaves purchasing. The sale in each instance was made some months after the date of the writing; and the only question is, whether the master could give such a general authority to sell to his slaves, so as to protect the seller from the penalties of the law.

The prosecutions were founded on the Code, ch. 104, § 1, p. 459, which provides, that if any person sell wine, &c., to a slave without the written consent of his master, he shall forfeit to his master four times the value of the thing sold, and also pay a fine of twenty dollars. There is nothing in the terms of the act which requires a special written consent for each act of selling. The law, though intended to guard the interests of the public, did so through the interests of the owner. He is the party most interested in preventing his slaves from purchasing ardent spirits, or dealing in other articles with third persons; for he is the party most likely to be injured by such acts. When therefore he gives his written consent, whether general or limited, the requisitions of the law would seem to be satisfied, even if no other forfeiture than the fine to the commonwealth were incurred. But the act, in addition to the fine to the commonwealth, subjects the offender to a forfeiture to the master of four times the value of the thing sold. The written consent was given in such general form to relieve the owner from the trouble of giving such consent in writing for every pur-
716 chase or sale provided for in the *first and second sections of the law under consideration. He intended it as a consent to any sale as long as the authority was unrevoked, and could not be injured by the seller doing what he had expressly permitted. But unless the selling was such a violation of his rights as master, as subjected the seller to the forfeiture to the amount of four times the value of the thing sold, no offense was committed against the public. The act complained of must subject the offender to the forfeiture as well as the fine. And if no injury is done to the owner, there is no offense against the public; for the injury to the community grows out of the improper dealing with the slave without the owner's consent. I think that upon the facts certified, no offense was committed; and that judgment should have been rendered discharging the plaintiffs in error from the prosecution.

The other judges concurred in the opinion of Allen, P.

Judgment reversed, and entered for the appellant.

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717 *Vaiden v. The Commonwealth.

April Term, 1855, Richmond.

1. **Criminal Law—Appellate Practice—Certification of Evidence.***—A bill of exceptions in a criminal case, upon the refusal of the court to grant a new trial, on the ground that the verdict is contrary to the evidence, is to be framed in the same way as the bill of exceptions in civil cases to the like refusal is framed. And if the evidence is certified instead of the facts proved, the appellate court will only look to the evidence introduced by the commonwealth.

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*See generally, monographic *note* on "Intoxicating Liquors" appended to Thon v. Com., 31 Gratt. 887.

†The act says, "If any person sell wine, ardent spirits, or any mixture thereof, or any other intoxicating liquor, to a slave, without the written consent of his master, he shall forfeit to the master four times the value of the thing sold, and also pay a fine of twenty dollars."

*Criminal Law—Appellate Practice—Certification of Evidence.—Several cases cite the principal case as authority for the statement that, in a criminal case, where the evidence is certified in the bill of exceptions taken upon the refusal of the court to grant a new trial on the ground that the verdict is contrary to the weight of evidence, the appellate court will only look to the evidence introduced by the commonwealth. See Gimmi v. Cullen, 20 Gratt.

2. **Appellate Practice—When Judgment Reversed.**†—In reviewing the judgment of the court below, the appellate court will not reverse the judgment on the ground that there is a doubt of its correctness; but it must be satisfied that the evidence is plainly insufficient to warrant the verdict.

3. **Murder—Justification.**‡—On a trial for murder the necessity relied on to justify the killing must not arise out of the prisoner's own misconduct.

At the March term 1855 of the Circuit court of Lunenburg county, Ishman W. Vaiden was indicted and tried for the murder of James A. Winn. The jury found him guilty of voluntary manslaughter, and fixed his term of imprisonment in the penitentiary at four years; and the court sentenced him accordingly.

After the verdict was rendered, the prisoner moved the court for a new trial, on the ground that the verdict was contrary to the evidence; but the court overruled the motion, and the prisoner excepted.

The bill of exceptions commences by stating that on the trial of the cause, it was proved by, &c. and then states the name of a witness, and proceeds to give his statement; and so it proceeds, giving the name of each witness and what he stated, until near the close of the bill of exceptions, when it is stated it was proved by several witnesses, that for the last eighteen months or two years Winn had been a drinking man, and that when drinking he was a quarrelsome,
718 turbulent *man; though some regarded him as a coward; and that Vaiden was an amiable and peaceable man, although a drinking man. And the exception then concludes: And this being the testimony in the case, &c.

The first witness examined for the commonwealth, Pennington, stated, that on the night of the 29th of December 1854, he went to the house of the prisoner, to the wedding of the prisoner's daughter, and got there about half an hour after nightfall. That he found the prisoner and the deceased playing cards when he arrived; and that they continued their game from twenty-five to thirty minutes afterwards. When they stopped playing, Vaiden said to Winn, you owe me five dollars, which Winn did not deny, but discovering a card under the table, accused Vaiden of putting it there. Vaiden then said he had not put it there, and Winn said he had not. Winn then accused Vaiden of having cheated him. Vaiden said he had not, and Winn called him a damn'd liar. Mrs. Vaiden, the wife of the prisoner, taking hold of Winn, said to him, I thought you promised

452; Read v. Com., 22 Gratt. 931; State v. Thompson, 21 W. Va. 754.

Appellate Practice—Certification of Evidence—When Judgment Reversed—Old Rule.—So several cases cite the principal case as authority for what is known as the old rule in Virginia, *i. e.*, when the evidence is certified, the court will not reverse the judgment of the lower court unless, on rejecting all the parol evidence of the acceptor and giving full faith and credit to the adverse party, the judgment should still appear to be wrong. See Bull v. Com., 14 Gratt. 621; Bank v. Waddill, 31 Gratt. 475; Proctor v. Spratley, 78 Va. 264; State v. Baker, 33 W. Va. 337, 10 S. E. Rep. 646.

See further, on this point, cases and *foot-notes* collected in *foot-note* to Bull v. Com., 14 Gratt. 613; *foot-note* to Gimmi v. Cullen, 20 Gratt. 441. See generally, monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

Bills of Exception—Refusal to Certify Facts.—For the proposition that where the evidence is conflicting the court may refuse to certify the facts proved, the principal case was cited in *foot-note* to Bull v. Com., 14 Gratt. 613; *foot-note* to Caldwell v. Craig, 21 Gratt. 132.

See monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

Same—Apparent Certification of Facts—Effect.—In Read v. Com., 22 Gratt. 929, it was said: "Whether the court of trial intended to certify the facts, or the evidence only, is sometimes a doubted question. In form, it sometimes appears that the certificate is one of facts: whereas, in substance, it is a certificate of evidence only; and so, on the other hand, it may, in form, appear to be one of evidence only, when it was intended to be one of facts. Each case must depend upon its own circumstances, and the appellate court must determine, as well as it can, what is the character of the certificate in that respect. On this subject, see Bennett v. Hardaway, 6 Munf. 125; Jackson's Adm'x v. Henderson, 3 Leigh 196; Patteson v. Ford, 2 Gratt. 18; *Vaiden's Case, 12 Id.* 717. Where the matters certified in form as facts are in any respect conflicting, it is evident that the certificate, in that respect at least, is of evidence and not of facts, because facts cannot be conflicting, but must be consistent with each other." The principal case was also cited on this point in R. F. & P. R. R. Co. v. Snead, 19 Gratt. 354.

†**Appellate Practice—When Judgment Reversed.**—In reviewing the judgment of the court below, the appellate court will not reverse the judgment on the ground that there is a doubt of its correctness, nor merely because, if upon the jury, it would have given a different verdict; but it must be satisfied that the evidence is plainly insufficient to warrant the verdict. The principal case was cited as authority for this proposition in Kates v. Com., 17 Gratt. 561, 562, and *foot-note*; Oneale v. Com., 17 Gratt. 591; Kemp v. Com., 18 Gratt. 977; Read v. Com., 22 Gratt. 925, 942, and *foot-note*; Kimball v. Friend, 95 Va. 144, 27 S. E. Rep. 901; State v. Donohoo, 22 W. Va. 766; State v. Flanagan, 26 W. Va. 120; Nuzum v. Pittsburgh, etc., Ry. Co., 30 W. Va. 240, 4 S. E. Rep. 249.

For further authority on this subject, see cases and *foot-notes* referred to in *foot-note* to Gimmi v. Cullen, 20 Gratt. 442; *foot-note* to Kates v. Com., 17 Gratt. 561; monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

‡**Murder—Justification.**—Several cases cite the principal case as authority for the proposition that, on a trial for murder, the necessity relied on to justify the killing must not arise out of the prisoner's own misconduct. See Lewis v. Com., 78 Va. 734; Honesty v. Com., 81 Va. 296, 298; Gaines v. Com., 88 Va. 693, 14 S. E. Rep. 375; Clark v. Com., 90 Va. 369, 18 S. E. Rep. 440; Gray's Case, 92 Va. 775, 22 S. E. Rep. 858; Jackson's Case, 98 Va. 848, 36 S. E. Rep. 487; *foot-note* to Bristow's Case, 15 Gratt. 635.

Homicide—Duty to Retreat.—See principal case cited in State v. Cain, 20 W. Va. 700; 6 Va. Law Reg. 177. See monographic *note* on "Homicide."

me to have no fuss here. Winn replied that he did; and at the instance of Mrs. Vaiden, Winn left immediately, saying "good night," and went into the yard. He remained there some five minutes, cursing and talking loud, and seemed to be enraged; but witness could not distinguish his words, the door being shut. Vaiden then went to the door and told Winn he owed him five dollars, and Winn said to him, Come out here, you damn'd old rascal, and I will pay you your five dollars. Winn then came and asked for his gun, which George Vaiden, the son of the prisoner, handed to Mrs. Vaiden and she handed it to Winn through the door. At this time this witness and Harding left the house and joined Winn in the yard. Whilst Winn was talking loudly in the yard and before his gun was handed to him, Vaiden
719 *took up his gun and went towards the door; but his wife persuading him, he set his gun down.

Witness and Harding mounted their horses, and in company with Winn, who was walking, went towards the gap on the path leading from Vaiden's house to the main road. George Vaiden joined them a few yards from the house; and as the party were going to the gap, Winn told George Vaiden, that if he had said any thing to hurt his feelings or his mother's, he asked their pardon; but tell your father, a damn'd old rascal, that the first time I catch him out of his plantation, I will flail him well. The whole party went through the gap, and George Vaiden put up the fence. Witness and Harding left Winn and George Vaiden outside of the gap in not unfriendly conversation; Winn telling him the particulars of a fracas he had recently gotten into at Lunenburg court-house. When witness had rode about a quarter of a mile from the gap he heard a gun fire, but did not return. Witness did not see the cap taken off Winn's gun before it was handed to him; and heard no one tell George Vaiden or any one else to take it off.

Harding proved the same facts as Pennington, and his statement as to the taking off the cap from Winn's gun was the same. He saw and heard nothing of it.

Dr. Saunders, another witness for the commonwealth, was called to see Winn as a physician. Found him dead when he arrived, and the body lying in the corner of the fence inside, about two panels from the gap spoken of by Pennington. Thought he must have been shot at a distance of not more than three feet. Found Vaiden bleeding from a wound on the forehead, which witness thought was inflicted with the breech of a gun. Thinks Winn must have inflicted this blow after he was shot, because, if inflicted before, such an instrument wielded by a man of Winn's strength, must inevitably have crushed
720 the skull of *Vaiden. The body of the deceased laid where he died until the inquest was held the next day. The night was cloudy, but the moon was full; and the figure of a man could be distinguished at the distance of thirty yards. The gap was two hundred and seventeen steps from the house.

George Vaiden, another witness for the commonwealth, a son of the prisoner, gave the same account of what passed at the house, and to the time Pennington and Harding left him and the deceased at the gap, as was given by them. He further stated, that after the gap was put up he and Winn stood on the outside leaning against a panel. Winn had his side face towards the house, and was telling witness of a fracas he had had at Lunenburg court-house, when he suddenly exclaimed, "Yonder comes the damn'd old rascal, and I'll flail him now;" and jumped over the fence, and clubbed his gun soon after he jumped the fence, in both hands, about half way the barrel, and rushed upon the prisoner. As Winn jumped over the fence, witness distinctly heard the prisoner tell him not to approach him; if he did, he would shoot him. Winn did not stop, but rushed on the prisoner with his gun raised in both hands, grasped about half way the barrel. The prisoner stepped back one or two steps; and when Winn got within a few feet of him, fired. Winn struck the prisoner two blows with the breech of his gun after he was shot, and then staggered back; and then both of them fell together. Witness thinks they closed, and that Winn pulled the prisoner down with him. Witness did not see the prisoner till Winn made his first exclamation; and when witness saw him he was about fifteen feet from the gap, in the usual walking path from the house, which was on the north edge of the cart path.

Witness took the cap from Winn's gun at the suggestion of Reuben Clarke,
721 before he handed it to his *mother who handed it to Winn. Does not think any one else heard Clarke, who spoke in a low voice. Prisoner could not have seen him take it off, as a door, which was about half open, was between them.

Benjamin Yates, another witness for the commonwealth, lived about five or six hundred yards from Vaiden's house. The next morning Vaiden came to the house of witness, when in reply to a remark he made, witness asked what was the matter; and the prisoner said he had killed Jimmy Winn. Witness told him that he reckoned not, and prisoner replied that he had; and said there was another damn'd rascal in the neighborhood, who, if he didn't look sharp, would be killed too. That the deceased was a damn'd dog, and ought to have been killed twenty years ago, and that some body had to do it: and didn't witness think so. Prisoner told witness that Winn had struck him two blows over the head before he shot him; and that both he and Winn were tolerably tight. Prisoner looked as if he had been drinking a good deal the night before, but was not drunk when he came to the house of witness in the morning. The deceased was a quarrelsome man when drunk, and for the last eighteen months or two years had had a great many fracases. He could manage Vaiden easily. He was a large, muscular man, about forty-two years of age; and Vaiden a small man, about sixty years old.

Reuben Clarke, a witness for the prisoner, gave substantially the same account of what

occurred in the house as the other witnesses, up to the time of their leaving. He confirmed what George Vaiden said about taking off the cap of the gun at his suggestion; and that the prisoner did not see it done. He states that after Winn had left the yard, Vaiden walked up and down the room, and asked "where is George?" two or three times, and seemed uneasy. He then took his gun and started out, and upon Mrs. Vaiden's asking
722 *him not to go out, he said he would have no difficulty. About three or four minutes after Vaiden went out, witness heard the report of a gun, and went out to where Winn lay. Winn lived about twenty or thirty minutes. Whilst Mrs. Vaiden and witness were standing near Winn, he asked Vaiden to forgive him. Vaiden did not appear to hear him at first. Winn repeated it, and Vaiden said "All right," or something signifying that he did forgive him. Vaiden's forehead was cut about three inches; and he said that Winn had struck him there.

Moremus, another witness for the prisoner, his son in law, gave substantially the same account of what passed in the house as the other witnesses. He heard and knew nothing at the time of the taking off the cap from Winn's gun. His account of Vaiden's going out of the house to see after his son George, is the same as that of Clarke.

The prisoner applied to this court for a writ of error, which was awarded.

Howard, for the prisoner.

The Attorney General, for the commonwealth.

LEE, J. Upon the threshold of this case we are met with the objection that the bill of exceptions taken to the opinion of the court overruling the motion for a new trial, contains only a statement of the evidence given on the trial of the cause, and not a certificate of the facts proved: and the question presents itself, whether the rules by which this court is governed when reviewing the action of a Circuit court in granting or refusing a motion for a new trial in a civil cause, apply also in criminal cases; and if they do, we have then to determine the true character of the certificate contained in the bill of exceptions, and the manner in which the same must be considered in the present case.
723 *The rule propounded by this court in Bennett v. Hardaway, 6 Munf. 125, was that a bill of exceptions to a decision of the court below upon a motion for a new trial, should not set out all the evidence given upon the trial of the cause; but should state the facts which appeared to the court to have been proved by the evidence. The principle which lies at the foundation of the rule is, that as it is the function of this court to pass upon the very case which was before the court below, and with the same lights and the same materials by which to form its judgment, it cannot have that case and those lights and materials if it should be called upon to pass on the weight of testimony and the credibility of witnesses. The court below has the witnesses before it, and can observe their manner and demeanor in giving their testimony. This court only sees their testimony on paper, and has not the same means of judging of the weight due to it, and of the credibility of the witnesses. Hence an exception taken on such an occasion should not be so framed as to cast upon this court the duty of judging as to the credibility of the witnesses or the weight due to their testimony. And it would seem that the reason for the rule applies in all its force in criminal cases. In these, this court can no better nor more successfully perform the task of weighing testimony than it can in civil cases. Its inability to determine the credibility of witnesses must be the same in both.

Looking, then, to the bill of exceptions, it would seem from its form to be somewhat uncertain whether it was intended by the judge to be a certificate of the facts proved, or merely a statement of the evidence on both sides. The names of the witnesses are all given, excepting those who were called to prove the habits and general deportment of the prisoner, and the deceased; and each witness is stated to have "proved" what is there narrated. But the exception
724 concludes *thus: "And this being the testimony in the case, the jury found, &c." The mere form of the certificate in a bill of exceptions may, it is true, be extremely fallacious for it may profess to state the facts proved, and yet in effect amount only to a mere statement of the evidence. Such was the certificate in the case of Jackson's adm'r v. Henderson, 3 Leigh 196. And in any case, as correctly stated by Judge Baldwin, in Patterson v. Ford, 2 Gratt. 18, 33, whether a judge means to certify the testimony of a witness or the facts which he proves in the shape of evidence, is a matter that depends more on the substance than the form of the bill of exceptions. If we examine, then, the statement which follows the name of each witness as given, we will find that it is a mere narrative of his testimony as given in by him at the time. In some instances, two or more of the witnesses speak as to the same circumstances, but do not state them precisely in the same way. Thus the witness Pennington and the witnesses Clarke and Moremus are not agreed as to whether the deceased accused the prisoner of putting the card under the table before or after the prisoner claimed the five dollars of the deceased. Pennington says that the prisoner claimed the five dollars, and that the deceased then discovered the card under the table, and accused the prisoner of putting it there; while Clarke and Moremus testify that the deceased discovered the card under the table, and accused the prisoner of putting it there, before anything was said by the prisoner about the five dollars. So in regard to the material fact, whether the blows which the deceased inflicted upon the prisoner were given before or after the prisoner shot the deceased, there is much uncertainty. There is some testimony tending to show that the blows were inflicted be-

fore the shot, while the testimony of George Vaiden is that the blows were struck after the shot; and Dr. Saunders, another
725 witness, *expresses the opinion that the mark on the head of the prisoner must have been caused by a blow inflicted after the shot, because if the blow had been given by such a man as the deceased before he was shot, it must inevitably have crushed the skull. So the witnesses who depose as to what the deceased said to George Vaiden about his father when they were going away from the house, do not agree exactly as to what the deceased did say. Other discrepancies in the statements of the different witnesses might be noticed. It will be observed also, that with regard to several matters, some of the witnesses express merely the opinions they entertained at the time of the trial, without undertaking to state directly how the facts really were. Now the facts and circumstances attending the occurrence must of course all harmonize and consist; they cannot be varied according to the varying statements of the witnesses; nor can they be made to depend upon the correctness of their opinions, or the logical accuracy of their deductions. Neither is this court much better prepared to judge of the weight due to their opinions than of the credit to which their statement of facts may be entitled.

It seems to me that it is impossible to read the bill of exceptions without seeing that it is but a mere detail of the evidence (as the judge terms it himself in the concluding part of the bill of exceptions) given in the witnesses at the trial, excepting only the proofs as to habits and deportment, and not a certificate of the facts of the case. That it is evidence liable to be impeached by the circumstances of the transaction, whether successfully or not, and which it was the peculiar province of the jury to weigh and consider, cannot be doubted. And thus, according to the test prescribed in the opinion of Judge Baldwin in Patterson v. Ford, 2 Gratt. 18, 33, the matter of it, however certified, cannot be treated as facts
726 proved before the *jury. In the case just referred to, the bill of exceptions was held not to have been well taken, and upon comparing it with that in the present case, it will be found (so far as parol testimony is set out) very nearly to resemble it in the form of statement and the manner of the certificate.

Regarding the bill of exceptions then as not well taken according to the rule of Bennett v. Hardaway, we must reject the evidence on behalf of the prisoner, and examine the case upon the evidence on the part of the commonwealth, according to the modification or explanation of the rule established by subsequent cases. Ewing v. Ewing, 2 Leigh 337; Green v. Ashby, 6 Leigh 135; Rohr v. Davis, 9 Leigh 30; Pasley v. English, 5 Gratt. 141. And in passing upon the case as presented by the evidence, we must be governed by the same rules, and conform to the same principles, which prevail in civil cases. In the latter, it is true the jury are to weigh the evidence and to decide according to its preponderance, while in criminal cases it has been usual for the courts to advise the jury to require clear and satisfactory proof of the guilt of the prisoner before they bring in a verdict of conviction; and if they entertain a reasonable doubt of his guilt, to give him the benefit of the doubt, and bring in a verdict of acquittal. But this is a matter for the guidance of the jury in the performance of their especial and peculiar function of responding to the questions of fact involved, and not for the government of the court before which the trial is had, in reviewing the action of the jury, and still less for that of this court in reviewing the action of that court. This court can only enquire whether the verdict is warranted by the evidence before it; it certainly cannot enter upon an enquiry whether the jury should not have entertained a reasonable doubt of the guilt of the prisoner, and set aside the verdict
727 or suffer it to *stand, according to the supposed result of such an enquiry. In Grayson's Case, 6 Gratt. 712, 723, Judge Scott, in delivering his opinion, in which two of the three judges who sat with him expressed their entire concurrence, states it as a proposition deducible from the decisions of the General court, that motions for new trials are governed by the same rules in criminal as in civil cases. Judge Lomax, who was sitting in the case, also concurred in the judgment of the court, and in the opinion of Judge Scott, excepting that he was not prepared to admit in the unqualified manner therein expressed, an analogy between motions for new trials in civil cases and similar motions in criminal cases. He did not proceed to point out any difference between them, and all I apprehend that he meant was to intimate that it was a subject on which he had not matured his opinion, and did not deem it necessary to express any upon that occasion. I have been able to find no case in the decisions of the General court, nor has any occurred in this court, which establishes any different rule by which a motion for a new trial in a criminal case is to be determined from that which would prevail in a civil case; nor do I think any sufficient reason can be shown for making any distinction between them in this respect.

Now, whatever may be the rule in cases where the bill of exceptions is well taken, and states the facts proved, and not the evidence merely; whether in such case the appellate court would be influenced by the opinion of the jury and of the inferior court, or without regarding it, would proceed to judge for itself originally, and determine whether the proper inferences and conclusions were made and drawn from the facts, according to the opinion of Judge Allen in the case of Slaughter's adm'r v. Tutt, 12 Leigh 147, and as would seem to have been done in the case of Governor for Fisher v. Vanmeter, 9
728 Leigh 18, there can be no *doubt that where the court has to pass upon the evidence in the cause, a new trial ought not to be granted except in a case of plain deviation or of palpable insufficiency of evidence; and not in a doubtful case, merely because the

court, if on the jury, would have given a different verdict. The same reasons which led to the establishment ot the rule in Bennett v. Hardaway, would apply in all their force when the court is called upon to pass upon a motion for a new trial upon the evidence against the exceptor, and would forbid its being granted except in a case of plain deviation. And this, I think, is to be deduced from the decisions of this court and the opinions of several of the judges. See Ross v. Overton, 3 Call 309; Brugh v. Shanks, 5 Leigh 598; Mays v. Callison, 6 Leigh 230; Brown v. Handley, 7 Leigh 119; Mahon v. Johnston, 7 Leigh 317; Slaughter's adm'r v. Tutt, 12 Leigh 147. And this has been clearly recognized as the correct rule by the General court in criminal cases. Thus, in McCune's Case, 2 Rob. R. 771, it was held that although where the finding of the jury is clearly against the evidence, or clearly without evidence to justify it, it is the duty of the court to set the verdict aside upon the application of the prisoner, and to grant him a new trial; yet if the evidence be circumstantial, and the court before which the case was tried, has refused to grant a new trial, the verdict should not be disturbed by the appellate court, even although in the opinion of that court the evidence do not amount to very clear and strong proof. And in Hill's Case, 2 Gratt. 594, McWhirt's Case, 3 Gratt. 594, and Grayson's Case, 6 Gratt. 712, it is declared that a new trial should not be granted merely because the court, if upon the jury, would have given a different verdict; but that to justify the granting of a new trial, the evidence should be plainly insufficient to warrant the finding of the jury. In Grayson's Case, 7 Gratt.
729 613, *there had been two trials and two convictions; and the court said that if in their opinion the evidence made even a probable case of guilt, they would be unwilling to disturb the verdict; but being of opinion that the testimony was not only not sufficient to prove the guilt of the accused, but that it was hardly sufficient to raise a suspicion against him, a new trial was awarded.

According to these views then, this case resolves itself into an enquiry whether, looking to the evidence on the part of the commonwealth, it is found to be plainly insufficient to warrant the finding of the jury; for if not so plainly insufficient, we will not be justified in granting a new trial even if we should think that, had we been upon the jury, we might have found a different verdict.

The fact of the homicide by the prisoner is not controverted, and the jury by their verdict have ignored the malice which is necessary to constitute murder, and have convicted the prisoner of manslaughter. But it is urged on his behalf that the killing was clearly in self-defense, and that upon that ground he should have been wholly acquitted.

When a man is assaulted in the course of a sudden brawl or quarrel, he may in some cases protect himself by slaying the person who assaults him, and excuse himself on the ground of self-defense. Before a party thus assaulted, however, can kill his adversary, he must have retreated as far as he safely could to avoid the assault, until his further going back was prevented by some impediment, or as far as the fierceness of the assault permitted. He must show to the jury that the defense was necessary to protect his own life, or to protect himself against grievous bodily harm. 4 Black. Comm. 184; 1 Hale P. C. 481 et seq.; 1 Russ. on Cr. 661. And with regard to the necessity that will
730 justify the slaying of another *in self-defense, it should seem that the party should not have wrongfully occasioned the necessity; for a man shall not in any case justify the killing of another by a pretense of necessity, unless he were without fault in bringing that necessity upon himself. 1 Hawk, P. C. ch. 10, § 22, p. 82; 1 Russ. on Cr. 669; 1 Hale P. C. 405.

Now, it appears that on the night in question the deceased was at the house of the prisoner, where a marriage was expected to take place; and he and the prisoner were drinking and playing cards together. An altercation took place between them, growing out of the deceased charging the prisoner with cheating. The wife of the prisoner then took hold of the deceased and reminded him of his promise to have no "fuss" there. The deceased assented, immediately bade "good night," and went out into the yard. There he remained, however, some five minutes, apparently enraged, cursing and talking loudly. While he was thus engaged, the prisoner took up his gun and walked towards the door, but was induced by his wife's persuasion to set the gun down. After he went out, deceased demanded his gun, which he appears to have left behind him in the house, and it was handed to him through the door by Mrs. Vaiden. Deceased then went away on foot in company with two other persons, who rode away on horse back, and George Vaiden, son of the prisoner, went with them as far as the drawbars, some two hundred yards from the house, for the purpose of letting them through. The deceased had been in conversation with George Vaiden, and after the party went through the gap, he continued the conversation with him as they both stood together on the outside of the fence leaning against one of the panels. The night was cloudy, but the moon was at its full, and the figure of a man could be distinguished at the distance of thirty yards. The con-
731 versation between *the deceased and George Vaiden was of no unfriendly character, and had changed from the events of the evening to a "fracas" which the deceased had had at Lunenburg court-house, of which he was giving George Vaiden the particulars. While thus engaged, and when the prisoner had approached within fifteen feet of where they were standing, the deceased, according to the testimony of George Vaiden, suddenly exclaimed, "Yonder comes the damned old rascal, and I'll frail him now," jumped over the fence, clubbed his gun about half way of the barrel, and rushed upon the prisoner, who told him not to approach, or he would shoot him. Deceased, however, did not stop,

and the prisoner gave back one or two steps, and when the deceased got within a few feet of him, fired. The deceased then struck the prisoner two blows with the breech of his gun, and then staggered back and fell mortally wounded, and died in a short time afterwards.

Nor, it can scarcely be said that the homicide here occurred in the course of a sudden brawl or quarrel. The altercation had taken place at the house, and the deceased had gone away, to all appearances peaceably, and had got out into the main road, and here he was standing conversing quietly with George Vaiden, when the prisoner followed him out: and this must have been between twenty minutes and half an hour after the deceased had left the house; ample time certainly for the irritation of the first altercation to have subsided. Still less can it be said that the prisoner was wholly without fault in bringing the necessity of killing the deceased upon himself, if such necessity did in fact exist. After the deceased had gone away, why should the prisoner have followed him with his gun? Why go out at all? If it be said that the prisoner may have been afraid his son might receive some harm at the hands of deceased, the answer is, that
732 there was *no ground for any such apprehension. The deceased had had no altercation with the son, nor had the latter participated in that which occurred between him and the prisoner. And if it be supposed that the prisoner might have thought that possibly his son might undertake to resent the insult offered to his father by the deceased, and then be brought into a difficulty with the prisoner, in which he might need his assistance, the prisoner could not but have discovered that any such apprehension was groundless; for he must have seen when he went out, and before he was observed by the deceased, that there was no quarrel between his son and the deceased, and that they were conversing in a quiet and not unfriendly manner. He could discover them at the distance of thirty yards, and yet he advanced to within about fifteen feet of them before he was observed by the prisoner. That he went out with his gun with the expectation of an affray, cannot be doubted, and it is far more probable that his object was to provoke one than to protect his son. In fact, whilst the deceased was still in the yard, and the prisoner's son yet in the house, the prisoner had taken up his gun and gone towards the door unquestionably with a hostile purpose towards the deceased; but had yielded to the persuasion of his wife, and set the gun down. That such must have been his purpose is still further evinced by what he said to the witness Yates on the morning after the occurrence, when he informed him that he had killed the deceased. He added, that "there was another damned rascal in the neighborhood, who, if he didn't look sharp, would be killed too; that the deceased was a damned dog, and ought to have been killed twenty years ago, and that some body had to do it." And he asked the witness if he didn't think so? This was early in the morning, but the prisoner was sober; and it reflects a
733 strong light upon the true character *of the occurrences of the previous evening, and the motives and conduct of the prisoner. It tends to show that the necessity for slaying the deceased, if such necessity lay upon the prisoner, was of his own seeking, and self imposed. He made no allusion in this conversation to any peril of his life in which he was placed by the assault made upon him by the prisoner, though he did say that the prisoner had struck him two blows on the head before he shot him. The necessity which seemed at that time to be impressed upon his mind, was rather that of ridding the community of one whom although at that moment lying stiff and cold in death on the ground in a fence corner, and slain by his hand, he stigmatized as a damned dog that ought to have been killed twenty years before, than of taking his life for the purpose of avoiding imminent danger of death to himself.

Considering the whole conduct of the prisoner on the evening in question in connection with the state of feeling which he avowedly entertained towards the deceased, I think it very difficult to say that he was free from fault upon that occasion, or that his case comes within the rules which renders homicide justifiable or excusable on the ground of necessary self-defense. Nay, if the jury had gone further and found the prisoner guilty of murder, it might be a matter of grave consideration whether the verdict could have been disturbed upon the ground that there was no sufficient evidence of the malice which is necessary to constitute that crime. Certainly, I am not prepared to say that this verdict is a plain deviation from right and justice, and that the evidence is clearly insufficient to warrant it.

In conclusion, I would remark that it can scarcely be doubted the exact weight due to the testimony of George Vaiden must have been matter of serious consideration with the jury. He was the only person
734 *who was present at the time the homicide was committed, and he was called as a witness almost as a matter of necessity. But he was the son of the prisoner, and of course under the strongest inducements to make his account of the occurrence as favorable to his father as he could; and there would seem to be some apparent discrepancy between his account of the manner in which the affray took place, and the spot at which the death wound was inflicted, and circumstances proved by himself and others. It is certainly true as a general rule, that a party is not permitted to impugn the credibility of a witness called by himself, by general evidence showing him to be unworthy of belief. There are exceptions, however, to the rule, as in the case of a subscribing witness whom the law obliges the party to call. Whether the case where there is but a single witness present at the homicide, and who is therefore called on behalf of the commonwealth in a prosecution for murder, should constitute another exception, as argued by the attorney general, I undertake to express no opinion. But in any case, the party call-

ing a witness may give evidence in direct contradiction of what he has testified; and not only where the witness was innocently mistaken, but even where the evidence may have the effect collaterally of showing that he was unworthy of belief. 1 Greenl. Ev. § 443, and cases cited in the note. I forbear, however, to dwell upon this point, because in the view I have already taken, the result must be unfavorable to the prisoner; and it is therefore unnecessary to determine whether there is not such necessity for passing on the weight due to the testimony of the witness, George Vaiden, as would according to the rule preclude the court from undertaking to review the action of the jury and of the court below.

I think no sufficient reason is shown
735 for disturbing *the verdict of the jury, and am of opinion to affirm the judgment.

ALLEN, P., and MONCURE and SAMUELS, Js., concurred in the opinion of Lee, J.

DANIEL, J., dissented. He regarded the certificate of the judge of the Circuit court as a certificate of facts; and thought that the facts proved a case of homicide in self-defense.

Judgment affirmed.

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ADMINISTRATION.

1. If a County court commits an estate to a sheriff for administration before the expiration of three months from the death of the testator or intestate, the act is not void but voidable.

Hutcheson, sheriff, adm'r &c. *v.* Priddy, 85

2. In such a case, the County court having general jurisdiction to grant administration, the act of the court in committing the estate to the sheriff, cannot be questioned in any collateral proceeding. Idem, 85

3. An estate having been committed to the sheriff, the County court cannot grant the administration to a distributee without notice to the sheriff of the application. Idem, 85

4. It is not imperative on the County court to grant administration to a distributee, after the estate has been committed to the sheriff; but there is a legal discretion in the court. Idem, 85

ADVANCEMENTS.

1. Advancements to children are not brought into hotchpot for the benefit of the widow: She is only entitled to share in the estate of the intestate of which he died possessed.

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2. The slaves allotted to the widow are not a part of the distributable surplus, to be divided among the children at the death of the intestate; and a child refusing to bring his advancements into hotchpot upon the first division, is not thereby precluded from claiming his share in the division of the dower slaves. Idem, 33

3. Quære: If this right to postpone his election whether or not he will take a share of the estate, exists as to any estate other than the dower slaves. Idem, 33

4. A child having received advancements and refused to share in the first division, but claiming to share in the division of the dower slaves, is to be charged with interest on his advancements or their value, from the death of the intestate to the date of the division. And if the principal and interest of his advancements exceed the amount received by the other children, he is then to be charged with interest on such excess from that time to the period of the second division. But having elected not to come in on the first division, if his advancements, with interest thereon, were not equal to the shares of the other children in that division, he is not to have the deficiency made up on the second division. Idem, 33

5. Advancements made by a testator in his lifetime are not to be taken into account in fixing the proportion of the debts of the testator which each devisee and legatee is to pay, though they are directed to be charged to them in the distribution of the residuum of the estate.

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ALIENS.

1. A subject and citizen of Great Britain purchased land in Virginia in 1793; and he lived until 1818. By the treaty of 1794 between Great Britain and the United States, he was entitled to hold the land; and no proceeding having been instituted during the war of 1812 to escheat it, that war did not divest his rights, but the land descended, on his death, to his heirs.

Fiott & als. *v.* The Commonwealth, 564

738 *2. In a case of escheat between the heirs of the alien and the commonwealth, both parties claiming under the same person, and the inquisition referring to a deed to the alien for the land as recorded in the county of K, an office copy of said deed is evidence for the heirs, though it was not recorded on proper proof. Idem, 564

AMENDMENTS.

1. A judgment by confession entered by mistake of the clerk, instead of a judgment by nil dicit, cannot be corrected at the next term of the court under either the 1st or 5th sections of ch. 181 of the Code, p. 680.

Richardson's ex'x & al. *v.* Jones, 53

2. In an action of debt, the common order is confirmed at rules irregularly; the defendant having pleaded to a part of the plaintiff's demand. The irregularity cannot be corrected at rules.

Southall's adm'r *v.* The Exchange Bank of Va., 312

3. An irregularity committed at rules may be corrected at the next term of the court; and the plaintiff may be allowed to withdraw a defective replication, and reply; and if the plea filed at rules does not go to the plaintiff's whole demand, he may sign

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APPELLATE COURT.

1. Plaintiffs demur to pleas, and the demurrer is sustained; but upon appeal the judgment is reversed. The cause will be sent back, with directions to permit the plaintiffs to withdraw their demurrer and reply, if they shall ask leave so to do.

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2. A decree that a married woman shall convey her land with general warranty, though erroneous, is no cause for reversing the decree, as under the statute the warranty will not bind her. Code, ch. 121, § 7, p. 514.

Clarke & als. *v.* Reins, 98

3. Several instructions are given to the jury, in the last of which a fact is assumed which is properly for the determination of the jury. The previous instructions, however, had submitted that fact to the consideration of the jury, so that there could be no doubt on their minds as to the meaning of the court in the last instruction. The law having been correctly stated, the judgment will not be reversed.

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4. Where irregularities at rules are corrected in court, and the pleadings there made up, the defendant is entitled to a continuance of the cause as of right, if he demands it. But if instead of asking for a continuance, he asks that the cause may be sent back to rules, and excepts because his motion is overruled, the appellate court cannot reverse the judgment because the court required him to proceed to trial.

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5. In reviewing the judgment of the court below in a case of murder or manslaughter, the appellate court will not reverse the judgment on the ground that there is a doubt of its correctness; but it must be satisfied that the evidence is plainly insufficient to warrant the verdict.

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1. There may be an appeal by the justice from an order of the Circuit court prohibiting his proceeding to try a party for the violation of a city ordinance.

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2. An execution is for less than five hundred dollars, but it is levied on a slave allotted to a widow at a valuation above that sum. She having obtained an injunction to the sale under the execution, which was afterwards dissolved. Quære: If the Supreme court of appeals has jurisdiction.

Snoddy *v.* Haskins & als., 363

3. If an appeal from an interlocutory order or decree is allowed, and the Court of appeals is of opinion that the cause should have been proceeded in further before the appeal was allowed, it will be dismissed as improvidently awarded.

Hughes & wife *v.* Johnston, 479

4. In a bill to confirm the sale of infants' land, which is decreed in 1836; the cause is continued without any thing further being done until 1853; and then an appeal is taken from the decree of 1836. It was improvidently allowed, and should be dismissed.

Idem, 479

ASSETS.

In favor of a judgment creditor of a deceased debtor, his real estate was not merely a secondary fund for the payment of debts, under the act of 5 George 2, 739 *ch. 7, § 4; but the real and personal estate was equally liable.

Suckley's adm'r *v.* Rotchford & als., 60

ASSIGNMENTS.

1. Under a mutual mistake as to the proportion of the debts of the testator which a legatee was bound to pay to the executor, the legatee assigned the legacy to the executor for the payment of the amount for which she was supposed to be liable. The assignment will only be allowed to stand as a security for the true amount for which the legatee is liable.

Gaw *v.* Huffman, 628

2. The legacy not being payable until the termination of a life estate, and the legatee being very needy; on that ground too, the assignment will be held only as a security for the amount due from the legatee to the executor. Idem, 628

ATTACHMENTS.

1. W living in Virginia, determines to remove to another state; and in pursuance of that purpose, leaves the place where he has resided, and proceeds directly to the place where he intends to reside. He is a nonresident of the state, in the sense of the attachment law, directly he commences his removal, and before he gets beyond the limits of the state.

Clark *v.* Ward & als., 440

2. The endorsement on the process of attachment not mentioning or describing real estate, the attachment does not operate upon any such estate. Idem, 440

3. The attachment is served upon trustees in a deed of trust for the payment of certain debts, and among them are the debts due to the plaintiff in the attachment. There could, therefore, be no surplus in the hands of the trustees until the plaintiff's debts were paid, and consequently there can be no surplus in their hands liable to his attachment. Idem, 440

4. It seems that the statute in relation to

attachments at law refers to debts due from the garnishee to the defendant at the time of the service of the process upon the garnishee.

Balt. & Ohio R. R. Co. *v.* Gallahue's adm'rs, 655

5. Quære: Whether the statute operates at law upon debts which, though contracted at the time of the service of the attachment upon the garnishee, are not then payable. Idem, 655

6. The debt due from the garnishee being only payable upon a release under seal of all claims arising out of the contract in which the debt originated, there can be no judgment against the garnishee until the release is executed.

Balt. & Ohio R. R. Co. *v.* McCullough & Co., 595

7. A corporation may be summoned and proceeded against as a garnishee, upon proceedings under the Code, ch. 151, § 2, p. 601.

Balt. & Ohio R. R. Co. *v.* Gallahue's adm'rs, 655

8. Where a corporation is proceeded against as a garnishee, its answer is to be received in the only mode in which a corporation can answer, under its corporate seal. Idem, 655

9. The answer of the garnishee speaks of debts due from him to the defendant at the date of the service of the attachment; the verdict of the jury impaneled in the cause, speaks as to a later date. The verdict is no reply to the answer, and should be set aside. Idem, 655

10. The lien of a fieri facias issued and returned before the issue of an attachment, has priority over the attachment lien.

Puryear *v.* Taylor, 401

AWARDS.

1. An order of reference is made in a pending action of ejectment, by the terms of which all matters in difference between the parties are submitted to the final arbitrament of the arbitrators chosen. But this order is made in pursuance of an agreement in writing under seal, between the same parties, to refer the single question of the value of the land in controversy: the defendant agreeing to give to the plaintiffs for the land, the price fixed upon it by the arbitrators. The order of reference is to be construed with reference to the agreement; and therefore the award, which only fixes the value of the land in controversy, is in conformity to the submission.

Clarke & als. *v.* Reins, 98

2. Certain legal questions are submitted by parties to a controversy to an arbitrator, and they agree to be bound by the ward. Upon a suit being afterwards instituted by one of the parties against the other, in relation to the subject matter of the submission, the award of the arbitrator deciding the questions submitted to him, is the law of the case.

Lunsford *v.* Smith, 554

BAILMENT.

Contractors on a railroad hire slaves
740 *for a year to work on the road in the county of A. They take them to the adjoining county of C, and employ them on the road in that county; and whilst there they take sick and die, *held*:

1st. This removal of the slaves from the county of A to the county of C, is not of itself a conversion of the slaves to their own use by the contractors, whereby they became immediately liable to the owner for the value of the slaves in the event of their death, whether occasioned by such wrongful act or not.

Harvey & al. *v.* Epes, 153

2d. But if the death of the slaves was occasioned by the wrongful act of removing and working them in the county of C, then the said act, in connection with the death of the slaves, was a conversion of them by the contractors to their use, and made them liable for the value of the slaves, either in case or trover. And the slaves having died whilst they were employed in C, the burden of showing that their death was not occasioned thereby devolves upon the contractors. Idem, 153

3d. Whether the removal of the slaves to the county of C was or was not a conversion, depending upon whether or not it occasioned their death, the implied waiver of the owner of the slaves, of the obligation by the contractors to work them in the county of A, cannot be inferred from facts which transpired before the death of the slaves. Idem, 153

4th. The acceptance, by the owner of the slaves, of the hires up to the time of their death, having been after the institution of the action to recover their value, and whilst the said action was vigorously prosecuted, was not a waiver in law of the conversion. Idem, 153

BALTIMORE & OHIO R. R. CO.

The Baltimore & Ohio R. R. Co. is a corporation of the state of Virginia; and although its principal office is in Maryland, and its principal officer resides there, it may be sued in Virginia on contracts made here.

Balt. & Ohio R. R. Co. *v.* Gallahue's adm'rs, 655

BANKS.

1. A majority of the directors of a bank constitute a board to do business; and if in the election of a president a majority vote, the person receiving a majority of the votes cast is duly elected.

Booker *v.* Young & als., 303

2. A board of directors of a bank consists of seven, and they are all present. Upon a vote for president but five vote, three of whom vote for Y, and two for B, who had been president the previous year. Under the belief that it required a majority of the whole number to elect, they postpone the

election; and B continues to act as president. At a subsequent meeting they proceed again to the election, when Y receives the three votes he had received before, and votes for himself, making a majority of the whole number; B receives two votes and he votes for S. Whereupon Y is declared to be duly elected; and he proceeds to act as president. Upon an application by B for a mandamus to restore him to the office: *held*, by two judges, that Y was duly elected the first day; and whether or not he accepted, B had no right to it after that time. One judge held that Y, not then having insisted on it, it was no election; but that he might vote for himself, and therefore was duly elected on the last day. And another judge held that the votes of both Y and B were to be held as nullities, under the act, Code, ch. 57, § 16, and therefore that Y received a majority of the legal votes cast on the last day, and was duly elected. Idem, 303

BILL OF REVIEW.

A party to a suit claiming to have purchased a part of the real estate of a testator at a sale for taxes, and to have received a conveyance therefor; but such purchase having been made before a decree directing the real estate to be sold at the suit of a creditor of the testator; he cannot set up his purchase by a bill to review the decree on that ground.

Suckley's adm'r *v.* Rotchford & als., 60

BONDS.

1. By a bond dated the 27th of March 1840, the obligor bound himself to pay to the obligee or order, on or before the 25th of March 1842, a certain sum of money with interest; "which sum may be discharged in notes or bonds due on good solvent men residing in the county of R." This is a bond for the payment of money, for which debt will lie; and it is not necessary to notice the provision as to the mode of payment in the declaration.

Butcher *v.* Carlile, 520

2. See the opinion of Moncure, J., for the distinctions in relation to such obligations. Idem, 520

741 *CAVEATS.

A caveat is revived in the name of the executor of the caveator, who is directed to sell the land, and of the devisees of the proceeds of sale; and no objection is taken thereto until after the verdict. The executor being the proper party, the irregularity of joining the others with him will then be disregarded.

Caruthers & als. *v.* Eldridge's ex'or & als., 670

CHARGE.

Testator says, "It is my will and desire that my just debts be paid out of my estate by my executors hereafter named." The debts are not thereby charged upon the real estate.

Gaw *v.* Huffman, 628

CONDITIONS.

1. By contract between a railroad company and a contractor, he is not to receive the amount of the final estimate of his work until he shall release, under seal, all claims or demands upon the company arising out of the contract. This is a valid agreement, and is a condition which must be complied with before the contractor can recover the money.

Balt. & Ohio R. R. Co. *v.* McCullough & Co., 595

2. Testator bequeaths slaves to trustees for the use of J for her life; and directs that at her death the slaves be emancipated. But should they or any of them prefer remaining in the state, they can do so by choosing masters to serve during the life of the person chosen; and then they are to have the option of freedom or slavery by making a second choice. The slaves are emancipated, and the condition is repugnant and void.

Osborne & als. *v.* Taylor's adm'r & als., 117

3. See Ordinaries, No. 6, 7, and Sights *v.* Yarnalls, 292

CONFLICT OF LAWS.

1. A statute requiring a license to keep a cook-shop, and laying a tax upon it, is not in conflict with, and does not avoid, an ordinance of the city of Richmond passed in pursuance of its charter, prohibiting or restricting the keeping of cook-shops by free negroes within the city.

Mayo, mayor, *v.* James, 17

2. A rule of practice prescribed by the Supreme court of the U. S. which is in conflict with an act of congress, is void.

Suckley's adm'r *v.* Rotchford & als., 60

CONSTRUCTION—Rules of.

For rules for the construction of wills, see Wills, and

Wootton *v.* Redd's ex'or & als., 196

CONTINUANCE OF A CAUSE.

1. Irregularities at rules being corrected at the next term of the court, and the pleadings then made up, the defendant is entitled to a continuance of the cause as of right.

Southall's adm'r *v.* Exchange Bank of Va., 312

2. Under what circumstances it is error to refuse a continuance of a cause.

Fiott & als. *v.* The Commonwealth, 564

CONTRACTS.

1. An agreement is entered into in 1844 between T, a commission merchant in P, and Y, an inspector of tobacco at a warehouse in that city, by which T was to send all his tobacco to that ware-house, and Y was to endorse his notes to an amount not

exceeding ten thousand dollars. At the same time three of the owners of the ware-house agree with Y, that they will each bear a certain proportion of any loss he may sustain by his endorsements for T. This agreement with T is acted on until October 1847, when Y was removed from his place as inspector, and soon thereafter T, with the assent of Y, ceased to send his tobacco to that ware-house. At this time Y is first endorser on a note of T, and two of the owners of the ware-house are also endorsers on the note. It is afterwards renewed with Y still as first endorser, and with two other endorsers, they being inspectors at another ware-house where T was about to send his tobacco. In May 1848 T fails, and Y is compelled to pay the note. Y is entitled to recover from each of the owners of the ware-house who contracted with him, his proportion of the note which he had agreed to pay.

Young *v.* Thweatt & als., 1

2. The contract between a railroad company and one of the contractors on its line of improvement, provides that the contractor shall not receive the amount of the final estimate of his work until he shall release, under seal, all claims or demands against the company arising out of the contract. The contractor cannot recover the amount of the final estimate until he has executed the release: And his attaching creditor at law has no greater rights against the company in relation to the final
742 estimate, *than he has; and therefore cannot recover the amount unless the contractor has executed the release.

Balt. & Ohio R. R. Co. *v.* McCullough & Co., 595

3. See Equitable Mortgages, and Ruffners *v.* Putney & als., 541

CONTRIBUTION.

How devisees and legatees shall contribute to payment of debts of testator. See Executors & Administrators, No. 6, 7, 8, and Gaw *v.* Huffman, 628

CONVERSION.

See Bailments.

CONVEYANCES—Fraudulent.

1. The act, Code, ch. 149, § 13, p. 593, limiting the period in which suits may be brought to set aside conveyances or transfers of property on considerations not deemed valuable in law, does not apply to cases of actual fraud.

Snoddy *v.* Haskins & als., 363

2. H a merchant conveys to L all his stock of goods and the store-house for the current year, in trust to pay certain debts described in the deed: And the deed provides that H shall keep possession of and sell the stock of goods in the usual line of his trade, and occupy the store until default in the payment of any of the debts secured, and until the trustee shall be requested by any of the said creditors to close the deed by a sale. The deed is fraudulent per se and void as to the creditors of H.

Addington *v.* Etheridge, coroner, 436

3. A deed is made conveying personal property to trustees for the purpose of paying debts specified therein; and the trustees take possession of the property and proceed to sell it for the purposes of the trust. Though the deed was not duly recorded, yet the property having been delivered to the trustees, there was a valid transfer thereof, and protects the property against the demands of creditors who had not acquired liens upon it before said transfer was consummated.

Clark *v.* Ward & als., 440

CORPORATIONS.

1. When the word person is used in a statute, corporations as well as natural persons are included for civil purposes.

Balt. & O. R. R. Co. *v.* Gallahue's adm'rs, 655

2. A corporation may be summoned and proceeded against as a garnishee, upon proceedings under the Code, ch. 151, § 2, p. 601. Idem, 655

3. Where a corporation is proceeded against as a garnishee, its answer is to be received in the only mode in which a corporation can answer, under its corporate seal. Idem, 655

4. The Baltimore and Ohio railroad company is a Virginia corporation, and may be sued as such in Virginia, upon contracts made here. Idem, 655

COSTS.

In a suit for specific execution of a contract by a vendor of land, the title being defective when the suit was brought, though there is a decree for plaintiff, defendant is entitled to his costs.

Peers *v.* Barnett & others, 410

COUNTY COURTS.

See Courts.

COURTS.

1. The County court, in passing upon any question under the act, Code, ch. 37, § 15, is invested with no judicial power, but acts in a capacity purely ministerial: And in determining whether or not it will order report of the surveyor therein required, to be recorded, is restricted to the consideration of objections to the report; and has no right to look beyond the return of the list of sales by the sheriff required by § 11 of said chapter.

Delaney *v.* Goddin, 266

2. In such a case, upon a motion by the purchaser to order the report of the surveyor to be recorded, the County court, not acting judicially, has no authority to render a judgment overruling the motion with costs.

Idem, 266

3. If the County court renders such a judgment, upon appeal to the Circuit court, that court should simply reverse the judg-

ment with costs; but should not proceed to order that the report of the surveyor should be recorded: The error of the County court can only be corrected by mandamus, and not by writ of error or supersedeas.
Idem, 266

4. As to the correction of irregularities at rules. See Practice at Common Law, No. 5, 6, and
Southall's adm'r *v.* Exchange Bank of Va., 312

5. If a County court commits an estate to a sheriff for administration, before
743 *the expiration of three months from the death of the testator or intestate, the act is not void but voidable.
Hutcheson, sheriff, adm'r &c. *v.* Priddy, 85

6. An estate having been committed to the sheriff, the County court cannot grant the administration to a distributee, without notice to the sheriff of the application.
Idem, 85

7. It is not imperative on the County court to grant administration to a distributee after the estate has been committed to the sheriff; but there is a legal discretion in the court. Idem, 85

CREDITOR AND DEBTOR.

1. In favor of a judgment creditor of a deceased debtor, his real estate was not merely a secondary fund for the payment of the debts under the act of 5 George 2, ch. 7, § 4, but the real and personal estate was equally liable.
Suckley's adm'r *v.* Rotchford & als., 60

2. A judgment creditor might file a bill in equity against the executor and devisees to subject the real and personal estate to the payment of his debt. Idem, 60

3. A judgment creditor was not bound to pursue debtors of his debtor out of the District of Columbia, when the act of 5 George 2 was the law, before proceeding to subject the real estate. Idem, 60

4. When profits of husband's labor, though professing to act as agent for his wife, liable to his creditors. See Husband & Wife, No. 2, and
Penn *v.* Whiteheads, 74

5. When deed of trust, though not properly recorded, good against creditors. See Conveyances—Fraudulent, No. 3, and
Clark *v.* Ward & als., 440

6. Creditor may claim against a deed; and if he fails, may nevertheless claim under it. Idem, 440

7. What laches in pursuing a surviving partner, will deprive a creditor of his right to subject the estate of the deceased partner. See Partners, No. 2, 3, 4, 5, and
Jackson's adm'r *v.* King's adm'r & als., 499

8. See Fraud, No. 1, 2, and
Winston *v.* Starke & als., 317

CRIMES AND PUNISHMENTS.

1. It is not illegal to affix the punishment of stripes to the violation of a city ordinance by a free negro.
Mayo, mayor, *v.* James, 17

2. On a trial for murder, the necessity relied on to justify the killing must not have arisen out of the prisoner's own misconduct. Vaiden's Case, 717

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. On a trial for a felony, a member of the grand jury which found the indictment against the prisoner, is not a competent juror to try him. Dilworth's Case, 689

2. If the prisoner does not know or might not, with due diligence, have known, that one of the jury was a member of the grand jury which found the indictment against him, until after the jury is impanelled and sworn, he may make the objection, if made before any of the evidence is introduced. Idem, 689

3. Quære: If he may not make the objection at any time before the verdict is rendered. Idem, 689

4. Quære: If upon such objection being made to a juror, it is proper to examine him upon his voir dire as to the circumstances, and the state of his mind and feelings towards the prisoner. Idem, 689

5. The act, Code, ch. 162, § 4, p. 628, only relates to those disabilities created by our statutes; and do not refer to other causes of challenge which exist at common law, and as to which the statutes are silent.
Idem, 689

6. In reviewing the judgment of the court below in a case of felony, the appellate court will not reverse the judgment on the ground that there is a doubt of its correctness; but it must be satisfied that the evidence is plainly insufficient to warrant the verdict. Vaiden's Case, 717

7. Bill of exceptions to the refusal of the court to grant a new trial in a criminal case, must state the facts proved, not the evidence. Idem, 717

CROSS BILL.

When it may be filed. See Parties, No. 3, and
W. & C. Tarr *v.* Hendricks' ex'or, 642

DEBT.

By a bond dated the 27th of March 1840, the obligor bound himself to pay to the obligee or order, on or before the 25th of March 1842, a certain sum of money with interest, "which sum may be discharged in notes or bonds due on good
744 *solvent men residing in the county of R." This is a bond for the payment of money, for which debt will lie: and it is not necessary to notice the provision as to the mode of payment in the declaration.
Butcher *v.* Carlile, 520

DECLARATIONS.

1. When declarations or statements not

evidence. See Evidence, No. 6, 8, Wills, No. 3, and
Unis & als. *v.* Charlton's adm'r & als., 484
Balt. & Ohio R. R. Co. *v.* Gallahue's adm'rs, 655
Wootton *v.* Redd's ex'or & als., 196
2. When declarations evidence. See Evidence, No. 10, and
Lunsford *v.* Smith, 554

DECREES.

When appeal from interlocutory decree will be dismissed as improvidently allowed. See Appellate Jurisdiction, No. 3, and
Hughes & wife *v.* Johnston, 479

DEEDS.

1. A deed, though it may be invalid to pass the title it purports to convey, may be admissible evidence as a link in plaintiff's chain of title to show the bounds of the land claimed by him, and the extent of his possession.
Olinger *v.* Shepherd, 462
2. When copy of deed, though not properly recorded, may be evidence. See Aliens, No. 2, and
Fiott & als. *v.* The Commonwealth, 564
3. An ancient deed may be introduced as evidence without proof of its execution, though possession may not have been held for thirty years in accordance therewith, if such account be given of the deed as may be reasonably expected under all the circumstances of the case, and will afford the presumption that it is genuine.
Caruthers & al. *v.* Eldridge's ex'or and als., 670

DELINQUENT AND FORFEITED LAND.

H is the owner of a tract of land in 1797. Two papers purporting to be deeds bearing date in that year, one from H to G and the other from G to M, conveying this land, are by the proper court directed to be recorded, and are recorded, though they are not duly authenticated. M. enters the land as his own on the books of the commissioner of the revenue; and in 1815 it is sold as the land of M, as having been forfeited for nonpayment of taxes, and conveyed by the sheriff to B, who enters it on the commissioner's books; and it has been ever since held by B and those claiming under him; and all the taxes charged thereon have been paid or released. In 1843 a patent is obtained for the land by L, who enters it with the commissioner and pays the taxes thereon regularly: *held*, that under the circumstances, the title of the parties claiming under B is valid; and the land was not forfeited under the act of 1835, as the land of H, so as to enure to the benefit of the junior patentee.
Lohrs *v.* Miller's lessee, 452

DEPOSITIONS.

1. A deposition is taken in another state, by a plaintiff in an action depending in Virginia, and the justices certify that the defendants appeared by counsel and cross-examined the witness: And the deposition shows that counsel professing to represent the defendants, did appear and cross-examine the witness. It does not appear, however, that the deposition was taken under a commission, or that the court had ever authorized a commission to issue; nor was any notice to the defendants produced or proved. The deposition was taken without authority; and the justices having no authority to take the deposition, their certificate is no proof of the facts it states.
Unis & als. *v.* Charlton's adm'r & als., 484
2. A deposition taken without authority or notice is not admissible as evidence; and the objection to it may be taken when it is offered to be read as evidence to the jury.
Idem, 484
3. A deposition taken at so late a day that the other party cannot attend at the time and place of taking it and then get to court where the cause in which it is taken is to be tried, by the commencement of the term, is not admissible in evidence.
Idem, 484
4. A notice given at 8 P. M. to take a deposition between 8 and 9 A. M. of the next day, in the city where both the parties and their counsel reside, would generally be a reasonable notice. And such notice given directly the plaintiff learned the witness would leave for a distant state on the next day at 3 P. M. and would not return again, is sufficient, though a court is in session in the city at the time, and
745 though the defendant, who *is an attorney, and his counsel, had been occupied as counsel in a cause on the day of the notice, and were to be and were so occupied on the next day, so that they could not attend to the taking of the deposition.
McGinnis *v.* Washington Hall Association, 602

DEVISEES.

In what proportion devisees are to be charged with debts of their testator binding the heirs, which have been paid by the executor. See Executors and Administrators, No. 5, 6, 7, and
Gaw *v.* Huffman, 628

DISTRIBUTABLE SURPLUS.

1. Advancements to children are not brought into hotchpot for the benefit of the widow: She is only entitled to share in the estate of the intestate of which he died possessed.
Knight & wife *v.* Oliver & als., 33
2. The slaves allotted to the widow are not a part of the distributable surplus to be divided among the children at the death of the intestate. Idem, 33
3. See Advancements, No. 4, and
Idem, 33

DISTRIBUTEES.

See Advancements.

EJECTMENT.

For distinction between ejectment and forcible entry and detainer, see Judge Moncure's opinion in
Olinger *v.* Shepherd, 462

ELECTIONS.

1. A majority of the directors of a bank constitute a board to do business; and if in the election of a president a majority vote, the person receiving a majority of the votes cast is duly elected.
Booker *v.* Young & als., 303

2. See Banks, No. 2, and Idem, 303

EMANCIPATION.

See Slaves, No. 2, 6, 8, and
Osborne & als. *v.* Taylor's adm'rs & als., 117
Wood *v.* Humphreys, 333
Taylor *v.* Cullins, 394

EQUITABLE JURISDICTION AND RELIEF.

1. Administrator with the will annexed having in his possession slaves of his testator, and being in doubt whether they are emancipated by the will, may come into equity, making the legatees and next of kin of the testator parties, and ask the court to construe the will. And in this suit the court being of opinion that the slaves are emancipated by the will, may decree in their favor, and direct that they be freed.
Osborne & als. *v.* Taylor's adm'r & als., 117

2. Equity will interfere to prevent the building a dike along a stream by the proprietor of the land on one side of the stream, which would have the effect to destroy an old dike on the other side, and injure the land of the proprietor on that side.
Burwell *v.* Hobson, 322

3. A court of equity will not decree a sale of land for payment of the purchase money whilst there is a cloud upon the title. But if the cloud is removed before the hearing, the vendor is entitled to a decree for the sale.
Peers *v.* Barnett & als., 410

4. In such case, as the vendee was not in default when the suit was commenced, he is entitled to a decree for his costs.
Idem, 410

5. How title may be perfected by lapse of time pending the suit. See Vendors and Purchasers, No. 4, and Idem, 410

6. A creditor plaintiff in an attachment suit in chancery, states in his bill and proves, that his debtor had assigned to him certain railroad stocks and a bond secured by a deed of trust, as a security for one of his debts; and seeks to attach the effects in the hands of trustees in a deed of trust for payment of debts, including plaintiff's. Though there are no effects in the hands of the trustees subject to the attachment, and they disclaim any right to or possession of the stocks and bond assigned to the plaintiff, they are interested for the creditors to see that the fund assigned to the plaintiff is properly applied to the satisfaction of his debt; and therefore the bill should not be dismissed as to them; but the court should proceed to have the assigned property properly disposed of and applied; and to give the plaintiff relief according to his rights under the deed.
Clark *v.* Ward & als., 440

7. See Husband & Wife, No. 3, 4, 5, 6, 7, and
Penn *v.* Whiteheads, 74
Clarke & als. *v.* Reins, 98

746 *EQUITABLE MORTGAGES.

1. A husband conveys a tract of land, one part of which is his own, and the other part is his wife's maiden land, in trust to secure a debt. Afterwards the husband and wife unite in a conveyance of the land to a third person, upon the consideration of five hundred dollars, and that the grantee will pay the debt, to secure which the land had been conveyed by the husband. The creditor has an equitable lien upon the land under this last deed, which is good against all parties claiming under the grantee: And if the five hundred dollars has not been paid, it will be postponed to the creditor's lien.
William & Mary College *v.* Powell & als., 372

2. A case in which, by contract between a father and two of his children, an equitable mortgage for payment of certain debts of a son in law, is created upon any estate which the son in law or his wife may derive by devise or descent from her father.
Ruffners *v.* Putney, 541

3. How the accounts of the equitable mortgagee in possession are to be settled.
Idem, 541

4. Quære: Whether mortgagee in possession entitled, under the circumstances, to compensation for managing the property.
Idem, 541

ESCHEATS.

See Aliens.

ESTATES.

See Limitation of Estates.

ESTOPPEL.

1. Upon appeal, the Court of appeals, with all the parties before it, held that a bond was valid, though executed after the time prescribed in a private act of assembly. That judgment concludes the question, though the decree of the court below was reversed because the proceeding was by petition, instead of by bill.
Corbell's ex'or *v.* Zeluff & als., 226

2. A copy of a will purporting to be certified by a former clerk, is admitted to record under the act of February 19th, 1840, Sess. Acts, ch. 55, p. 47. The act of the clerk

admitting the paper to record is conclusive upon the question whether the paper is what it purports to be; and it is not admissible to prove that the person who certified the copy was not the person whose name is signed to the certificate.

Taliaferro & als. *v.* Pryor, 277

EVIDENCE.

1. What evidence is proper to aid in the construction of wills. See Wills, No. 2, and

Wootton *v.* Redd's ex'or & als., 196

2. What evidence not proper in such a case. See Wills, No. 3, and Idem, 196

3. In ejectment, it being proved that an ancestor of the plaintiff lived upon the land, evidence that he was generally considered the owner, or that the witness considered him the owner of it, is incompetent and inadmissible.

Taliaferro & als. *v.* Pryor, 277

4. A copy of a will purporting to be certified by a former clerk, is admitted to record under the act of February 19th, 1840, Sess. Acts, ch. 55, p. 47. The act of the clerk admitting the paper to record is conclusive upon the question whether the paper is what it purports to be; and evidence to prove that the copy was not certified by the clerk whose name is affixed to the certificate, but by another person who was not authorized to make the certificate, is inadmissible in a collateral action.

Idem, 277

5. When record not evidence. See Trusts and Trustees, No. 2, and

Winston *v.* Starke & als., 317

6. In a suit by persons held as slaves, for their freedom, on the ground that their ancestress had been brought into the state without the oath then required by the statute having been taken by her master, her declarations that she was free in the state from whence she was brought, and request to the witness to write to that state to get information on the subject, it not appearing that such declaration or request was made within twenty years after she was brought into the state, are not competent evidence to rebut the presumption arising from lapse of time, that the oath was taken by the master.

Unis & als. *v.* Charlton's adm'r & als., 484

7. Nor in such case is it competent to prove the character of the master holding her in the state, to account for her failure to assert her freedom. Idem, 484

8. The statements of a division engineer of a railroad company as to the indebtedness of the company to a defendant in an attachment, where the railroad company was summoned as a garnishee,
747 *are not evidence against the company; it not appearing that he was the agent of the company having any authority on this subject, or that at the time of making the statements he was engaged as agent about the business referred to, so as to make his statements a part of the transaction, and explaining the nature thereof.

Balt. & Ohio R. R. Co. *v.* Gallahue's adm'rs, 655

9. Testimony in relation to the correctness of a copy of a paper is not admissible, unless the absence of the original paper is accounted for.

Lunsford *v.* Smith, 554

10. To prove the authority of an agent, the parol declarations of the principal to him may be given in evidence.

Idem, 554

11. In four suits for freedom all the plaintiffs claim their freedom under one ancestress, and all the defendants claim under C, whose administrator is a defendant in one of the cases, and who plaintiffs insist purchased their ancestress from S, with general warranty of title; the cases are tried together, and it is agreed by counsel that the depositions taken in one case shall be read in all. The defendants offer the deposition of S, and with it offer a release from the administrator of C to S of all right of recovery upon the warranty. The release of the administrator is sufficient to restore the competency of S; and if it does not apply to all the plaintiffs in the other actions, still under the agreement of counsel the deposition is admissible as evidence on the trial.

Unis & als. *v.* Charlton's adm'r & als., 484

12. The deposition of a witness having been introduced as evidence, it is not competent for the other party to impeach his credibility, by the proof of statements made by him at another time inconsistent with and contradictory of the statement in his deposition, before the foundation is first laid by an examination of the witness touching the fact of his having made such statement. Idem, 484

13. A deed, though it may be invalid to pass the title it purports to convey, may be admissible evidence as a link in plaintiff's chain of title, to show the bounds of the land claimed by him, and the extent of his possession.

Olinger *v.* Shepherd, 462

14. In a case of escheat between the heirs of the alien and the commonwealth, both parties claiming under the same person, and the inquisition referring to the alien's deed for the land as recorded in the county of K, an office copy of said deed is evidence for the heirs, though it is not recorded upon proper proof.

Fiott & als. *v.* The Commonwealth, 564

15. An ancient deed may be introduced as evidence without proof of its execution, though possession may not have been held for thirty years in accordance therewith, if such account be given of the deed as may be reasonably expected under all the circumstances of the case, and as will afford the presumption that it is genuine.

Caruthers & al. *v.* Eldridge's ex'or & als., 670

16. Husband is not a competent witness after the death of his wife, to prove the consideration upon which he made a post-nuptial settlement upon her.
William & Mary College *v.* Powell & als., 372

17. See Depositions.

EXCEPTIONS—Bill of.

1. In an action at law the parties waive a trial by jury, and submit the whole matter of law and fact to the judgment of the court, under the act, Code, ch. 163, § 9, p. 629. An exception taken to the judgment of the court must state the facts proved, not the evidence: And it will be treated as governed by the principles applicable to exceptions taken to the opinion of the court overruling a motion for a new trial on the ground that the verdict is contrary to the evidence.
Pryor *v.* Kuhn, 615

2. A bill of exceptions in a criminal case, upon the refusal of the court to grant a new trial on the ground that the verdict is contrary to the evidence, is to be framed in the same manner as the bill of exceptions in civil cases to the like refusal is framed. And if the evidence is certified instead of the facts proved, the appellate court will only look to the evidence introduced by the commonwealth. Vaiden's Case, 717

EXECUTIONS.

1. A fieri facias is a lien from the time it goes into the hands of the officer to be executed, upon all the personal estate of the debtor, including debts due to him, with the exception stated in the statute; and this lien continues after the return day of the execution, and only ceases when the right to levy the execution or to levy a new execution upon the judgment, ceases or is suspended by a forthcoming bond be-
748 ing given and forfeited, or *by a supersedeas or other legal process. See Code, ch. 188, § 3 and 4, p. 717.
Puryear *v.* Taylor, 401

2. The lien of a fieri facias of prior date has priority over a subsequent attachment. Idem, 401

3. Upon the dissolution of an injunction to a judgment, execution may issue thereon within a year and day from the dissolution of the injunction, without a scire facias, though the injunction was in force more than ten years.
Hutsonpiller's adm'r *v.* Stover's adm'r, 579

EXECUTORS AND ADMINISTRATORS.

1. A private act of assembly empowers the County court to authorize G, administrator of Z, to sell and convey land, on such terms as the court should prescribe. Upon the construction of the statute, held, that G acted as administrator in the sale of the land.
Corbell's ex'or *v.* Zeluff & als., 226

2. The administrator having sold and conveyed the land and collected a part of the purchase money, held, under the construction of the statute and the order of the County court, the purchaser was justified in paying to the administrator, and therefore as between their respective sureties, the sureties of the administrator were liable. Idem, 226

3. Executor having exhausted the personal estate in payment of debts, and being largely in advance to the estate for the payment of debts which bound the heirs, is entitled to stand in the place of the creditors whose debts he has paid, and charge the real estate. And the real estate in the hands of the devisees is liable in proportion to its value at the time of the death of the testator.
Gaw *v.* Huffman, 628

4. A life estate in land having been given to the widow in lieu of dower, and being of less value than her dower would have been, her life estate is not to bear any part of the burden of paying the debts. Idem, 628

5. The remainder after the death of the widow in the land devised to her for life, having been given to some of the devisees, their proportion of the debts is according to the value of their interest at the death of the testator. Idem, 628

6. The shares of some of the devisees in said remainder are charged with the payment of certain legacies. The present value of the legacies at the death of the testator is also to be deducted from such present value of the remainder; and the proportion of the debts is according to the value of the remainder so ascertained. Idem, 628

7. The legacies charged upon the remainder in the land are to bear a proportion of the debts according to their value at the death of the testator. Idem, 628

8. The sum which at compound interest will produce the amount of the legacy at the death of the widow, is the present value: And the widow being dead, the period of her death is the time for the payment of the legacy. Idem, 628

9. Advancements made by the testator in his lifetime are not to be taken into the account in fixing the proportion of the debts which the devisee is to pay. Idem, 628

10. As to contracts between executor and legatees, see Legacies & Legatees, No. 1, 2, and Idem, 628

11. When a release of a warranty by an administrator is sufficient. See Evidence, No. 11, and
Unis & als. *v.* Charlton's adm'r & als., 484

EXPECTANT INTERESTS.

See Legacies & Legatees, No. 2, and
Gaw *v.* Huffman, 628

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

1. In a case of forcible entry and detainer

pending when the Code of 1849 went into operation, the subsequent proceedings may conform to the provisions of the Code.
Olinger *v.* Shepherd, 462
2. It seems that under the Code of 1849 a separate complaint is not necessary in a proceeding for an unlawful detainer; that the only complaint necessary is that embodied in the summons. Idem, 462
3. The distinction between the action of ejectment and a proceeding of forcible entry, stated by Moncure, J. Idem, 462
4. In a proceeding for an unlawful entry and detainer, if the defendant has entered unlawfully, the plaintiff is entitled to recover without any regard to the question of his right of possession: And this though the land from which he is ousted is the land of the commonwealth, or of the party who ousted him. Idem, 462

FORFEITURES.

See Delinquent and Forfeited Land.

749 *FRAUD.

In a suit between S, trustee in a deed for the wife of the grantor, and B, a creditor of the grantor, the deed is held to be fraudulent to the extent of one thousand four hundred and eighty-three dollars, much more than sufficient to pay B's debt. W, another judgment creditor of the grantor, files a bill, in which he states his debt and the decree in the former suit, and asks that S may be decreed to pay plaintiff's debt out of the balance remaining in his hands for which the deed was declared fraudulent: And he files a copy of the record in the first suit. S answers, denying that the deed is fraudulent, and objecting to the record of the former suit as evidence, *held*:

1st. If the bill is to be considered as charging fraud in the deed, the answer puts that fact in issue; and the plaintiff not having been a party to the first suit, the record is not competent evidence.
Winston *v.* Starke & als., 317

2d. The bill does not charge fraud in the deed, but relies on the first suit as a proceeding of which plaintiff is entitled to the benefit. The case does not come within the principles upon which proceedings in rem are held to bind all the world.
Idem, 317

3d. When deed fraudulent per se. See Conveyances—Fraudulent, No. 2, and
Addington *v.* Etheridge, coroner, 436

4th. See Husband & Wife, No. 2, and
Penn *v.* Whiteheads, 74

FREE NEGROES.

1. It is not illegal to affix the punishment of stripes to the violation of a city ordinance by a free negro.
Mayo, mayor, *v.* James, 17

2. A statute requiring a license to keep a cook-shop and laying a tax upon it, is not in conflict with, and does not avoid, an ordinance of the city of Richmond passed in pursuance of its charter, prohibiting or restricting the keeping of cook-shops by free negroes within the city. Idem, 17

GARNISHEES.

See Attachments, No. 4, 5, 7, 8, 9, and
Balt. & Ohio R. R. Co. *v.* Gallahue's adm'rs, 655

GUARDIAN AND WARD.

1. Upon the coming of age or marriage of a ward, or the death of the guardian, the guardianship terminates; and from that time only simple interest is to be charged on any balance then in his hands, or which he afterwards received.
Armstrong's heirs *v.* Walkup, 608

2. The estate of the ward having come into the possession of the guardian, his bond of office binds him in his lifetime, and his estate after his death, for the interest, hires and profits received by him, whether received before or after the expiration of his authority as guardian. But from the termination of the guardianship the same is to be accounted for on the ordinary principle governing accounts between creditor and debtor. Idem, 608

3. A guardian is not to be charged upon the money received by him from the day it is received; but he is to be allowed six months in which to invest it.
Idem, 608

4. A guardian retains his female wards in his family, and treats them as his children, but they are required to work as children might be; though the condition of his family did not require their services. The guardian is to be allowed a reasonable compensation for their board and clothing, and he is not to be charged for their services.
Idem, 608

HOTCHPOT.

See Advancements.

HUSBAND AND WIFE.

1. Advancements to children are not brought into hotchpot for the benefit of the widow: She is only entitled to share in the estate of the intestate of which he died possessed.
Knight & wife *v.* Oliver & als., 33

2. A husband carries on a mercantile business as agent for his wife, and he is aided by his sons who are minors. The business is profitable, and property is accumulated from its profits. The husband has an interest in this property which may be subjected by his creditors to the payment of his debts.
Penn *v.* Whiteheads, 74

3. Upon a bill by a decree creditor of the husband, to subject the property, charging that the agency was a fraud, and that the property was the husband's, or at least that he had an interest in it on account of his and his sons' services, and asking for an injunction to restrain the collection of the debts and the disposition of the prop-
750 erty and for a receiver; the *injunc-

tion is properly granted: And upon a motion in vacation to dissolve the injunction, which was overruled, it was proper to appoint a receiver to sell the property and collect the debts. Idem, 74

4. One of the sons having come of age was taken in as a partner; and there were debts due for goods purchased for which the son was liable. If these debts were to be first paid out of the property, it was still error to direct the receiver to pay them before having a report upon them by a commissioner of the court. Idem, 74

5. A court of equity will not decree a specific performance of a contract by a husband and wife for the sale of the wife's land, at the suit of the vendee, the wife refusing to execute the contract.

Clarke & als. *v.* Reins, 98

6. Nor will the court compel the husband to convey his life estate to the vendee, with compensation for the failure of the wife to convey her interest in the land.

Idem, 98

7. A decree that a married woman shall convey her land with general warranty, though erroneous, is no cause for reversing the decree, as under the statute the warranty will not bind her. Code, ch. 121, § 7, p. 514. Idem, 98

8. Widow is a necessary party to a suit for partition of land by the heirs.

Curtis *v.* Snead & als., 260

9. Though a post nuptial settlement by a husband on his wife is declared fraudulent as to his creditors at the suit of one creditor, this cannot be relied on by another creditor in another suit; but he must charge the fraud and prove it.

Winston *v.* Starke & als., 317

10. A widow having received her distributable share of the personal estate of her husband, is not a purchaser for value, so as to be entitled to set up the defense of purchaser for value without notice.

Snoddy *v.* Haskins & als., 363

11. In such case the husband having obtained slaves by a conveyance fraudulent as to creditors of the grantor, and one of these slaves having been allotted to the widow, the slave in her possession may be taken in execution at the suit of a creditor of the grantor, though the husband and those claiming under him have been in possession more than five years.

Idem, 363

12. Husband is not a competent witness after the death of his wife, to prove the consideration upon which he made a post nuptial settlement upon her.

William & Mary College *v.* Powell & als., 372

13. Such a settlement is made which recites that the consideration in part, is the agreement by the wife to unite in a conveyance of land a part of which is her own, and in another part of which she has a right of dower, for the purpose of paying a debt of her husband; and she does afterwards unite in the conveyance. The deeds themselves are proofs of the consideration, and the settlement will be sustained to the extent of the value of the interest she conveyed. Idem, 372

14. See Equitable Mortgages, No. 1, and Idem, 372

15. Testatrix bequeaths slaves to A, B and C jointly, upon the following trust: To be held by them in trust for the benefit of her daughter E (a married woman) or her heirs. And as it is my wish to guard in the most ample manner, against the imprudent sale or other disposition of the aforesaid property, during the natural life of E, it is hereby wholly and solely confided to the discretion of the aforesaid trustees A, B and C, in what manner the said E shall receive and enjoy the profits arising from the hires or other disposition of the slaves aforesaid. And in the event of the death of E without heirs of her body, then all the slaves and their increase to B, *held*:

1st. E took an absolute estate in the slaves, and the bequest over is void.

2d. That it is a bequest to the separate use of E.

3d. That separately or jointly with her husband, E had no power to alienate the slaves during her coverture.

4th. That the trustee may permit E and her husband to take possession of the slaves, and thus enjoy the profits of them.

5th. Two of the trustees having died since the death of the testatrix, the legal title survived to the third; and he may maintain an action to recover one of the slaves which had been sold by a son in law of E with her consent.

Nixon *v.* Rose, trustee, 425

16. A life estate in lands having been devised to a widow in lieu of dower, and being of less value than her dower would have been, her life estate is not to bear any part of the burden of paying the debts of the testator.

Gaw *v.* Huffman, 628

INFANTS.

1. In a bill to confirm a sale of infants' lands, and a decree in 1836, nothing
751 *further is done in the cause until 1853. The proceedings on their face were irregular, the bill not having been sworn to, and it not appearing that the testimony was taken in the presence of the guardian ad litem, or on interrogatories agreed to by him. There should not be an appeal by the infant after coming of age from the decree of 1836; but plaintiff should be allowed to amend his bill and make the purchaser a party; to make the affidavit required by the statute; and prove, if he can, that the testimony was properly taken; and both parties should be allowed to take further evidence. And if upon taking the proper accounts, and the evidence introduced, it shall appear that the sale was necessary under the facts existing at the time, and was fairly made and for a full price, the same should not be set aside on

account of irregularities in the proceedings.
Hughes & wife *v.* Johnston, 479

2. As to the mode of making partition of lands where infants are parties, see Partition, No. 1, 2, and
Curtis *v.* Snead & als., 26

INSTRUCTIONS.

1. Several instructions are given to the jury, in the last of which a fact is assumed which is properly for the determination of the jury. The previous instructions, however, had submitted that fact to the consideration of the jury, so that there could be no doubt in their minds as to the meaning of the court in the last instruction. The law having been correctly stated, the judgment will not be reversed.
Harvey & al. *v.* Epes, 153

2. Parol evidence having been introduced on a trial, some of which is legal and other parts illegal, it would be improper for the court to instruct the jury, in general terms, to disregard all parol evidence tending to alter, vary, explain or add to the written contracts between the parties introduced in evidence. Nor is the court bound to point out to the jury such of the evidence as would thus affect the contract; but this is to be done by the party asking for the instruction. Idem, 153

3. In a case of probat, where the question was whether the paper was executed according to the statute, a motion to instruct the jury assumes all the facts stated by the subscribing witnesses as true, and asks the court to instruct the jury that the paper is not proved to be the will of the person making it, according to the statute. This instruction does not ask the court to pass upon the truth of the facts, but upon the law as applicable to them; and therefore it is not objectionable.
Green & als. *v.* Crain & als., 252

4. Upon a scire facias to revive a judgment which has been suspended by an injunction for forty-six years, issue was made up on the plea of payment; and upon the trial the court instructed the jury that the pendency of said injunction cause repelled the legal presumption of payment which would have arisen from lapse of time if said injunction had not been pending. This instruction was proper; and it was unnecessary to distinguish to the jury between the legal presumption, and the natural presumption arising from lapse of time.
Hutsonpiller's adm'r *v.* Stover's adm'r, 579

INTEREST.

How interest is to be charged against a guardian. See Guardian and Ward, No. 1, 2, 3, and
Armstrong's heirs *v.* Walkup, 608

JUDGMENTS.

1. An entry "that the defendant relinquishing his plea of payment, saith he cannot gainsay the plaintiff's action for the sum of," &c., "and judgment accordingly," is a judgment by confession, and releases all previous errors in the proceedings in the cause.
Richardson's ex'x & al. *v.* Jones, 53

2. A judgment by confession entered by mistake of the clerk, instead of by nil dicet, cannot be corrected at the next term of the court under either the 1st or 5th section of ch. 181 of the Code, p. 608. Idem, 53

3. In an action of debt against two, one dies, and the suit is revived against his executrix; and then she and the other defendant give separate confessions of judgment, and a separate judgment is entered against each. This is not error.
Idem, 53

4. As to rights of judgment creditor in Alexandria county, see Creditor and Debtor, No. 1, 2, 3, and
Suckley's adm'r *v.* Rotchford & als., 60

5. When execution may issue upon a judgment upon dissolution of an injunction to it. See Execution, No. 3, and
Hutsonpiller's adm'r *v.* Stover's adm'r, 579

6. The statute of limitations to
752 judgments *does not run whilst an injunction to the judgment is pending. Idem, 579

7. If a defendant in a judgment dies whilst an injunction to the judgment is pending, though the injunction may not be dissolved for more than five years after his death, the statute requiring judgments to be revived within five years, does not run pending the injunction; and the judgment may be revived after the five years from the death of the defendant. And this though the judgment might have been revived pending the injunction.
Idem, 579

8. The act, Code, ch. 186, § 13, p. 710, which directs that the time for which the right to sue out execution on a judgment is suspended by the terms thereof or by legal process, shall be omitted in computing the limitation, applies to judgments recovered previous to the act, which were suspended by injunction at the time when that act went into operation. Idem, 579

9. See Instructions, No. 4, and
Idem, 579

JURORS.

1. On a trial for a felony, a member of the grand jury which found the indictment against the prisoner, is not a competent juror. Dilworth's Case, 689

2. When the objection to the juror may be taken. See Criminal Jurisdiction and Proceedings, No. 2, 3, 4, 5, and
Idem, 689

JUSTICES.

Justices take a deposition without authority; their certificate is not evidence of the facts it states.
Unis & als. *v.* Charlton's adm'r & als., 484

LACHES AND LAPSE OF TIME.

1. As to what laches will deprive a creditor of relief against the estate of a deceased partner, see Partners, No. 2, 3, 4, 5, and
Jackson's adm'r *v.* King's adm'r & als., 499

2. When lapse of time will cure defects in title to real estate. See Vendor and Purchaser, No. 4, and
Pecrs *v.* Barnett & others, 410

3. See the distinction between the legal presumption and the natural presumption from lapse of time.
Hutsonpiller's adm'r *v.* Stover's adm'r, 579

LEGACIES AND LEGATEES.

1. Under a mutual mistake as to the proportion of the debts of the testator which a legatee was bound to pay to the executor, the legatee assigned the legacy to the executor for the payment of the amount for which she was supposed to be liable. The assignment will only be allowed to stand as a security for the true amount for which the legatee is liable.
Gaw *v.* Huffman, 628

2. The legacy not being payable until the termination of a life estate, and the legatee being very needy; on that ground also, the assignment will be allowed only as a security for the amount due from the legatee to the executor. Idem, 628

3. Legacies charged upon land which is liable for debts of the testator binding the heirs, are to bear a proportion of the debts according to the relative value of the subjects. Idem, 628

4. The legacies being payable at the death of a life tenant of the land, and the remainder in the land being only liable for the legacies and for the debts, the value of the legacies and the remainder in the land at the death of the testator is to be ascertained, and the debts are to be apportioned upon that value. Idem, 628

5. The sum which at compound interest will produce the amount of the legacy at the death of the life tenant, is the present value of the legacy. Idem, 628

LICENSES.

See Ordinaries, passim.

LIEN.

1. For the lien of an execution, see Executions, No. 1, 2, and
Puryear *v.* Taylor, 401

2. As to what debts due from the garnishee an attachment at law operates upon, see Attachments, No. 4, 5, and
Balt. & Ohio R. R. Co. *v.* Gallahue's adm'rs, 655

LIMITATION—Of Estates.

1. Testator gives his estate to his wife during her life; and at her death it is to be equally divided amongst all his children. "And, the shares of his two daughters M and B are to be held by them during their natural lives, and no longer, and then equally divided between their heirs lawfully
753 begotten." And at his *wife's death his lands to be sold and the proceeds divided as aforesaid. The words "heirs lawfully begotten," are words of limitation; and M and B took the whole interest in their shares of the estate.
Moore & als. *v.* Brooks, 135

2. See Husband and Wife, No. 15, and
Nixon *v.* Rose, trustee, 425

LIMITATION—Statute of.

1. The act, Code, ch. 149, § 13, p. 593, limiting the period in which suits may be brought to set aside conveyances or transfers of property on considerations not deemed valuable in law, does not apply to cases of actual fraud.
Snoddy *v.* Haskins & als., 363

2. See Husband and Wife, No. 11, and
Idem, 363

3. The statute of limitations to judgments does not run whilst an injunction to the judgment is pending.
Hutsonpiller's adm'r *v.* Stover's adm'r, 579

4. The statute which requires a judgment to be revived within five years after the death of the defendant, does not apply to a case in which the judgment was enjoined for the whole period. Idem, 579

5. The act, Code, ch. 186, § 13, p. 710, directing that the time for which the right to sue out execution on a judgment is suspended by the terms thereof or by legal process, shall be omitted in computing the limitation, applies to judgments suspended by injunction at the time the act went into operation. Idem, 579

MANDAMUS.

1. In carrying out the provisions of the law in relation to sales of land for taxes, the County court acts ministerially; and if it refuses to act, the remedy is not by appeal but by mandamus.
Delaney *v.* Goddin, 266

2. It seems mandamus is the proper remedy to be restored to an office in a bank.
Booker *v.* Young & als., 303

3. The council of the city of Wheeling cannot be compelled by mandamus to grant a license to keep an ordinary.
Sights *v.* Yarnalls, 292

4. Where a license is granted to commence at a future day, a mandamus will not lie against the proper officer to issue it before that day arrives. Idem, 292

5. In a case of this kind a mandamus nisi may be issued in the first instance, without a previous rule upon the party to appear and show cause against it.
Idem, 292

MORTGAGES.

See Equitable Mortgages.

MURDER.

On a trial for murder, the necessity relied on to justify the killing, must not arise out of the prisoner's own misconduct.
Vaiden's Case, 717

NONRESIDENT.

Who is a nonresident of the state, in the sense of the attachment law. See Attachments, No. 1, and
Clark *v.* Ward & als., 440

NOTICE.

What is a sufficient notice to take a deposition. See Depositions, No. 4, and
McGinnis *v.* Washington Hall Association, 602

ORDINARIES.

1. A statute requiring a license to keep a cook-shop, and laying a tax upon it, is not in conflict with, and does not avoid, an ordinance of the city of Richmond passed in pursuance of its charter, prohibiting or restricting the keeping of cook-shops by free negroes within the city.
Mayo, mayor, *v.* James, 17

2. By an ordinance of the city of Wheeling, a license to keep an ordinary is to expire and be of no further effect on the 1st of May next succeeding the date thereof. The council having in April granted such a license for the ensuing year, such grant did not vest in the party to whom it was granted, any absolute or vested right to such license; but the right did not become perfect until the actual emanation of the license, or until the 1st of May following.
Sights *v.* Yarnalls, 292

3. By the same ordinance the council has authority to annul a license actually issued under its order. A fortiori, it may rescind an order granting a license before the 1st of May, which has not issued.
Idem, 292

4. A party to whom such license was granted in April, cannot properly apply for a mandamus to compel the proper
754 *officer to issue it before the 1st of May; and therefore the pendency of such mandamus cannot affect the right of the council to rescind the order granting the license before that time. Idem, 292

5. The council being authorized by the charter of the city to assess a tax on licenses to keep ordinaries, in addition to the state tax, it was competent for the council to make the payment of the tax a condition precedent to the emanation of the license.
Idem, 292

6. The council having by an ordinance assessed a tax on a license to keep an ordinary, and having granted the license "under existing rates of taxation," such grant must be taken to refer not only to the state tax, but to the tax imposed by the council; and to require the payment of the latter as the condition of the right to call for the license. Idem, 292

7. In such case, though the tax was unequal, oppressive and illegal, yet as its payment was a condition precedent to the emanation of the license, without the performance of the condition nothing passed under the grant: And the condition cannot be separated from the grant and disregarded, so as to render the grant absolute and unconditional. The whole must be taken together and accepted or refused.
Idem, 292

8. By the charter the city council has power to refuse a license to keep an ordinary; and if the tax laid is unjust, excessive and illegal, it is in effect the exercise of this power, and for all legal purposes should be so regarded. And the exercise of this power cannot be controlled by the circuit court by mandamus or otherwise. But the charter authorizing a party to whom license is refused to apply to the County court of Ohio county for it, his only remedy is to apply to that court.
Idem, 292

9. The order granting the license having been made in April, if the tax then imposed was illegal, or if no tax had been assessed upon it at the time, it was competent for the council, at any time before the 1st of May, to modify its grant by requiring the payment of a legal tax, in lieu of that which was illegal, or to supply the omission to lay a tax on ordinaries. And without the payment of this tax at least the party to whom the license had been granted had no right to demand it. Idem, 292

10. Upon a mandamus nisi sued out by the party to whom the license had been granted by the council, against the officer whose duty it is to issue the license, he may in his return set up the ordinance imposing a tax upon licenses, passed since the order granting the license.
Idem, 292

11. In a case of this kind a mandamus nisi may be issued in the first instance, without a previous rule upon the party to show cause against it. Idem, 292

PARTIES.

1. All persons having an interest or color of interest in the residuum of an estate, must be parties to a suit in which the court is to decide upon the construction of the will affecting that residuum.
Osborne & als. *v.* Taylor's adm'r & als., 117

2. When slaves may be parties to a suit. See Slaves, No. 4, and Idem, 117

3. In a bill by a residuary legatee against the administrator with the will annexed, who is insolvent, and his sureties T and H, C the son of T has received assignments of a number of the legacies, claiming them as his own; but H insists they belong to T, and were purchased at a large discount, the benefit of which he claims. H insists further, that C shall not be paid these legacies until T or T and C shall file a cross-bill against him, and thus give an opportunity

to contest C's right. If C is not entitled to the legacies, he is entitled to compensation for purchasing them up. C is a proper party defendant to the original bill, to have his right to the legacies settled. And T and C having filed a cross-bill against H, setting up C's right to the legacies, H cannot object to it at the hearing, after having insisted on it. And if C is held not entitled to the legacies, he should be allowed compensation for purchasing them.
W. & C. Tarr *v.* Ravenscroft & als., 642
Same *v.* Hendricks' adm'r & als., 642

4. A caveat is revived in the name of the executor of the caveator, who is directed to sell the land, and of the legatees of the proceeds of sale; and no objection is taken thereto until after the verdict: The executor being the proper party, the irregularity of joining the others with him will then be disregarded.
Caruthers & al. *v.* Eldridge's ex'or & als., 670

PARTITION.

1. Upon a bill for partition of land, as a general rule, the share of each parcener should be assigned to him in severalty. And if from the condition of the 755 *subject or the parties, it is proper to pursue a different course, the facts justifying a departure from the rules should, at least where infants are concerned, be disclosed by the report or otherwise appear, to enable the court to judge whether or not their interests will be injuriously affected.
Curtis *v.* Snead & als., 260

2. Where the same parties are entitled to lands derived from their father, and also to lands derived from their mother, and some or all of them are infants, if these lands are blended in the division, it must appear to the court that the interest of the parties in general will be promoted by this mode of partition, to enable the court to protect the rights of the infants.
Idem, 260

3. Where the widow of the person who died seized of the lands of which partition is sought, is alive and entitled to dower, she should be a party to the suit; and her dower should be assigned to her, and partition made of the residue. And it is error to proceed in her absence, and make partition of the land subject to her right of dower. Idem, 260

PARTNERS.

1. See Husband and Wife, No. 4, and
Penn *v.* Whiteheads, 74

2. The creditor of a partnership may lose his remedy against the estate of the deceased partner by his laches in prosecuting his claim against the surviving partner.
Jackson's adm'r *v.* King's adm'r & als., 499

3. In such case there is no definite and fixed rule by which to measure the delay and neglect which will deprive the creditor of his remedy against the estate of the deceased partner. Each case must stand on its own circumstances and be judged by them. Idem, 499

4. In such case, whilst the creditor may not be held to adopt a very rigorous course, nor to exercise the utmost possible diligence, at least he may be required within a reasonable time to place the debt in the ordinary channels of collection, and to give it that attention during its progress which may render it probable that in the natural course the money may be made, and the estate of the deceased partner thus saved harmless. Idem, 499

5. Where the creditor fails bona fide to use ordinary or reasonable diligence to collect his debt, or where measures have been taken to compel payment from the surviving partner, and there has been gross and unaccountable delay in the proceedings adopted, and it is palpable that the consequences of such delay have been to cast upon the estate of the deceased partner a debt which might certainly have been obtained from the surviving partner, and which it was his duty to pay, this is such laches as will forbid a court of equity to lend its aid to subject the estate of a deceased partner. Idem, 499

PAYMENTS.

1. See Executors and Administrators, No. 2, and
Corbell's ex'or *v.* Zeluff & als., 226
2. See Vendors and Purchasers, No. 6, and
Peers *v.* Barnett & als., 410

PERPETUITIES.

The doctrine of perpetuities applicable to bequests of personal chattels, does not apply to the bequest of freedom to a slave.
Wood *v.* Humphreys, 333

PLEADING.

1. A plea that the plaintiffs are an unchartered banking company, and as such discounted the note declared on, or a plea that the consideration of the note was the bank paper of such unchartered banking company, is a good defense, and the plea need not conclude as against the form of the statute.
Hamtramck *v.* Selden, Withers & Co., 28

2. A bond is for the payment of money, "which sum may be discharged in bonds due on good solvent men living in the county of R." In debt on this bond, it is not necessary to notice the provision as to the payment of the money in the declaration.
Butcher *v.* Carlile, 520

PRACTICE AT COMMON LAW.

1. When the appellate court will send the cause back with leave to amend the pleadings. See Appellate Court, No. 1, and
Hamtramck *v.* Selden, Withers & Co., 28

2. An entry that the defendant relinquishing his plea of payment, saith he cannot gainsay the plaintiff's action for the sum of, &c., and judgment accordingly, is a judgment by confession, and releases all previous errors in the proceedings in the cause.

Richardson's ex'x & al. *v.* Jones, 53

756 *3. In an action of debt against two, one dies, and the suit is revived against his executrix; and then she and the other defendant give separate confessions of judgments, and a separate judgment is entered against each. This is not error. Idem, 53

4. See Instructions, No. 1, 3, 4, and

Harvey & al. *v.* Epes, 153

Green & als. *v.* Crain & als., 252

Hutsonpiller's adm'r *v.* Stover's adm'r, 579

5. In an action of debt the common order is confirmed at rules irregularly, the defendant having pleaded as to a part of the plaintiff's demand. This irregularity cannot be corrected at rules.

Southall's adm'r *v.* Exchange Bank of Va., 312

6. An irregularity committed at rules may be corrected at the next term of the court; and the plaintiff may be allowed to withdraw a defective replication and reply; and if the plea filed at rules does not go to the whole demand, he may sign judgment for so much as is not covered by the plea. Idem, 312

7. In such case the defendant is entitled to a continuance of the cause as of right, if he demands it. But if instead of asking for a continuance, he asks that the cause may be sent to rules, and excepts because his motion is overruled, the appellate court cannot reverse the judgment, because the court required him to proceed to trial. Idem, 312

8. Where suit for freedom brought in wrong county, when and how court will correct it. See Slaves, No. 11, 12, and

Ratcliff *v.* Polly & als., 528

9. Under what circumstances it is error to refuse to continue a cause.

Fiott & als. *v.* The Commonwealth, 564

10. In a common law attachment, the garnishee is only bound to pay the debt he owes upon getting a release under seal from all claims arising under the contract. The common law court has no authority to make its judgment against the garnishee operate as a release under seal.

Balt. & Ohio R. R. Co. *v.* McCullough & Co., 595

11. Where a jury is dispensed with, and the court tries the cause, an exception to the judgment of the court as being contrary to the evidence, must be framed as is an exception for the refusal of the court to grant a new trial on the same ground.

Pryor *v.* Kuhn, 615

12. When deposition may be objected to. See Depositions, No. 2, and

Unis & als. *v.* Charlton's adm'r & als., 484

13. See Evidence, No. 11, 12, and Idem, 484

PRACTICE IN CHANCERY.

1. A ground which existed and was known to a party before a decree, is not ground for a bill of review.

Suckley's adm'r *v.* Rotchford & als., 60

2. See Creditor and Debtor, No. 2, 3, and Idem, 60

3. A rule of practice prescribed by the Supreme court of the U. S. which is in conflict with an act of congress, is void. Idem, 60

4. Upon motion to dissolve an injunction in vacation, it is overruled. The court may proceed to appoint a receiver to sell and collect the property and debts.

Penn *v.* Whiteheads, 74

5. But court may not direct the receiver to pay debts for which the property is primarily bound; but they should be reported on by a commissioner. Idem, 74

6. How partition should be made. See Partition, and

Curtis *v.* Snead & als., 260

7. It is not the duty of the court to advise a party as to the sufficiency of his proof. As to that, he must judge for himself before going to a hearing of his cause.

Winston *v.* Starke & als., 317

8. If a party has doubt about the admissibility of his proof when objected to, he may bring the question before the court, and have it decided before going to a hearing. Idem, 317

9. A court of equity will not decree a sale of land for payment of purchase money, whilst there is a cloud upon the title. But if the cloud is removed before the hearing, the vendor is entitled to a decree for the sale.

Peers *v.* Barnett & als., 410

10. Although at the time of filing such bill the defects in the title would forbid the sale of the land, yet the lapse of time and uninterrupted possession by the vendee under the deed, the absence of any suggestion of disturbance or of the assertion of any adverse claim during the long pendency of the suit, may quiet the vendee's title, and cure the defects thereof: And a decree for the sale may be proper. Idem, 410

11. In such case, as the vendee was not in default when the suit was commenced, he is entitled to a decree for his costs. Idem, 410

12. The vendee claims a credit for payments and offsets against the purchase

757 *money, and a commissioner is directed to state an account of them; but he contumaciously refuses to present his vouchers and evidence before the commissioner, but when the report is returned files exceptions to it. Though it is proba-

ble he may be entitled to some credits not allowed him, yet having refused to submit them to the commissioner where they might have been properly investigated, they will not be allowed. Idem, 410

13. As to the proceedings in suits for sale of infants' lands, see Infants, No. 1, and
Hughes & wife *v.* Johnston, 479

PRINCIPAL AND AGENT.

1. To prove the authority of an agent, the parol directions of the principal to him may be given in evidence.
Lunsford *v.* Smith, 554

2. The statements of a division engineer of a railroad company as to the indebtedness of the company to a defendant in an attachment, where the railroad company was summoned as a garnishee, are not evidence against the company, it not appearing that he was the agent of the company having authority on this subject, or that at the time of making the statements he was engaged as agent about the business referred to, so as to make his statements a part of the transaction, and explaining the nature thereof.
Balt. & Ohio R. R. Co. *v.* Gallahue's adm'rs, 655

PRINCIPAL AND SURETY.

1. See Contracts, No. 1, and
Young *v.* Thweatt & als., 1

2. See Executors and Administrators, No. 2, and
Corbell's ex'or *v.* Zeluff & als., 226

3. There is principal and surety in a bond, and the principal conveys land to the surety in consideration that the surety will pay the debt. This does not convert the surety into the principal and the principal into the surety in respect to the creditor, so that the original principal may be released by the dealing of the creditor with the original surety.
William & Mary College *v.* Powell & als., 372

4. One of two sureties of an insolvent administrator purchases up legacies for which the sureties are bound, at a discount. He shall only charge his cosurety for his proportion of what he paid for the legacies, and of the expenses of purchasing them.
W. & C. Tarr *v.* Ravenscroft & als., 642
Same *v.* Hendricks' adm'r & als., 642

PROBAT.

See Administration.

PROCEEDINGS IN REM.

See Frauds, No. 2, and
Winston *v.* Starke & als., 317

PROHIBITION.

1. The mayor of the city of Richmond has authority to try cases in which a party is prosecuted for the violation of a city ordinance. Quære: Whether in such a case a prohibition will lie to his proceeding to try the case, on the ground that the ordinance is in conflict with an act of the general assembly: And it seems it will not.
Mayo, mayor, *v.* James, 17

2. For the mode of proceeding in the case of prohibition, see the opinion of Moncure, J., Idem, 17

3. There must be a rule to show cause why the prohibition should not issue, before the writ is issued. Idem, 17

4. This rule to show cause operates as a prohibition until the further action of the court. Idem, 17

PURCHASER FOR VALUE.

Widow as to her portion of her husband's personal estate, is not a purchaser for value.
Snoddy *v.* Haskins & als., 363

RECEIVER.

A judge having authority to hear motions to dissolve injunctions in vacation, that carries with it the power in vacation to appoint a receiver, where one is necessary.
Penn *v.* Whiteheads, 74

RELEASE.

See Evidence, No. 6, and
Unis & als. *v.* Charlton's adm'r & als., 484

SALE OF INFANTS' LAND.

See Infants, No. 1, and
Hughes & wife *v.* Johnston, 479

758 *SECURITIES.

When an assignment of a legacy will be held only as a security. See Legacies and Legatees, No. 1, 2, and
Gaw *v.* Huffman, 628

SETTLEMENTS.

1. As to proof of the consideration of a postnuptial settlement, see Husband and Wife, No. 13, and
William and Mary College *v.* Powell & als., 372

2. See Trusts and Trustees, No. 4, and
Nixon *v.* Rose, trustee, 425

SHERIFF.

See Administration.

SLAVES.

1. Administrator with the will annexed having in his possession slaves of his testator, and being in doubt whether they are emancipated by the will, may come into equity making the legatees and next of kin of the testator parties, and ask the court to construe the will. And in this suit, the court being of opinion that the slaves are emancipated by the will, may decree in their favor and direct that they be freed.
Osborne & als. *v.* Taylor's adm'r & als., 117

2. Testator bequeaths the whole of his slaves not before disposed of, to trustees for the use of J for her life, and directs

that at her death, the slaves embraced in this clause of the will be emancipated. But should they or any of them prefer remaining in this state, they can do so by choosing masters to serve during life of the person chosen; and then they are to have the option of freedom or slavery by making a second choice, *held*:

1st. The slaves are emancipated, and the condition is repugnant and void. Idem, 117

2d. The slaves born during the life of J are emancipated, Idem, 117

3. The administrator having filed his bill after the death of J, when there were no debts of the testator, and having submitted the slaves to the control of the court; and they having been hired out by him under the direction of the court, during the pendency of the suit; they are entitled to have their hires: And this especially as though the bill was filed before the act of 1850, ch. 106, § 8, p. 465, it was not decided until after that act went into operation. Idem, 117

4. In such suit it is no objection that the slaves are parties. Idem, 117

5. The doctrine of perpetuities applicable to bequests of personal chattels, does not apply to a bequest of freedom to a slave. Wood *v.* Humphreys, 333

6. Testator by his will directs that a female slave Nancy shall be freed at the end of twenty years from his death. And he then directs that if she shall have children whilst she continues in servitude, "the children shall serve until they shall become of the age of thirty-one years, and no longer; and so on until they shall become free." Within the twenty years Nancy has a child J; and before J is thirty-one she has a child M. At the age of thirty-one M is entitled to her freedom. Idem, 333

7. The principle of the case of Maria *v.* Surbaugh, 2 Rand. 228, recognized and affirmed. Taylor *v.* Cullins, 394

8. Testator gives all his estate to his two daughters for life, or until they marry; and directs that his slaves whom he names, shall be free on the happening of either event: And he gives them all the property which should then remain. One of the slaves has a child and dies during the lifetime of the daughters. The child is not freed by the will, but is embraced in the bequest to the slaves: And by the act of March 15th, 1832, Sup. Rev. Code, p. 246, the bequest of the child to the emancipated slaves is void. Idem, 394

9. Suits for freedom must be brought in one of the courts of the county or corporation in which the party suing is detained in custody by the person having him in custody. Ratcliff *v.* Polly & als., 528

10. Where a person having persons of color in custody claiming them as slaves, resides in one county; and brings them into another county in obedience to a writ of habeas corpus sued out for them, this is not such a detention of them in this last county as will give the courts thereof jurisdiction of a suit instituted by them there for their freedom: And this especially if the resort to the writ of habeas corpus was a contrivance to give jurisdiction of the case to the courts of the county to which they are so brought. Idem, 528

11. In such a case the court should dismiss the suit upon the motion of the defendant. And a rule upon the plaintiffs to show cause why the suit should not be dismissed, is a proper mode by which to raise the question of jurisdiction. Idem, 528

12. Though the petition of the 759 paupers *and the warrant of the justice are returned into court at one term, when one of the claimants enters himself a party, and the cause is then continued; and though depositions are taken by consent to be read on the trial, before the next term, yet no summons having been served on the person in whose custody the paupers were, he having entered himself a party at the next term, may then have the suit dismissed for want of jurisdiction: And it will be dismissed as to both defendants. Idem, 528

13. A master may give a general written consent to the purchase by his slaves of ardent spirits of a particular person; which will be valid to protect the seller from incurring the penalties prescribed by the act, Code, ch. 104, § 1, p. 459.

Johnson's Case, 714
Gary's Case, 714
Pankey's Case, 714

14. As to the responsibility of the hirer of slaves for their loss, whilst employed in violation of the contract of hiring, see Bailment, and

Harvey & als. *v.* Epes, 153

SPECIFIC PERFORMANCE.

1. A court of equity will not decree the specific performance of a contract by a husband and wife for the sale of the wife's land, at the suit of the vendee; the wife refusing to execute the contract. Clarke & als. *v.* Reins, 98

2. Nor will the court compel the husband to convey his life estate to the vendee, with compensation for the failure of the wife to convey her interest in the land. Idem, 98

3. The wife being one of three equal joint owners of the land, and they and the husband having united in the sale; though the husband and wife will not be compelled to execute the contract on their part, the other joint owners will be compelled to convey their undivided interests upon the payment by the vendee of their shares of the purchase money. Idem, 98

4. The case distinguished from Bailey *v.* James, 11 Gratt. 468. Idem, 98

STATUTES.

1. The act, Code, ch. 181, § 15, 5, p. 681, in relation to amendments, construed in
Richardson's ex'x & al. *v.* Jones, 53

2. The act, Code, ch. 130, § 10, p. 542, in relation to committing estates to sheriffs, construed in
Hutcheson, sheriff, adm'r &c. *v.* Priddy, 85

3. The act, Code, ch. 37, § 15, in relation to proceedings on sales of land for taxes, construed in
Delaney *v.* Goddin, 266

4. The act of 1840, Sess. Acts, ch. 55, p. 47, in relation to recording papers burned in a clerk's office, construed in
Taliaferro & als. *v.* Pryor, 277

5. The act, Code, ch. 16, § 17, in relation to the election of public officers, construed in
Booker *v.* Young & als., 303

6. The act, Code, ch. 171, § 51, p. 653, in relation to the control of the court over proceedings at rules, construed in
Southall's adm'r *v.* Exchange Bank of Va., 312

7. The act, Code, ch. 149, § 13, p. 593, in relation to limitation of suits to set aside conveyances on considerations not deemed valuable in law, construed in
Snoddy *v.* Haskins & als., 363

8. The act, Code, ch. 188, § 3, 4, p. 717, in relation to the lien of a fi. fa. construed in
Puryear *v.* Taylor, 401

9. The act, Code, ch. 186, § 13, p. 710, in relation to the time of suing out execution on judgments suspended, &c. construed in
Hutsonpiller's adm'r *v.* Stover's adm'r 579

10. The act, Code, ch. 163, § 9, p. 629, in relation to dispensing with a jury trial, construed in
Pryor *v.* Kuhn, 615

11. The act, Code, ch. 151, § 2, p. 601, in relation to attachments, construed in
Balt. & Ohio R. R. Co. *v.* Gallahue's adm'rs, 655

12. The act, Code, ch. 162, § 4, p. 628, in relation to exceptions to jurors, construed in Dilworth's Case, 689

13. The act, Code, ch. 104, § 1, p. 459, in relation to selling to slaves, construed in
Johnson's Case, 714

SUBSTITUTION.

See Executors & Administrators, No. 3, 4, 5, 6, 7, 8, 9, and
Gaw *v.* Huffman, 628

SUITS FOR FREEDOM.

See Slaves, No. 9, 10, 11, 12, and
Ratcliff *v.* Polly & als., 528

SURETIES.

See Principal and Surety.

TAX SALES.

1. The County court, in passing upon 760 *any question under the act, Code ch. 37, § 15, is invested with no judicial power, but acts in a capacity purely ministerial: And in determining whether or not it will order a report of a surveyor therein required, to be recorded, is restricted to the consideration of objections to the report, and has no right to look beyond the return of the list of sales by the sheriff required by § 11 of said chapter.
Delaney *v.* Goddin, 266

2. In such a case, it is the duty of the court to see whether the said report is in conformity with the provisions of said section 15, requiring it to specify the metes and bounds of the land sold, and the names of the owners of the adjoining tracts, and to give such other description of the land sold as will identify the same. And in order to the discharge of that duty, no enquiry into the regularity or validity of the previous proceedings is necessary or proper.
Idem, 266

3. In such a case, upon a motion by the purchaser to order the report of the surveyor to be recorded, the County court not acting judicially, has no authority to render a judgment overruling the motion with costs.
Idem, 266

4. If the County court renders such a judgment, upon appeal to the Circuit court, that court should simply reverse the judgment with costs; but should not proceed to order that the report of the surveyor should be recorded: The error of the County court in refusing to order the report to be recorded, can only be corrected by mandamus, and not by writ of error or supersedeas.
Idem, 266

TROVER.

See Bailment.

TRUSTS AND TRUSTEES.

1. Though a conveyance by a husband in trust for his wife is declared fraudulent and void as to creditors at the suit of one creditor, this cannot be relied on by another creditor in another suit, but he must charge the fraud; and if it is put in issue by the answer, he must prove it.
Winston *v.* Starke & als., 317

2. In such case the plaintiff not having been a party to the first suit, the record thereof is not competent evidence to establish the fraud. Idem, 317

3. See Frauds, No. 1, 2, and
Idem, 317

4. Testatrix bequeaths slaves to A, B and C jointly, upon the following trust: To be held by them in trust for the benefit of her daughter E (a married woman), or her heirs. And as it is my wish to guard in the most ample manner against the imprudent sale or other disposition of the aforesaid property, during the natural life of E, it is hereby wholly and solely confided to the discretion of the aforesaid trustees A, B and C, in what manner the said E shall receive and enjoy the profits arising from

the hires or other disposition of the slaves aforesaid. And in the event of the death of E without heirs of her body, then all the slaves and their increase to B, *held*:

1st. E took an absolute interest in the slaves; and the bequest over is void.
Nixon *v.* Rose, trustee, 425

2d. That it is a bequest to the separate use of E. Idem, 425

3d. That E separately or jointly with her husband, had no power to alienate the slaves during her coverture.
Idem, 425

4th. That the trustees may permit E and her husband to take possession of the slaves, and thus enjoy the profits of them.
Idem, 425

5th. Two of the trustees having died since the death of the testatrix, the legal title survived to the third; and he may maintain an action to recover one of the slaves which had been sold by the son in law of E, with her consent. Idem, 425

5. When deed of trust fraudulent per se. See Conveyances—Fraudulent, No. 2, and
Addington *v.* Etheridge, coroner, 436

6. A trustee sells land and bids it in for the creditor, but no conveyance or memorandum in writing of the purchase is made, nor is possession taken; but the possession remains in the former owner under an agreement, as it is said, with the trustee, who is also the agent of the creditor, that the said owner shall take it at the bid. The purchase is not valid, and the creditor will not be charged with the land at the price at which it was bid in.
William & Mary College *v.* Powell & als., 372

7. A deed is made conveying personal property to trustees for the purpose of paying debts specified therein; and the trustees take possession of the property and proceeds to sell it for the purposes of the trust. Though the deed was not duly recorded, yet the property having been delivered to the trustees, this was a valid transfer thereof, and protects the property against the demands of creditors who had not acquired liens upon it before said transfer was consummated.
Clark *v.* Ward & als., 440

761 *8. A creditor secured by a deed of trust with others, sues out a foreign attachment against his debtor, and seeks to subject the property conveyed in the deed to the payment of his debt, in preference to the other creditors; but he fails. This does not preclude him from his right to claim under the deed, his ratable proportion of the trust fund. Idem, 440

9. See Equitable Jurisdiction and Relief, No. 6, and Idem, 440

UNCHARTERED BANKS.

1. To an action of debt on a note alleged to have been made, and to have been discounted by the plaintiffs in Virginia, but made payable at a bank out of the state, a plea that the plaintiffs are an unchartered banking company issuing and circulating their own paper, notes or bills as currency, contrary to law and public policy; and that they as a banking company discounted the said note, contrary to law and public policy, sets up a good defense to the action.
Hamtramck *v.* Selden, Withers & Co., 28

2. So in such a case, a plea that the consideration of the note declared on, was the bank paper of the plaintiffs unlawfully issued by them as currency, they being an unchartered banking company, presents a good defense to the action. Idem, 28

VENDOR AND PURCHASER.

1. A widow having her distributable share of her husband's personal estate, is not a purchaser for value, so as to set up the defense of purchaser for value without notice.
Snoddy *v.* Haskins & als., 363

2. Land is purchased by the acre; but after the survey is commenced the vendee agrees to take it at the quantity for which the vendors held it; and the survey is stopped. He is concluded by his agreement, and is not entitled to an abatement from the purchase money on account of a deficiency in the quantity.
Peers *v.* Barnett & others, 410

3. A court of equity will not decree a sale of land for payment of the purchase money whilst there is a cloud upon the title. But if the cloud is removed before the hearing, the vendor is entitled to a decree for the sale. Idem, 410

4. Although at the time of filing such bill the defects in the title would forbid a sale of the land, yet the lapse of time, and uninterrupted possession of the vendee under the deed, the absence of any suggestion of disturbance, or of the assertion of any adverse claim during the long pendency of the suit, may quiet the vendee's title, and cure the defects thereof: And a decree for the sale may thus be proper.
Idem, 410

5. In such case as the vendee was not in default when the suit was commenced, he is entitled to a decree for his costs.
Idem, 410

6. The vendee claims a credit for payments upon and offsets against the purchase money, and a commissioner is directed to state an account of them. He however contumaciously refuses to present his vouchers and evidence before the commissioner; but when the report is returned, files exceptions to it. Though it is probable he may be entitled to some credits not allowed him, yet having refused to submit them to the commissioner where they might have been properly investigated, they will not be allowed. Idem, 410

VERDICT.

How the verdict must respond to the issue. See Attachments, No. 9, and
Balt. & Ohio R. R. Co. *v.* Gallahue's adm'rs, 655

WATER COURSES.

H owning lands on both sides of a creek which frequently overflows its banks, built a dike along the south side of it to protect his low grounds on the creek; and this caused the creek to overflow the land on the north side still more. At his death his lands were divided by commissioners, who allotted to one of his children the land on the south side of the creek, and to another, W, the land on the north side; and in their report they make no allusion to the dike. The son who received the land on the south side of the creek, afterwards sold it to B; and then W owning the land on the north side, commenced to build a dike on that side to protect his lands, which would have the effect to destroy the dike built by H, and flood the low grounds on the south side. B then filed a bill to enjoin the building of the dike on the north side, *held*:

1st. B is entitled to have his dike as it was when H died, and to have his
762 lands *protected thereby; and W has no right to build a dike on his side of the creek, which would destroy the dike of B, or overflow his low grounds.

Burwell *v.* Hobson, 322

2d. Equity will interfere to prevent the building of the dike, and will compel W to abate so much of his dike already built as would injure the dike and low grounds of B. Idem, 322

WHEELING.

See Ordinaries.

WILLS.

1. In expounding a will, the court will make the amplest allowance for the unskillfulness and negligence of the testator; technical informalities will be disregarded; the most perplexing complication of words and sentences will be carefully unfolded; and the traces of the testator's intention will be diligently sought out in every part of the instrument; and the whole carefully weighed together.

Wootton *v.* Redd's ex'or & als., 196

2. To aid in the true construction of the will, evidence may be received of any facts known to the testator, which may reasonably be supposed to have influenced him in the disposition of his property; and as to all the surrounding circumstances at the time of making the will. Idem, 196

3. But declarations of the testator as to his intention to make a particular bequest, or that he has made such a bequest, is not competent evidence, except where the terms used in the will apply indifferently, and without ambiguity, to each of several subjects or persons; when evidence may be received as to which of the subjects or persons so described was intended by the testator. Idem, 196

4. In construing a will, effect must be given to every word, if any sensible meaning can be given to it not inconsistent with the general intention apparent on the whole will taken together. Words are not to be rejected or altered unless they manifestly conflict with the intention of the testator, or unless they are absurd, unintelligible or unmeaning for want of any subject to which they can be applied.

Idem, 196

5. Though it may be possible that the testator intended to give more, yet if there be a subject found to satisfy the description in the will, the court can neither enlarge or extend it. Idem, 196

6. But where the subject is sufficiently and clearly ascertained, though there be added particulars of description which are false or mistaken, effect will be given to the devise notwithstanding; and the false or mistaken description will be rejected.

Idem, 196

7. But if such particulars of description are restrictive in their character; if they serve to narrow and limit the extent of the subject pointed out by the previous words, they never can be rejected. And if there be a subject which satisfies the whole description taken together, evidence is inadmissible to show that the testator intended a greater or different subject.

Idem, 196

8. If the words in a will describe nothing, or if with the aid of surrounding circumstances they are insufficient to determine the testator's meaning, so that it may be ascertained with legal certainty what is the exact subject devised, the devise is void for uncertainty. Idem, 196

9. A case in which the first part of the devise is sufficient to pass a large tract of land, but the language is capable of being restricted by the addition of boundaries, and it is followed by calls for certain lines which are nearly a straight line, and which describe nothing and include no space: And the surrounding circumstances do not show with legal certainty whether the whole or what part of the land was intended to be passed by the devise: It is void for uncertainty.

Idem, 196

10. C subscribes his name to his will in the presence of R who wrote it, and requests R to witness it, who does so. H is then called into the room, and requested by C to witness the instrument, and C acknowledges his signature to him in the presence and hearing of R, and H subscribes his name as a witness in the presence of the testator and R, *held*:

1st. Though the testator spoke of the paper as an instrument, and did not speak of it as his will to H, yet knowing that it was his will, and knowing its contents, it was a sufficient publication of it as his will.

Beane & wife *v.* Yerby, 239

2d. The acknowledgment of his signature by C was a sufficient acknowledgment of the will. Idem, 239

3d. The will was duly executed.

Idem, 239

11. The act, Code, ch. 122, § 4, p. 516, does not change the former law either as to what shall constitute an acknowledgment or a publication of a will. Idem, 239

12. A paper prepared as the will of
763 *C is read to him by the scrivener and approved; and then the scrivener, at the request of C, subscribes C's name to the paper, and by like request he attests it; and no other witness attests it in the presence of this one. About three days after C acknowledges the paper as his will in the presence of H, who at his request attests it in his presence. No other witnesses attest the paper on that day; but about four days after H is again at the house of C, when C requests W to attest the paper, which W does in the presence of C and H, and C then acknowledges the paper as his will in the presence of H and W. The will is duly executed.
Green & als. *v.* Crain & als., 252

13. In this case a motion to instruct the jury assumes all the facts stated by the subscribing witnesses as true, and asks the court to instruct the jury, that the paper is not proved to be the will of C according to the statute. The instruction does not ask the court to pass upon the truth of the facts, but upon the law as applicable to them; and therefore is not objectionable.
Idem, 252

WITNESS.

1. The deposition of a witness having been introduced as evidence, it is not competent for the other party to impeach his credibility by the proof of statements made by him at another time inconsistent with and contradictory of the statements in his deposition, before the foundation is laid by an examination of the witness touching the fact of his having made such statements.
Unis & als. *v.* Charlton's adm'r & als., 484

2. What release will render a witness competent. See Evidence, No. 11, and
Idem, 484

3. A husband is not a competent witness, after the death of the wife, to prove the consideration on which he made a post nuptial settlement upon her.
William & Mary College *v.* Powell & als., 372